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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

CAFLISCH et al. v. HUMBLE.

HUMBLE v. CAFLISCH et al.

(Circuit Court of Appeals, Sixth Circuit. May 17, 1918.)

Nos. 3111, 3118.

1. EVIDENCE ⟸442(1)—CONSTRUCTION—PRELIMINARY NEGOTIATIONS.
 Where the terms of a written contract are full and unambiguous, parol negotiations between the parties anterior to or contemporaneous with the execution of the instrument are to be regarded as either merged in it or concluded by it, and parol evidence is incompetent to show other terms verbally agreed to previously, but not inserted in the written instrument.
2. COURTS ⟸347—FEDERAL COURTS—PLEADING—COUNTERCLAIM.
 Under equity rule 30 (198 Fed. xxvii, 115 C. C. A. xxvii), a defendant, who has a counterclaim arising out of the transaction which is the subject-matter of the suit, is required to set it up, or it is waived.

Appeal and Cross-Appeal from the District Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

Suit in equity by J. C. Caflisch and A. L. Caflisch, partners as Caflisch Bros., against A. R. Humble. From the decree, both parties appeal. Affirmed.

Waite, Schindel & Bayless and John R. Schindel, all of Cincinnati, Ohio, for appellants.

O. H. Waddle & Sons and Wm. Waddle, all of Somerset, Ky., for appellee.

Before KNAPPEN and DENISON, Circuit Judges, and SATER, District Judge.

SATER, District Judge. Judge Cochran sustained an equitable lien in favor of the plaintiffs on lumber, on which they had made certain advancements to the defendant, and awarded damages to the defendant for their breach of contract. Plaintiffs appealed, because the net result was a judgment against them; the defendant, because he was not awarded a larger sum.

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On April 8, 1913, the defendant agreed in writing to sell, and the plaintiffs agreed to buy, the output of lumber handled by defendant for two years from that date. The price named in the contract for certain kinds and grades was to be increased $2 per 1,000 feet when their thickness exceeded one inch. At least 2,000,000 feet of lumber were to be delivered. Whether the delivery of a larger amount was required or permitted need not, for reasons hereinafter stated, be determined. If the defendant at any time so desired, the plaintiffs, after inspection made by representatives of the respective parties, were to advance to him on the lumber, by way of time drafts or notes maturing in four to six months, without interest, $15 per 1,000 feet. Advancements were to be subtracted from the purchase price when the lumber was inspected for shipment and loaded f. o. b. cars at the railroad, at which time the plaintiffs were to pay the remainder due; but, if any of the notes given by plaintiffs were outstanding at the time of such loading, they were to take them up or pay an equitable portion of the interest on them, to be determined by a rule stated in the contract. A bill of sale was to be given to plaintiffs on all of the lumber on which advancements were made, and all inspections (but not the lengths and thickness of the lumber) were to be governed by the then existing rules of the National Hardwood Lumber Association. If any of the notes should become due before the lumber was received by plaintiffs, who were to receive and pay for it as fast as furnished, the defendant was to renew or pay the same himself. Should the plaintiffs furnish specifications for the guidance of the sawyer, the defendant was to conform to them in "so far as he can, not detrimental to him in the manufacturing of the said lumber." There was no stipulation as to lengths, except such as is implied in this provision. It is conceded that the contract embraced, not only such lumber as the defendant might manufacture, but such also as he might purchase from mills operated by others.

[1] Performance of the contract proceeded without friction until in July following, at which time plaintiffs sent a saw bill or specification, which the defendant was asked to "follow as closely as possible." At the same time plaintiffs claimed that, in a conversation between two of its representatives and the defendant at Cincinnati, in the February preceding the execution of the written contract, it was agreed that not more than 30 per cent. of the lumber should be poplar. The parties disagree as to the substance of that preliminary conversation. The saw bill called for a larger percentage of lumber of greater thickness and lengths than the defendant had previously furnished. The defendant promptly repudiated the claim that there was any contract between them other than the one reduced to writing in April, or that it prohibited the inclusion of more than 30 per cent. of poplar. In plaintiffs' quite lengthy letter of August 8, they allude to an agreement at the Cincinnati conference as to the percentage of lumber that should be 14 or 16 feet in length and that might be poplar, making no claim, however, as to the portion of lumber to be over one inch in thickness. That letter, correctly interpreted, admits that the parties were bound by the written contract and expresses a purpose to abide by it. That

they were thus necessarily bound is manifest. The rule is fundamental that, when the terms of a contract are full and unambiguous, as were those of the contract under consideration, parol negotiations between the parties, anterior to, or contemporaneous with, the execution of the instrument, are to be regarded as either merged in it, or concluded by it, and that parol evidence is incompetent to show terms and conditions at variance with, or in addition to, a written agreement which the parties agreed to verbally, prior to, or at the time the contract was reduced to writing, but which were not inserted in the instrument. Thurston v. Ludwig, 6 Ohio St. 1, 4, 5, 67 Am. Dec. 328; Montgomery v. Ætna Life Ins. Co., 97 Fed. 913, 917, 38 C. C. A. 553 (C. C. A. 6); Reid v. Diamond Plate Glass Co., 85 Fed. 193, 195, 196, 29 C. C. A. 110 (C. C. A. 6); Seitz v. Breweries' Refrigerating Co., 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837.

Both parties proceeded under the contract without further complaint until February 27, 1914. In December a decline began in the lumber market and continued many months thereafter, the embarrassing effect of which is mentioned in plaintiffs' letter of January 22, in which, however, they expressed their purpose to carry the contract to completion. On February 27, they reverted to the Cincinnati conversation and charged the defendant with nonperformance, in that lumber of the lengths of 14 and 16 feet was rarely received, and that nearly all of it was only one inch thick. They informed the defendant that they did not intend to confine him absolutely to the saw bill claimed to have been furnished him at the Cincinnati conference, but informed him that:

"It is necessary that you do a good deal better than has so far developed. In making purchases of stock from other parties for our account, we wish to caution you to have these two essentials in view."

They did not assert that he had not complied with his contract as to the lengths and thickness of the lumber, all of which had been accepted by and paid for by them, but demanded that he should conform closely to the saw bill, whether his so doing was detrimental to him or not. About that time the defendant asked the plaintiffs for an advance on certain lumber, as he was authorized to do by his contract, and requested them to send a man to inspect and receive it. They answered, demanding its lengths and thickness, to which the defendant replied, insisting on the inspection and advance, which he greatly needed on account of his shortage of funds, and disclaimed his ability to give the percentage of lengths and thicknesses of the particular lumber whose inspection was demanded (doubtless due to its being in mill yards other than his own), and further declared that he had at all times complied with his contract. The plaintiffs sent no inspector and declined to make the requested advancements. This constituted a breach of their contract; and by demanding that the defendant must, not absolutely, but as far as possible, conform to their alleged saw bill, whether it was detrimental or not for him to do so, they repudiated an important provision in the agreement and sought to substitute for it another favorable to themselves and severe on the defendant. Following the letter of February 27, there was in-

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sistence on the defendant's part that the lumber which he desired inspected be received by the plaintiffs; and, on the other hand, they demanded the shipping of that on which advances had previously been made. It would be a strained construction of the contract to hold that it conferred on them that right. If both the trial court and ourselves are in error in our conclusion that the plaintiffs violated the contract on February 27, there can be no doubt of their so doing on April 3, when they informed the defendant that:

"We will make no more advances on your stock that does not conform, at least approximately, to the saw bill that was rendered you at the time [the] signed contract was delivered."

This was clearly a repudiation of its detriment clause. We do not find that the defendant breached his agreement. There was not and never had been any inducement for a refusal on his part to saw the lumber of greater thicknesses and lengths. By so sawing it he would have economized in the cost of production and obtained a higher price than he had been receiving. The difficulty lay in the fact that the timber at his command was such as would not yield lumber other than such as he had been furnishing. To meet the requirements of the plaintiffs' saw bill would result in wastage and be detrimental to him. The evidence tends to show that the sawyers were furnished with plaintiffs' saw bill, and that they used reasonable effort, not detrimental to the defendant, to conform to it.

To prevent the defendant from selling the lumber on which advancements had been made, plaintiffs filed a bill asserting an equitable lien on the same for more than $3,200, charged a breach of the contract on the part of the defendant, and prayed for an injunction against his disposition of the lumber and for other relief. By amendment to the bill damages were claimed for breach of contract, but this claim was evidently waived, as no evidence was offered in proof of it. The defendant answered, denying breach of the contract, and counterclaimed for damages. The trial court, after a deduction to which the defendant was entitled, found in favor of plaintiffs, on account of their advancements to defendant, for $3,028.10, awarded the defendant damages for $5,839.58, and entered judgment in his favor for $2,811.48. We find no error in its so doing. The defendant's claim for damages is extravagant, being for more than $28,000. He had delivered at the time of the breach over 800,000 feet of lumber. He endeavored to show that, had the contract been completed, he could and would have furnished several times that amount. Both parties concede that 2,000,000 feet were to be furnished, the difference between them being the defendant's claim of right under the contract to deliver more. The trial judge concluded, and we think rightly, that the evidence relating to damages claimed on lumber in excess of 2,000,000 feet was not of sufficient certainty or dignity to warrant a recovery, and that damages should be allowed on such only as represents the difference between what had been furnished and the 2,000,000 feet.

[2] The defendant's counterclaim for damages for breach of the contract in question arose out of the transaction which is the subject-

matter of the suit. Under the first clause of the second paragraph of equity rule 30 (198 Fed. xxvii, 115 C. C. A. xxvii) the defendant was required to set up its counterclaim or waive it. Portland Wood Pipe Co. v. Slick Bros. Const. Co. (D. C.) 222 Fed. 528; Electric Boat Co. v. Lake Torpedo Co. (D. C.) 215 Fed. 377, 380; Marconi Wireless Telegraph Co. v. National E. S. Co. (D. C.) 206 Fed. 295, 298. The necessary implication to be drawn from Williams v. Adler-Goldman Commission Co., 227 Fed. 374, 378, 142 C. C. A. 70 (C. C. A. 8), accords with the conclusion above reached. Whenever practicable to do so, a court of equity should do justice completely and not by halves. Camp v. Boyd, 229 U. S. 530, 551, 33 Sup. Ct. 785, 57 L. Ed. 1317; Chicago, Mil. & St. P. Ry. v. United States, 244 U. S. 351, 359, 37 Sup. Ct. 625, 61 L. Ed. 1184. The plaintiffs being nonresidents of the district from which this case came, a peculiar equity runs in defendant's favor, and he should not be sent to a distant district to try out what ought rightfully to be determined in the original suit. Rolling Mill Co. v. Ore & Steel Co., 152 U. S. 596, 616, 617, 14 Sup. Ct. 710, 38 L. Ed. 565; Porter v. Roseman, 165 Ind. 255, 260, 261, 74 N. E. 1105, 112 Am. St. Rep. 222, 6 Ann. Cas. 718.

The judgment of the District Court is affirmed.

COOK v. FLAGG.

(Circuit Court of Appeals, Second Circuit. January 16, 1918.)

No. 156.

1. TRUSTS ⇐95—CONSTRUCTIVE TRUST—FRAUDULENT REPRESENTATIONS.

Representations made by one holding himself out to customers as a stockbroker, doing business according to the custom of brokers and by the usual methods of dealing on the exchange, *held* fraudulent, and to impress in the money and property in his hands received from them a constructive trust in their favor, where it was shown that he was not a member of any exchange, but did business as a customer through other brokers, and that his method of doing business was such that he did not have at any time in his possession or under his control the stock to deliver to a purchasing customer or the money to pay a selling customer, arising out of his transactions for such customer, but that they could only rely on his personal solvency.

2. CUSTOMS AND USAGES ⇐8—ILLEGALITY.

A custom is illegal which allows a broker to match the opposite orders of two customers, and not keep on hand the proper securities.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by Elsworth E. Cook against Jared Flagg. From the decree, defendant appeals. Affirmed.

See, also, 233 Fed. 713.

Appeal from a decree in a suit in equity. The jurisdiction of the District Court was based on diversity of citizenship. The decree appointed a permanent receiver, directed him to take possession of certain property in the possession of the defendant on the 23d day of September, 1911, and in general

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to distribute the same to the persons entitled thereto in accordance with the claims of the complaint.

The suit was instituted on behalf of the plaintiff and all others similarly situated against the defendant, who had done business as a stockbroker in the city of New York up to the 23d day of September, 1911. The equity of the complaint was based upon the allegations that the plaintiff (and the same allegations applied in general to the other customers of the defendant) had paid to the defendant between March 9, 1910, and August 14, 1911, $10,000 in cash to be used for investment in the purchase and sale of stocks in the city of New York; that the defendant had obtained this money upon certain representations made as to his method of doing business. These representations were false. The defendant never did business in accordance with them, nor intended so to do. The money was received on a trust ex maleficio, and the remaining assets in the hands of the defendant at the termination of his business were impressed with such trust on behalf of all his customers which a court of equity would recognize. The specific allegations of fraud in the complaint are that the defendant represented that he was conducting a genuine brokerage business in buying and selling standard stocks on his customers' orders, and that each transaction represented a bona fide purchase and sale of stocks, while in fact the defendant did not conduct such a business, and did not actually buy and sell any stocks, but merely went through the form of making purchases and sales through the medium of brokers upon stock exchanges; that when the defendant, who was himself not a member of any stock exchange, received an order to sell stock, he gave a corresponding order to buy the same amount, so that each offset the other; that therefore no stock was actually bought or sold for any customer, and the purchases and sales were a fiction and pretense on the defendant's part.

The contract executed by all customers with the defendant, in substance, was as follows: That the defendant should purchase for the account and risk of the customer at the market price a given number of specified stocks; that he should repeat the purchase of the same number of shares of such stocks as their price declined one point or more and as often as any purchase showed a profit of one point or more that he should sell the same, and that this should be repeated as often as possible. Similarly the contract provided that the defendant should sell for the account and risk of the customer a specified number of shares of specified stocks, and, if these stocks went up a point or more, that he should sell the same number of shares, and should buy back these shares when they showed a profit of one point or more, and that this should be repeated as often as possible; that the profits should be paid to the customer irrespective of unclosed paper profits or unclosed paper losses up to 50 per cent. per annum on closed transactions. It was likewise agreed that the defendant was not a member of any exchange, but was to do business through recognized brokers upon some such exchange. The defendant in each case gave a receipt for margin deposited by the customer "to protect" the defendant "from loss in any transaction." This receipt provided that the defendant might close out all the transactions if the margin should not be sufficient. The defendant was authorized to lend all securities according to the usages of the New York and Consolidated Stock Exchanges and to pledge them on his loans.

The facts shown upon the trial were substantially as follows: The defendant had an office in the city of New York, and solicited business as a stockbroker, though he was not a member of any exchange. His plan was to buy and sell stocks through brokers upon the stock exchanges in 10-share lots. By refusing to close out any transaction which showed a loss, and by closing out those which showed a gain, the defendant asserted that in the end the balances were sure to show a profit, whether the transaction was a "short" sale or a "long" purchase. The customers in most instances were to buy or sell some proportion of 10-share lots of various stocks, generally not the whole 10 shares themselves, and were to be credited with their proportion of the profits on all closed transactions up to 50 per cent. of their investment each year, while the open transactions were supposed to offset each other, together with the profits on closed transactions above the amount necessary to pay the

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customer the 50 per cent. of earnings which he must get. The defendant, on receiving an order from a customer for the purchase of a fractional part of a unit of 10 shares of a given stock, would enter it upon his books as part of a purchase or sale of a unit of 10 shares, and would actually made in each case a proper contract through some stock exchange broker. The proper proportion of this sale he would enter in his books opposite to that customer, and when he closed out the transaction, it would be by making a corresponding sale or purchase for a unit, which he would parcel out among his customers in the same way, making the proper entries in his books. He followed the plan of holding open transactions which showed a loss and closing only those which showed a profit.

As the defendant repeatedly made sales and purchases of units upon the same day through the same broker of the same stocks, the result of his transactions was generally that he did not have, either in his possession or in the possession of his brokers, shares of stock equal in amount to those which his customers had bought or sold. Thus, if he bought a unit of 10 shares of a stock and the same day sold a unit of 10 shares, the broker through whom he did it would not have any shares of stock corresponding to both these transactions, because, as between the defendant and the broker, the transaction would have "washed" or been set off. At the close of his business, therefore, in September, 1911, he could not fulfill his commitments: that is to say, if his customers had paid him at that time the balance due upon stocks purchased by them, he would have had to go into the market and make new purchases of those stocks, and, if they had sold stocks short, he would not have had the purchase price of such stocks if they had delivered to him the stocks themselves to return the shares borrowed upon the short sale.

The District Judge concluded that, in representing himself as a broker engaged in making purchases and sales of stocks, defendant represented himself as having within his control stocks sufficient to deliver to his customers, upon payment of the purchase price, and credits, sufficient to pay them on return by them of stocks borrowed by him upon their short sales. He concluded, therefore, that the representations under which the defendant had done business were fraudulent, and that all the money received was impressed with a constructive trust. As the assets seized by the temporary receiver and the subject-matter of this suit were concededly assets which had come from customers under transactions of a similar sort, he held that all these were all impressed with the constructive trust which a court of equity would recognize.

Philip C. Samuels, of New York City, for appellant.

Gilbert E. Roe, of New York City (John M. Scoble, of New York City, of counsel), for appellee.

Before ROGERS, Circuit Judge, and LEARNED HAND and MAYER, District Judges.

LEARNED HAND, District Judge (after stating the facts as above). [1] The case depends upon whether the defendant, by representing that he did business as a broker through stock exchange brokers, committed fraud in the way he actually conducted such business; especially whether his right to lend securities according to the usages of the New York and Consolidated Stock Exchanges allowed him to buy and sell on his own account without having on hand the necessary securities to fulfill his commitments at any time. As a preliminary it is necessary to analyze the effect of transactions made by a broker in the execution of speculative orders for his customers.

If a broker, A., receives an order from his customer, B., to purchase 100 shares of stock, he goes upon the exchange and at once makes a contract of purchase which entitles him on the next day to call

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upon the selling broker, C., to deliver the necessary certificate of that stock. During the same day he may, however, have an order to sell 100 shares of the same stock for D., another customer, and he will execute a similar contract, requiring the payment from the buying broker E., of the purchase price on the following day. When the broker's obligations are stated at the end of the day, he will therefore be called upon to pay for the stock bought for B., and to deliver the stock sold for D., and he will be entitled to call for the stock bought for E., and for the purchase price of the stock sold for D. If all the transactions were carried out, he would therefore receive the stock from the selling broker, C., and deliver it to the buying broker E.; he would receive the purchase price from the buying broker, E., and pay it to the selling broker, C. If the purchase and sale were at the same figure, therefore, the performance of his contracts would result in no more than C.'s delivery of the stock to E., and E.'s payment to C. This is just what the "clearing" of the transactions ordinarily effects in the Clearing House. Thus it would appear that A. would have received no stock to deliver, if B. demanded delivery, and no purchase price to pay D., if D. presented his certificate. Nevertheless, this is not the whole of the transaction, because D. must deliver his certificate to A., when he gives the order or within 24 hours afterwards, and that certificate when delivered is at once available to B., and indeed becomes ipso facto his property. Gorman v. Littlefield, 229 U. S. 19, 33 Sup. Ct. 690, 57 L. Ed. 1047. Now, as soon as A. gets D.'s certificate, he has the right, as pledgee of B., to pledge it to the extent of B.'s debt to him, and the proceeds of this pledge, together with B.'s margin, are available to pay D. the purchase price of his sold stock. Thus, although A. gets nothing from his contracts of purchase and sale on the stock exchange, at the end he has 100 shares of the stock to answer B.'s purchase, and that stock is not incumbered by more than the unpaid balance of the purchase price.

If D. was a "short" seller, and therefore had no stock to deliver, A. proceeds precisely as before, and makes a contract of purchase from C. and of sale to E., and these contracts will be cleared as before, so that C. delivers to E., and E. pays C. However, as D. has no stock to deliver, A. would have no stock for B. and no cash for D. at the end of the day if the transaction stopped there, but it does not, or at least it should not. A. should borrow from F., another broker, 100 shares of the stock at the time of making the "short" sale for D. This certificate he will not need on the next day to make delivery under his "short" sale because it has been canceled, but he should get it within his control, or he will have no stock to deliver under B.'s purchase, and his "short" sale will not be a real sale at all. Of course, A. must secure F. for the stock which he borrows from him, and this he does by giving him a check for the present purchase price of the stock, with an additional sum to serve as margin in case of its advance in value.

In such a posture both customers are protected. If B. first wishes to get his stock, he may do so by paying his debt to A. A. having originally received B.'s margin, and now the debt being paid to him,

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can deliver the stock to B., being himself made whole by B.'s margin and his payment of his debt to A. If D. thereafter demands the original purchase price and his margin, he may get it from A. by tendering the stock which A. may deliver to F. and receive in payment the purchase price and D.'s margin, both of which F. was holding as security. On the other hand, if D. first wishes to get his original purchase price and his margin, he will tender to A. his stock, which A. will hold for B. at once, will return to D. his margin, and he can raise upon the stock which D. delivers the amount of B.'s debt to him, and pay both this amount and B.'s margin to D., together amounting to the purchase price to which D. is entitled. If thereafter B. wishes his stock, he can have it by paying his debt to A., who will have no claims upon it but the amount of B.'s debt, which he has raised by pledging it to pay D. A. may settle with F. by allowing him to keep the security.

All this assumes that A. in each transaction represents one customer in each bargain on the exchange, but a very different result arises if he does not. We must in this case suppose that A. does not execute the orders himself or through another broker, G., acting as his agent, who deals in his name, but that he becomes a customer upon the books of G. If he then attempts to execute through G. a "short" sale for D., and a "long" order for B., G. will of course not take the stock which he has borrowed upon D.'s "short" sale, for he does not need it. Regarding A., as he does, as trading altogether upon his own account, his purchases and sales will clear each other upon G.'s books, as they will be cleared in the Clearing House. G. need have, and indeed should have, no stock on hand at any time for A.; he will pay him only the differences in the sale prices. Thus A., by concealing the fact that he is acting as a broker for others, modifies their rights materially. If they call upon A. for their securities in the event of his insolvency, he would be totally unable to perform. He would have neither securities in his hands, nor would he even have the right to call upon others by valid contracts to deliver the securities. He must go out and by new contracts put himself in possession of the property which he represents himself as having purchased for his principals.

The defendant always figured merely as a customer with the exchange brokers through whom he dealt. In buying a unit of 10 shares and selling the same he paid no attention whatever to keeping available with the broker the necessary securities. Obviously it would have been impossible to do so, unless he was prepared to require his brokers to keep separate accounts with each customer or at least with each group of customers aggregated into a unit. He did operate through some 11 brokers for his 800 customers, and in some cases he doubtless sold stock for one unit through one broker and bought the same stock for another customer through another broker. In those cases he would have the proper securities available for each, but in an enormous number of instances he bought and sold the same stock through the same broker, and in these he necessarily had nothing to show but the differences, figuring himself, as he did, only as customer.

[2] The rules governing such transactions have been worked out in

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the courts of New York with precision,[1] and they were accepted by the Supreme Court in Richardson v. Shaw, 209 U. S. 365, 28 Sup. Ct. 512, 52 L. Ed. 835, 14 Ann. Cas. 981. The broker is an agent to buy, with the rights of a pledgee upon stock on which he has had to advance part of the purchase price. He must proceed as pledgee, and must have within his control enough securities to fulfill his commitments whenever he is called on to produce them. Re McIntyre & Co., 174 Fed. 627, 98 C. C. A. 381; Re Brown, 185 Fed. 766, 107 C. C. A. 656. The only open question seems to be whether he may pledge the securities generally, or only to the extent of his own lien (Strickland v. Magoun, 119 App. Div. 113, 104 N. Y. Supp. 425; Mayer v. Monzo, 151 App. Div. 866, 137 N. Y. Supp. 616), a question not material in this case, and probably covered in any event by the defendant's contract. We may assume for the purposes of this case that the defendant under that contract had the right to lend his customers' securities as his interest dictated, though that is not wholly clear. It is clear, however, that under these rules the broker has no right to set off the purchase of one customer against the sale of another, leaving nothing in his hands to answer either, and being obliged actually to execute the orders only if called on to do so. If the practice of clearing through the Stock Exchange Clearing House effects this, it changes the relation absolutely between him and his customer, as laid down in the courts of New York. It is said, however, that the custom of brokers permits just this, and that the defendant's reservation of a right to lend securities under such a custom justifies his conduct of his business in the way he conducted it.

The testimony of the stock brokers called by the defendant seems to refer to methods of business not in accordance with what we deem to be lawful practice. We cannot be sure that some of the witnesses altogether understood the questions, though it must be conceded that in parts anyway of their testimony they seem to say that it is their custom, to match a "long" purchase against a "short" sale, under an exercise of the right sometimes given brokers to lend out the "long" customer's stock. It is upon this somewhat problematical custom that the defendant relies. Whether it exists or not, it certainly can have no justification in the right to lend customer's securities. To return to the illustration given above: It is suggested that when the Clearing House cancels B.'s contract of purchase by D.'s contract of sale, it is the same thing as though B. had received his stock, had lent it to D. and D. had sold it. This is all a fiction. B. had not the right to receive the stock at the time of delivery, because under the rules of the Clearing House, it had been canceled. It is idle to speak of his stock being lent to D. A. has borrowed no stock for D., because he has not needed it. It is true that A. has a right to call on D. to return the stock and on B. to pay the purchase price, but only in case he fails to keep his margin

[1] Horton v. Morgan, 19 N. Y. 170, 75 Am. Dec. 311; Markham v. Jaudon, 41 N. Y. 235; Stewart v. Drake, 46 N. Y. 451; Baker v. Drake, 66 N. Y. 518, 23 Am. Rep. 80; Gruman v. Smith, 81 N. Y. 25; Caswell v. Putnam, 120 N. Y. 153, 24 N. E. 287; Minor v. Beveridge, 141 N. Y. 399, 36 N. E. 404, 38 Am. St. Rep. 804; Content v. Banner, 184 N. Y. 121, 76 N. E. 913, 6 Ann. Cas. 106.

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good. That is involved in A.'s contract with each. If, then, B. may not call upon D. through A. to return the stock, how can it be said to be a loan? Certainly it is not B.'s understanding that he lends his stock at the pleasure of the borrower.

It is strenuously urged, however, that the result to the parties is the same as though A. had the securities in his control, in the sense in which that phrase is used in Douglas v. Carpenter, 17 App. Div. 329, 45 N. Y. Supp. 219; that is to say, in the sense that he had either possession of the necessary securities or cash, or some outstanding contract with a specific person under which he could require their delivery or payment. Let us examine this contention. In the first place the defendant charged interest upon his "long" customers' accounts, and presumably charged his "short" customers with dividends. In the case of such matched orders he neither paid interest for the one nor dividends for the other and he was not bound to pay any. There can be no debate that such charges were fraudulent, no matter what custom may countenance them.

Again, though, if A. remains solvent till both B. and D. close out their contracts, the result is the same whether A. has actually received and held the stock or not, it is not the same if he becomes insolvent. If the orders have been matched, B. and D. have nothing but claims against A. along with his general creditors. If the orders have been truly executed, A. will have stock for B. and security in the hands of F. for D. Thus B. will be able to get his stock by paying for it, either from the possession of A. (Gorman v. Littlefield, 229 U. S. 19, 33 Sup. Ct. 690, 57 L. Ed. 1047) or from his bank if A. has pledged it, as is almost universally the case. Even if the rule in Mayer v. Monzo, 151 App. Div. 866, 137 N. Y. Supp. 616, applies (though it is very doubtful whether it does, Douglas v. Carpenter, 17 App. Div. 329, 45 N. Y. Supp. 219), B. will have some equity, since the bank never lends the full value of the securities. B. and other customers have the right to trace their property into the equity, and the records of this court are full of such cases.

It may be urged that A. may have lent the stock, in which case the security which he receives upon the loan will be mingled in his assets. In the first place, it is not impossible, at least theoretically, that B. should be able to trace the security among A.'s assets, in which case he would claim it. Moreover, if it should so happen that the borrower upon A.'s insolvency closed out the loan with a profit, it would inure to B.'s account, since it was his stock that was lent. While such a contingency is indeed unlikely, as the security is generally kept very closely equal to the value of the stock lent, it is not impossible in the case of property which like stocks has such fluctuating values.

Similarly of D., the "short" customer, he has the right to adopt the borrowing made in his behalf, and if F. should close out the loan at a less price than the security left in his hands, D. could claim any balance of the security remaining.

The point in respect of each customer is that he has some property rights which he may assert, if the orders have in fact been executed and are not merely obligations against his broker. The law has always in-

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sisted that he is entitled to such rights, and if the broker, having held himself out as such, conducts his business in a fundamentally different way, the customer may disaffirm the relation and reclaim what he has delivered to him. Nothing can conceal the fact that any such custom as that relied upon strikes at the very root of the relation and makes the broker, not an agent to buy and sell, but to make contracts to buy and sell, a very different thing. We are not concerned with the latitude of his powers over his customers' securities; we may assume for the purposes of this case that he may substitute them for others of like kind; that he may even pledge them without limit, or that he may lend them upon proper security. But some securities there must be in some other sense than his ability to go into the market and buy from the general mass of securities when his customer makes a demand.

The precise question has been twice so ruled in Massachusetts, Fiske v. Doucette, 206 Mass. 275, 92 N. E. 455; Green v. Corey, 210 Mass. 536, 547, 548, 97 N. E. 70. In that state a statute (R. L. c. 99, § 4) makes it a defense to the customer's recovery of his margins if the broker "makes * * * an actual purchase or sale." These cases hold that, when a Boston correspondent employed a New York broker to do exactly what the defendant's brokers did here, the Boston correspondent did not "make an actual purchase or sale," and the customer could recover.

The same case also arose in Katz v. Nast, 187 Fed. 529, 109 C. C. A. 295, where the Circuit Court of Appeals for the Seventh Circuit ruled that, where the broker did business through an exchange broker, he must keep within his control securities necessary to fill their claims. In that case, a part of the purchase had been set off by the exchange broker because of sales made the same day by the out of town broker. It was held that to that extent the out of town broker had not executed the order.

Des Jardins v. Hotchkin, 142 App. Div. 845, 127 N. Y. Supp. 504, condemns the practice, though the facts are not quite parallel. Yet the only ground for opening the account stated was that the broker at best had executed his orders through another who had the right to set off any claims of his own against the broker's account. That was not so strong a case as this.

Decree affirmed, with costs.

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CENTRAL COMMERCIAL CO. v. JONES-DUSENBURY CO.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1918.)

No. 2490.

1. Customs and Usages ⟸15(1)—Evidence—Admissibility—Written Contracts.

Where a written contract for sale of rosin was ambiguous on the question of possession, evidence as to general trade customs was admissible.

2. Customs and Usages ⟸18—Pleading—Necessity.

Where a written contract was ambiguous, evidence of general trade customs was admissible, though not pleaded.

3. Evidence ⟸354(17)—Salesbook.

Where defendant, having contracted with plaintiff for the rosin manufactured by a particular concern, refused rosin tendered on the ground that plaintiff was attempting to work off that of other manufacturers, a salesbook was competent to show the quantity of rosin delivered.

4. Evidence ⟸158(28)—Best and Secondary Evidence.

Where plaintiff sold to defendant rosin to be manufactured by a specified company, and defendant repudiated the contract, asserting that plaintiff attempted to work off rosin of other manufacturers, plaintiff is not obliged, having introduced direct testimony that the rosin it tendered to defendant was manufactured by the company specified, to introduce in evidence books of the manufacturer containing records of its production, on the ground that such books were the best evidence; for the evidence of plaintiff's witnesses was in no sense secondary.

5. Appeal and Error ⟸695(1)—Review—Verdict.

Where the record fails to disclose that the bill of exceptions contains all of the evidence produced in the case, the verdict cannot be reviewed on writ of error.

6. Sales ⟸332—Resale by Seller.

Where the buyer declined to make payment when tendered delivery, and it was the intention of the parties that the seller should retain possession until payment, the seller may on the buyer's default resell the goods and recover damages on account of his loss.

7. Courts ⟸328(9)—Federal—Amount in Controversy—Interest.

In assumpsit for damages for failure to take and pay for rosin purchased, it was permissible to include in the damages the loss on resale of the rosin and the interest for the purpose of fixing the amount in controversy, so as to give the federal court jurisdiction, although under the statute interest as such cannot be included in estimating the jurisdictional amount.

8. Appeal and Error ⟸518(5)—Record—Bill of Particulars.

Where not saved in the bill of exceptions, a bill of particulars is no part of the record, and an objection that an amount below the jurisdictional amount of the court was involved cannot be sustained where based on a bill of particulars not so saved.

9. Courts ⟸328(10)—Federal—Amount in Controversy—Claim and Recovery.

The damages claimed fix the amount in controversy for the purpose of determining whether the federal court has jurisdiction, and not the recovery.

10. Courts ⟸328(7)—Federal—Amount in Controversy—Set-Off.

For the purpose of determining the jurisdiction of the federal court, the matter involved includes the demands of both plaintiff and defendant, where defendant pleaded a set-off.

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In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Action by the Jones-Dusenbury Company against the Central Commercial Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Defendant in error, herein called plaintiff, brought suit in assumpsit against plaintiff in error, termed defendant herein, in the District Court of the United States for the Northern District of Illinois, Eastern Division, laying its damages at $4,500, for damages growing out of defendant's refusal to accept and pay for certain rosin tendered by plaintiff as agreed by it in its written contract.

The declaration contains one special and the common counts. The contract sued on reads as follows:

"This contract and agreement between Central Commercial Company, a corporation organized and existing under the laws of the state of Illinois, herein called the buyer, and Jones-Dusenbury Company, a corporation organized and existing under the laws of the state of Louisiana, herein called the seller, witnesseth:

"First. The buyer agrees to buy from the seller and the seller agrees to sell to the buyer the entire delivery of the production of dross and chip rosin from the plant of A. E. Turner & Co. from April 1, 1912, to March 31, 1912, inclusive, and tendered prior to the termination of this contract, said deliveries to be made upon the yards of the Naval Stores Warehouse & Storage Company at Pensacola, and to be approximately six thousand (6,000) round barrels of dross and chip rosin, upon the terms and conditions named herein.

"Second. The price to be paid by the buyer and accepted by the seller for said dross and chip rosins on the yard of the Naval Stores Warehouse & Storage Company at Pensacola shall be twenty (20c.) cents per two hundred and eighty (280#) pounds below the average official closing Savannah markets for the corresponding grades of the week in which delivery is made on the terminals or in the warehouse aforesaid.

"Third. The buyer hereby agrees and covenants to pay on the dross and chip rosin delivered under this contract a fee of four (4c.) cents per barrel for initial storage to the Naval Stores Warehouse & Storage Company.

"Fourth. The seller agrees not to hold dross and chip rosin for a market, but to bill and deliver same to the buyer as fast as deliveries shall be made to the seller by A. E. Turner & Co., who deliver to seller as fast as manufactured in 100-barrel lots, the buyer paying for the same in Pensacola funds or the equivalent thereof. All rosins delivered under this contract shall be delivered in accordance with the requirements of the rules and customs of the Savannah Board of Trade as to grades, cooperage, and weights.

"In witness whereof the said parties have caused these presents to be executed by their duly authorized officers on this 17th day of May, A. D. 1912.

"[Signed] Central Commercial Company,
"By Anthony Cosner, Treas.
"[Signed] Jones-Dusenbury Company,
"By T. A. Jennings, Vice President.

"Signed, sealed, and delivered in presence of:
"As to Central Commercial Co.:
"M. M. Russell.
"L. N. Waite.
"As to Jones-Dusenbury Co.:
"L. N. Waite.
"M. M. Russell."

In pursuance of the contract plaintiff tendered to defendant for delivery about 6,400 barrels of rosin. Of these defendant refused to accept a large number, on the alleged ground that of the amount still on hand and not yet accepted and paid for some 600 barrels were not the manufacture of Turner & Co. Thereupon such further transactions were had between the parties

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that plaintiff, after due notice to defendant, sold the same at less than the contract price, whereby there became due to plaintiff from defendant upon breach of said contract damages in the sum of $4,500, for the recovery of which sum this suit was instituted.

On the trial the proceedings were such that the jury rendered a verdict in favor of plaintiff, and found against a certain set-off to such damages filed by defendant for $3,845.77; motions to direct a verdict having been duly made and denied, and exception saved. On submission being duly made, the jury made affirmative answer to the following three questions:

(1) Were all the barrels of rosin which were delivered or tendered by plaintiff to defendant manufactured by A. E. Turner & Co.?

(2) From the evidence respecting the course of dealing between the parties under the contract, do you find that it was the understanding and intention of the parties that the plaintiff had the right of possession or control of the goods in controversy until they were paid for?

(3) Did plaintiff exercise due diligence in selling the 578 round barrels at Pensacola?

Motion for new trial was made and denied. The errors assigned are:

(1) That the court received evidence of a trade custom that rosin is delivered only when payment is made therefor, whereas the same was not pleaded and was inconsistent with the contract.

(2) That the court received extraneous evidence of the course of dealing with reference to shipping, etc., because such course of dealing was not pleaded and the contract not ambiguous.

(3) That the court received in evidence a certain salesbook claimed not to be competent.

(4) That the court received evidence that plaintiff stored, took out warehouse receipts for, and insured rosin in its own name.

(5) The court overruled the several motions for instructed verdicts and in arrest.

(6) The court instructed the jury to include interest not recoverable as damages.

Frank Crozier, of Chicago, Ill., for plaintiff in error.

S. S. Gregory and Albert S. Long, both of Chicago, Ill., for defendant in error.

Before KOHLSAAT, ALSCHULER, and EVANS, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). [1, 2] The trial court found that the contract was ambiguous in respect to the intention of the parties with regard to the matter of possession. To make the terms clear he admitted proof of the custom of the trade and the course of business between the parties, showing in whose name the warehouse receipts were taken out, the methods followed in loading into cars, payment, and evidence as to other matters involved deemed obscure in the contract, and necessary in arriving at an understanding of the conduct of the parties following their agreement.

We are of the opinion that the contract was obscure in the respects indicated by the trial court, and that the court was justified in receiving the evidence complained of. In doing so the contract was not modified. Nor was it essential that the customs and matters constituting the extraneous matters introduced be pleaded. The testimony was as to a general custom prevailing in the rosin trade, wherever located. The evidence was competent. Steidtmann v. Joseph Lay Co., 234 Ill. 84, 84 N. E. 640, in which it is said:

"The testimony of witnesses is admissible to explain not only technical words of art or science, but words or phrases having a local meaning or a

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special meaning in a particular calling, trade, business, or profession. * * * A person entering into a contract in the ordinary course of business is presumed to have done so in reference to any existing general usage or custom relating to such business. And this is so whether he knew of the custom or not."

See Lowe v. Lehman, 15 Ohio St. 179; Collins Ice Cream Co. v. Stephens, 189 Ill. 200, 59 N. E. 524; Hewitt v. John Week Lumber Co., 77 Wis. 548, 46 N. W. 822; Colman v. Clements, 23 Cal. 245; Hansbrough v. Neal, 94 Va. 722, 27 S. E. 593; Field v. Lelean, 6 H. & N. 617, 158 Eng. Rep. 255.

We do not find justification for the contention that the custom was inconsistent with the terms of the contract.

[3] As appears from the contract, defendant contracted with plaintiff for the product of A. E. Turner & Co., and only that. The defense interposed was that plaintiff undertook to work off upon defendant rosin of other manufacturers. To refute this charge plaintiff, among other evidence, introduced the testimony of the two alleged best qualified witnesses, who swore unqualifiedly to the statement that no rosin but that manufactured by Turner & Co. within the conditions named in the contract was delivered by plaintiff to defendant, nor was any other included in the rosin involved in this suit. A salesbook was also introduced. This was competent to show the quantity delivered, among other things. No evidence was introduced in rebuttal as to this point.

[4] Defendant now raises the point that plaintiff had better evidence as to the rosin manufactured by Turner & Co., viz. a certain book alleged to contain records of the daily production and all other rosin manufactured by Turner & Co. during the contract period, which, defendant insists, should have been introduced in evidence on the trial as being the best evidence of such production.

The contention is, to say the least, novel. The evidence introduced was in no sense secondary. It was primary in its nature. There was no denial of it. It may be that defendant could have found in the production records some better data for cross-examination, or evidence more conclusive to its counsel's mind, but the proposition that the rule requiring the production of the best evidence applies to circumstances and conditions such as here prevail does not commend itself to us. There seems to have been enough competent evidence adduced to satisfy the jury on that point, and we are not disposed to interfere. Whatever degrees of evidence existed in the trial were merely those as to the weight to be given to it and not as to its competency. No reason appears why defendant, had it desired, could not have procured access to the book, if there were one, in the usual way.

[5, 6] Defendant complains of the ruling of the court in receiving evidence that plaintiff stored and took warehouse receipts for and insured the rosin in its own name. Owing to the obscurity as to certain language of the contract bearing upon and involved in matters affecting the resale of the rosin, we have concurred in the ruling of the trial court upon that question. Among those are included the question of the possession, right to possession, and title of the rosin. The jury found that it was the intention of the parties that plaintiff should re-

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tain possession of the rosin until paid for. The record fails to disclose that the bill of exceptions contains all of the evidence produced in the case. We are therefore not at liberty to review the verdict in that respect. The evidence discloses that at the time when plaintiff resold the rosin in suit it had been tendered for delivery to defendant, but payment was not made as agreed. Certainly the right of possession had never vested in defendant, because of its refusal to pay, notwithstanding such delivery as is here disclosed. Urbansky v. Kutinsky, 86 Conn. 22, 84 Atl. 317; Sands et al. v. Taylor et al., 5 Johns. (N. Y.) 395, 4 Am. Dec. 374; Owens v. Weedman, 82 Ill. 409; Sturtevant v. Orser, 24 N. Y. 538, 82 Am. Dec. 321; Roebling's Sons Co. v. Fence Co., 130 Ill. 660, 22 N. E. 518; Habeler v. Rogers, 131 Fed. 43, 65 C. C. A. 281.

Under the circumstances of the case, we conclude that the right of possession was in plaintiff at the time of resale, and the sale properly made. Defendant makes no serious complaint as to the manner of its carrying out. There is nothing in the record to impeach the fairness of plaintiff in making the sale. So far as we can gather from the facts shown, the burden cast by the law upon it was fully and fairly sustained. As above stated, we must at any rate assume such to be the case as the record now stands.

Defendant assigns as error that part of the charge to the jury in which the court tells them they may include interest as damages in case they find for the plaintiff, the same to be figured from the commencement of the suit, since the time the contract was broken.

[7] The point is material as bearing on the question of jurisdiction, since the loss incurred on resale was less than $3,000, the minimum amount necessary to give the federal court jurisdiction. Under the statute interest cannot, as such, be included in estimating the jurisdictional amount. Plaintiff as well as the trial court arrived at the amount of the damages by including in the principal sum, among other items, interest, or a sum equal to interest calculated at the legal rate on said balance remaining unpaid from the time the contract was broken. This construction of the statute as applied to cases similar to the present case is based upon the rule of law followed by Mr. Chief Justice White in Brown v. Webster, 156 U. S. 328, 15 Sup. Ct. 377, 39 L. Ed. 440, where the cause of action was the sale, warranty, and eviction from certain premises by reason of failure of title. Damages were alleged as for one principal sum of $6,342.40, whereas the original transaction was with regard to a sale of land not exceeding $1,200 in value. The point was made that under the law of the state in which the land was situated damages in case of eviction were limited to a return of the purchase price with interest thereon, which could not exceed $2,000, and consequently fell short of the jurisdictional amount.

"This contention," says the court, "overlooks the elementary distinction between interest as such and the use of an interest calculation as an instrumentality in arriving at the amount of damages to be awarded on the principal demand. As we have said, the recovery sought was not the price and interest thereon, but the sum of the damage resulting from eviction. All such damage was therefore the principal demand in controversy, although interest and price and other things may have constituted some of

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the elements entering into the legal unit, the damage which the party was entitled to recover. Whether, therefore, the court below considered the interest as an instrument or means for ascertaining the amount of the principal demand is wholly immaterial, provided the principal demand as made and ascertained was within the jurisdiction of the court. Indeed, the confusion of thought which the assertion of want of jurisdiction involves is a failure to distinguish between a principal and an accessory demand. The sum of the principal demand determines the question of jurisdiction; the accessory or the interest demand cannot be computed for jurisdictional purposes. Here the entire damage claimed was the principal demand without reference to the constituent elements entering therein. This demand was predicated on a distinct cause of action—eviction from the property bought. Thus considered, the attack on the jurisdiction is manifestly unsound, since its premise is that a sum, which was an essential ingredient in the one principal claim, should be segregated therefrom, and be considered as a mere accessory thereto."

So here the suit was brought to recover damages for failure to take and pay for 578 barrels of rosin, not for the value of the rosin and interest. The whole amount claimed sounded in damages, of which the sum computed, as though it were interest, formed a part, and should be treated as a part of the principal sum, and not as an accessory demand. The same ruling was had in Continental Casualty Co. v. Spradlin, 170 Fed. 322, 95 C. C. A. 112, in a suit brought to recover damages for breach of a contract of assurance. The action was in assumpsit, and the damages were laid at $3,000.

"The exception of the plaintiff in error," says the court, "is upon the ground that the declaration discloses $2,000 as the principal demand, and that this should oust the jurisdiction; the further proposition being that (the) amount alleged and recovered above $2,000 was interest. We do not agree to this proposition. There was no contract for interest in this policy. The action is in assumpsit for damages for failure to perform. The interest, therefore, was not a mere incident or necessary to the amount demanded, but constituted, together with the amount set out in the policy, aggregate damages for the breach. We think Brown v. Webster, 156 U. S. 328, 15 Sup. Ct. 377, 39 L. Ed. 440, settles this point."

This doctrine is supported by numerous authorities, among others the following: Penn. Schuyl. V. R. Co. v. Ziemer, 124 Pa. 560, 571, 17 Atl. 187; Allegheny City v. Campbell, 107 Pa. 530, 52 Am. Rep. 478; Richards v. Citizens' Natural Gas Co., 130 Pa. 37, 40, 18 Atl. 600; 1 Sedgwick on Damages, § 282 et seq.; 22 Cyc. 1495, 1496; Hubbard v. Callahan, 42 Conn. 524, 19 Am. Rep. 564.

[8, 9] It is objected that the bill of particulars discloses a principal claim of only $2,800. But the bill of particulars is no part of the record, not having been saved in the bill of exceptions. The Star Brewery v. Farnsworth, 172 Ill. 247, 50 N. E. 228. The damages claimed, however, amount to $4,500. This, we think, adequately disposes of the last-named exception. As was said in Peeler v. Lathrop, 48 Fed. 780, 786, 1 C. C. A. 93, 99:

"It is not, however, the amount that plaintiff is able to prove he is entitled to that determines the amount in dispute for the purpose of jurisdiction; for otherwise the failure of the plaintiff to recover would oust the court of jurisdiction. The amount in dispute, or matter in controversy, which determines the jurisdiction of the Circuit Court, in suits for the recovery of money only, is the amount demanded by the plaintiff in good faith."

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To the same effect are Hilton v. Dickinson, 108 U. S. 165, 2 Sup. Ct. 424, 27 L. Ed. 688; Hampton Stave Co. v. Gardner, 154 Fed. 805, 83 C. C. A. 521; Barry v. Edmunds, 116 U. S. 550, 6 Sup. Ct. 501, 29 L. Ed. 729; Vance v. W. A. Vandercook Co., 170 U. S. 468, 18 Sup. Ct. 645, 42 L. Ed. 1111; LeRoy v. Hartwick (D. C.) 229 Fed. 857, 858.

The plaintiff, having, as we find from the record, brought suit in good faith for $4,500, is entitled to maintain its suit here. Armstrong v. Walters (D. C.) 219 Fed. 320; Wetmore v. Rymer, 169 U. S. 115, 18 Sup. Ct. 293, 42 L. Ed. 682; Schunk v. Moline, Milburn & Stoddard Co., 147 U. S. 500, 13 Sup. Ct. 416, 37 L. Ed. 255; Smithers v. Smith, 204 U. S. 632, 27 Sup. Ct. 297, 51 L. Ed. 656.

[10] Defendant, with the plea of the general issue, gave notice of a set-off of $2,000 and endeavored to enforce the same on the trial. For purposes of jurisdiction it has been frequently held that in cases similar to the instant case the matter involved includes the demands of both plaintiff and defendant. Shappirio v. Goldberg, 192 U. S. 232, 24 Sup. Ct. 259, 48 L. Ed. 419; Merchants' Heat & Light Co. v. Clow & Sons, 204 U. S. 286, 27 Sup. Ct. 285, 51 L. Ed. 488; American Sheet & Tin Plate Co. v. Winzeler (D. C.) 227 Fed. 321; Lee v. Continental Ins. Co. (C. C.) 74 Fed. 424; Lewis Mercantile Co. v. Klepner, 176 Fed. 343, 100 C. C. A. 285.

The court had jurisdiction and, in our opinion, rightly entered judgment in accordance with the verdict.

The judgment is therefore affirmed.

THE AVENGER.

(Circuit Court of Appeals, Fifth Circuit. April 5, 1918.)

No. 3105.

1. WORK AND LABOR ⟸14(2)—QUANTUM MERUIT—BREACH OF SALVAGE CONTRACT.

 A salvor may recover on a quantum meruit for services rendered under an express contract which was not performed, where full performance was prevented by the wrongful act of respondent, and the profits which would have resulted from full performance are not legally ascertainable.

2. SALVAGE ⟸16—CONTRACT—RIGHT TO EXTENSION OF TIME—"SATISFACTORY PROGRESS."

 Under a contract to salvage a sunken ship within 60 days, with privilege of 30 days' extension, if satisfactory progress had been made, the progress was satisfactory, if it gave reasonable assurance that the work could be completed within the 30 days' extension.

Appeal from District Court of the United States for the Southern District of Alabama; Robert T. Ervin, Judge.

Suit in admiralty by the Bisso Towboat Company against the ship Avenger; W. B. Gillican, claimant. Decree for respondent, and claimant appeals. Reversed and remanded.

See, also, 251 Fed. 23, — C. C. A. —.

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Harry T. Smith and Wm. G. Caffey, both of Mobile, Ala., and John D. Grace, of New Orleans, La., for appellant.

Palmer Pillans, of Mobile, Ala., for appellee.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

GRUBB, District Judge. This is an appeal from an order of the District Court sustaining exceptions to the libel, as amended, and dismissing the cause upon libelant's declining to plead further.

The libel seeks to recover for salvage services rendered the ship Avenger, which had lain stranded for years upon the shore of Chandelieur Island, by the appellant, under a contract between the appellant and the owners of the Avenger. The contract provided that the stranded ship should be floated and delivered to the owners at Mobile within 60 days, with a provision for an extension of 30 days, if satisfactory progress had been made in the work. The contract was on a "no cure, no pay" basis. The appellant entered upon the work and dug a channel 2,220 feet long, through which to float the ship, but failed to float the ship within the stipulated 60 days, and the appellee declined to grant an extension. The ship was afterwards floated by other salvors under a similar contract, who made use of the channel dug by the appellant. The libel seeks to recover the reasonable value of the work done by libelant as salvage service, and, in the alternative, for damages for the breach of the salvage contract, in that it was not allowed the additional 30 days, provided for by the contract in the event the progress of the work was satisfactory, to complete its contract and earn the stipulated compensation for so doing.

The exceptions to the libel assail it as being in the alternative, seeking a recovery both on a quantum meruit basis and for breach of an express contract. If alternative relief may be sought in admiralty pleading, then it is asserted that each alternative ground for recovery must be good, and that in the libel in this case neither alternative presents a good cause of action. It is contended that recovery cannot be had upon a quantum meruit, in the presence of an express and unperformed contract under which the work was done. It is also contended that recovery cannot be had for the breach of the express contract, because it was unperformed within the original 60 days, and the extension of 30 days was rightfully denied the appellant, since, by a proper construction of the contract, satisfactory progress was progress satisfactory to the appellee, and his expression of dissatisfaction was final, unless dishonestly entertained. We think the case of The Emily, 9 Wheat. 381, 6 L. Ed. 116, is authority for seeking alternative relief in a libel in admiralty, in cases where each alternative is sufficient.

[1] It is true as a general rule that one cannot proceed upon a quantum meruit for the recovery of the value of work done under an unperformed express contract. The rule is not without exceptions. The case of The Bayamo, 171 Fed. 65, 96 C. C. A. 1, 17 Ann. Cas. 1156, by this court, furnishes one. In that case, the salvor was permitted to recover the value of services, done under a "no cure, no pay" agreement, where the ship was floated by other salvors subsequently em-

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ployed by the master, and in which there was no performance by the original salvors. The fact that in that case the ship was agreed by the original salvors to be floated in a reasonable and not a fixed time cannot differentiate that case from this. If a reasonable time had elapsed before the second salvors were employed by the master, the contract had been broken by the original salvors, and no recovery on it or upon a quantum meruit could have been had. If a reasonable time had not elapsed, the master wrongfully terminated the first salvors' contract, and the case is in the identical attitude that this case is, and is an authority for entertaining the libel in its first aspect. There was no performance of the express contract, and yet the recovery of a reasonable salvage service was permitted.

There is also a line of cases that permit a recovery by a contractor for expenses incurred or work done towards the completion of a contract, broken by the other party to it, by wrongfully preventing its full performance, where the value of the contract—i. e., the profits that would have resulted from its complete fulfillment—are impossible of legal ascertainment. Ankeny v. Clark, 148 U. S. 345–352, 13 Sup. Ct. 617, 37 L. Ed. 475; United States v. Behan, 110 U. S. 338–344, 4 Sup. Ct. 81, 28 L. Ed. 168.

We are therefore not prepared to say that under no circumstances could the libelant recover for the value of the services actually rendered, as set out in the first eight paragraphs of the libel upon a salvage basis. If a recovery were allowed upon a quantum meruit, the compensation fixed by the contract would, however, measure and limit such recovery. It is also true that, in the absence of controlling and exceptional circumstances, the recovery for being wrongfully prevented from completing an express contract, is the value of the contract, when completed, to the contractor, if that value is legally ascertainable, which is the profit he would have made by its performance. In this case, it would be the compensation fixed by the contract itself, less the amount the appellant would have been required to pay out to have fully performed it.

The appellee contends that no recovery could be had for the breach of the contract, because it was rightfully terminated by him. The contract contained this provision:

"It is mutually understood and agreed that the period allowed the contractors, the Bisso Towboat Company, for the salvage of the ship, is limited to sixty (60) days from the date hereof, at the expiration of which time cancellation of this contract is optional with both parties, excepting, however, if satisfactory progress has been made in the work, an extension of thirty (30) additional consecutive days will be granted."

The libelant is alleged to have completed the artificial channel within the 60 days, and had arranged to procure pumps with which to take the water and sand from the ship, with appellee's consent. Upon applying for an extension before the expiration of the original period, it was refused by appellee, and the contract terminated by him on the expiration of the original period. Appellee contends that the proper construction of the contract was that the progress of the work should be satisfactory to him, to entitle appellant to an extension, and that his

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dissatisfaction could be questioned only if fraudulent. Appellant's contention is that "satisfactory progress" meant progress that would have been satisfactory to a reasonable man, or a rate of progress such as a reasonable man would have maintained in doing the work.

The authorities recognize two classes of cases, in applying the principle governing the construction of such a term in a contract. Where the promise is to perform a service to the satisfaction of the promisee in matters of taste or fancy, the promisee is the sole judge as to whether he is satisfied; even though his decision is capricious and arbitrary, it is final. In matters not involving fancy or taste, the promisee is not permitted to decide arbitrarily and capriciously, but after the manner of a reasonable man. In the former class of cases there is no other standard of satisfactoriness than the promisee's whim, and that is necessarily controlling. In the latter class, there is a standard susceptible of proof and outside of the mind of the promisee, namely, what would give satisfaction to a reasonable man. The utility of performance of a machine can be shown, independently of the mental state of the buyer; and if its performance would be satisfactory to a reasonable man, it is held to be satisfactory to him, though he may contend to the contrary. Where satisfactory performance can be shown, extraneously of the buyer, by a definite standard, this will take the place of any arbitrary right on the part of the buyer to reject. Every contract is to be allotted to its proper class by its peculiar subject-matter and terms. We think the rate of progress of the work provided for by the contract in question should be treated as coming under the last-mentioned class. What would be a satisfactory rate of progress for work of that character could be proven by the time that would be required to accomplish it by a competent contractor with a reasonable force working with ordinary diligence.

[2] Propositions of this sort are being constantly submitted to and decided by the courts. The contract itself provides a criterion of satisfactoriness. If the work had so far progressed, at the time the extension was applied for, as to make it reasonably certain that it could be completed and the ship floated within the additional 30 days, we think the contract shows that the parties contemplated that this would be considered by them a satisfactory rate of progress for the work. Otherwise, the insertion of the 30-day privilege would have been without purpose. In view of the character of the work, which was the subject-matter of the contract, and the privilege of an extension of a fixed period, provided for in it, we conclude that it belongs to the class where "satisfactory" is the equivalent of "reasonable," and that the parties have themselves defined what should be considered reasonable, namely, a performance within 90 days, if the rate of progress at the end of 60 days assured a complete performance within 30 days thereafter. Entertaining this opinion, it follows that the exceptions to the libel should have been overruled, and the appellant permitted to establish by proof, if it could, that the work was progressing, when the extension was applied for, in a way that would assure with reasonable certainty its completion within an additional 30 days.

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The decree sustaining the exceptions and dismissing the libel is reversed, and the cause remanded for further proceedings in conformity with this opinion.

THE AVENGER.

GILLICAN v. LENOIR MACHINERY & WRECKING CO.

(Circuit Court of Appeals, Fifth Circuit. March 4, 1918.)

No. 3130.

SALVAGE ⇐32—AMOUNT OF COMPENSATION—RAISING SUNKEN VESSEL.

Libelants contracted to raise and deliver in port a sunken vessel, which they did, although during the progress of the work the owner repudiated the contract. With an expenditure of $85,000, the vessel became worth from $150,000 to $225,000. Libelants lost property by storm, and made expenditures in the prosecution of the work to the amount of $14,000. *Held*, that a salvage award of $17,500 under the general maritime law was justified.

Appeal from the District Court of the United States for the Southern District of Alabama; Robert T. Ervin, Judge.

Suit in admiralty by J. B. Lenoir and others, doing business as the Lenoir Machinery & Wrecking Company, against the ship Avenger; W. B. Gillican, claimant. Decree for libelant, and claimant appeals. Affirmed.

See, also, 251 Fed. 19, — C. C. A. —.

Palmer Pillans, of Mobile, Ala., for appellant.

Elliott G. Rickarby, of Mobile, Ala. (Jere Austill, of Mobile, Ala., on the brief), for appellee.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

BATTS, Circuit Judge. Libel by J. B. Lenoir and others, under the name of the Lenoir Machinery & Wrecking Company, against the ship Avenger. Libelants entered into a salvage contract with George J. Santa Cruz representing the owners of the ship. The contract provided that the Wrecking Company would raise the vessel and deliver her in the Mobile river at Mobile, the work to begin in 10 days, and to be completed within 30 days after the expiration of the 10 days. The Wrecking Company was to receive, in addition to $20,000, $1,000 for every period of 5 days saved within the 30 days, and it was to pay to Santa Cruz $1,000 for every 5-day period required beyond the 30 days. It was provided that, if the contractors failed, they were to receive no remuneration.

The vessel was wrecked on Chandeleur Island, off the coast of Louisiana, about 13 years prior to the date of the contract. While the contractors were preparing, within the 10 days provided by the contract, to begin work, the great storm of July 5, 1916, destroyed the barge which was to have been used in the work, and necessitated additional arrangements, which could not be completed within the 10 days.

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As soon as practicable thereafter the contractors began the work. Santa Cruz, claiming that the contract had been forfeited, notified them to discontinue their efforts to salve the ship. This notice was given after it became apparent that the storm had washed away a very considerable part of the sand in which the vessel had been imbedded. The contractors stopped for 2 or 3 days, but, after consultation with their attorneys, resumed work. No additional effort was made by Santa Cruz to prevent this. On the contrary, he extended them aid by providing a necessary hawser. The hull was raised and taken into the Mobile river within 15 days after the expiration of the time provided for by the contract. The contractors presented a demand for $20,000, less $3,000 for the three periods of 5 days each. Payment was refused, and this libel was instituted.

Defendants, answering, set up the facts with reference to the failure to begin work within the time specified, and notice of rescission of the contract. Whereupon libelants filed an amended bill, alleging that, if the contract was no longer in effect, they had performed a salvage service for which they were entitled to proper compensation in excess of the amount named in the contract, and asked an award of $30,000.

Two substantial issues were made by the evidence. Defendants claimed that the hull had been injured by the pounding of the libelants' barge against her sides. Libelants claimed that the injury to the hull had occurred prior to the time of the storm which had destroyed the barge, and suggested that the damage had been occasioned by the washing out of the sand at the ends of the vessel, leaving a bank of packed sand, upon which the hull had pounded, the dent resulting. The evidence as to time and manner of the injury was conflicting. The District Judge held that the injury was not caused by the barge, and the evidence would not justify a reversal of this finding.

The other issue was with reference to the value of the salved vessel. Claimants insist that it was not worth more than $20,000. Libelants introduced evidence of value as high as $75,000. There was also evidence to the effect that, by the expenditure of $85,000, the vessel had become worth from $150,000 to $225,000. The finding of the District Judge that the vessel was worth $50,000 delivered at Mobile river has support in the evidence. The market value at that time is purely incidental. Without reference to whether the hull was worth $50,000, or was without a market value, it is apparent that libelants made very substantial contributions to a ship worth from $150,000 to $225,000. This value is to be considered in determining compensation.

The evidence indicates that libelants, in their efforts to perform the service, lost a barge worth $4,000, and made expenditures to the amount of $10,000. There is evidence that the salved vessel was in an exposed place, and that there was considerable danger to the barge and appliances used in the salving. The court treated the contract as canceled, and made an award under the general maritime law of $17,500. The facts warranted the award.

The judgment is affirmed.

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SHARPLES SEPARATOR CO. v. SKINNER.

(Circuit Court of Appeals, Ninth Circuit. May 6, 1918.)

No. 2978.

1. APPEAL AND ERROR ⟸237(5)—REVIEW—SCOPE.
The federal court will not re-examine any fact tried by a jury, otherwise than according to the rules of the common law, and where plaintiff in error at the close of the testimony made no motion for a directed verdict, on the ground of the insufficiency of the evidence, only rulings of the trial court in excluding or admitting evidence, and in giving or refusing instructions, can be reviewed.

2. SALES ⟸440(1)—ACTS OF AGENT—EVIDENCE—ADMISSIBILITY.
Where defendant's sales agent testified that he sent an agent to plaintiff to overcome plaintiff's difficulty with a milking machine bought from defendant, evidence as to the acts of such agent sent to plaintiff, as well as an agreement made by him, was admissible in action for breach of warranty of the machine.

3. EVIDENCE ⟸123(3)—RES GESTÆ—ACTS OF AGENT.
A report of an agent of defendant, which sold a milking machine, concerning the possibility of loss resulting from plaintiff's continued use of the machine, *held* admissible as part of the res gestæ in an action by plaintiff based on a warranty.

4. APPEAL AND ERROR ⟸1051(1)—REVIEW—HARMLESS ERROR.
The admission of testimony is harmless, if erroneous, where the fact elicited was established by other competent evidence.

5. SALES ⟸440(2)—ACTIONS FOR BREACH—EVIDENCE.
Where the guaranty under which defendant sold a milking machine recited that it was in all respects as represented in defendant's printed matter, a pamphlet issued by defendant and delivered to plaintiff pending negotiations is admissible in an action for breach of the warranty.

6. APPEAL AND ERROR ⟸204(4)—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW.
The objection that certain pamphlets offered in evidence by plaintiff were not the identical ones handed him is not available in the appellate court, where not raised below.

7. SALES ⟸440(2)—ACTIONS FOR BREACH—WARRANTIES.
Where the seller of a milking machine guaranteed the truth of certain pamphlets, and one of those pamphlets asserted that it had enough experts to see that dairymen kept their machines in order, a purchaser, in an action for breach of warranty, may testify that the seller was to send a demonstrator once a month to see that everything was working right.

8. EVIDENCE ⟸145—ADMISSIBILITY—REMOTENESS.
Where the state dairy inspector testified plaintiff's dairy was sanitary, testimony that milk from the valley in which plaintiff carried on his business was excluded from a market as unsanitary *held* inadmissible to show the unsanitary condition of plaintiff's dairy, which defendant asserted caused injuries to his cows, instead of the milking machine, as claimed by plaintiff.

9. EVIDENCE ⟸130—COMPARISONS—RES INTER ALIOS ACTA.
In an action for breach of warranty of a milking machine, which plaintiff asserted injured his cows, evidence as to the condition of cows on which machines were used in other parts of the country *held* inadmissible as res inter alios acta.

10. APPEAL AND ERROR ⟸1056(1)—REVIEW—HARMLESS ERROR.
In an action for injuries to plaintiff's cows, on which a milking machine purchased from defendant had been used, the exclusion of evidence as to

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the results of the use of milking machines in other dairies, etc., *held* not reversible error.

11. APPEAL AND ERROR ⇐231(6)—OBJECTIONS—SUFFICIENCY.
The propriety of a hypothetical question, objected to on the ground that it assumed the existence of conditions not shown by the evidence, cannot be reviewed, where the objection did not point out any matter which was not pertinent to the case.

12. APPEAL AND ERROR ⇐1048(5)—REVIEW—HARMLESS ERROR.
Where the answer was not unfavorable to it, defendant cannot complain in the appellate court of the allowance of a hypothetical question.

In Error to the District Court of the United States for the Southern Division of the Southern District of California; Oscar A. Trippet, Judge.

Action by W. W. Skinner against the Sharples Separator Company, a corporation. There was a judgment for plaintiff, and defendant brings error. Affirmed.

The defendant in error brought an action against the plaintiff in error to recover damages for breach of warranty. The plaintiff therein alleged that he was the owner of a herd of dairy cows; that on January 3, 1914, the defendant sold and delivered to him a certain mechanical milker, and warranted the same to be in all respects fit and proper for use in milking the plaintiff's cows, and that the use thereof would not in any way injure said cows, or decrease the amount of milk they would give, if the same were operated in accordance with the defendant's instructions; that the plaintiff had no knowledge regarding said mechanical milker, other than said representations and warranties of the defendant, and believed the same, and relied thereon, and made the purchase solely by reason thereof; that on February 5, 1914, the defendant installed said mechanical milker for plaintiff, and declared that plaintiff could thereafter safely use and operate the same for milking his cows; that plaintiff did use said mechanical milker in strict conformity with the defendant's instructions, but the same was not fit for such use, and bruised and injured the teats and udders of many of the plaintiff's cows, and greatly lessened the amount of milk given by all thereof; that as soon as the plaintiff discovered these facts he discontinued the use of said milker. The plaintiff further alleged that on two subsequent trials of said milker, made at the special instance of the defendant and upon the renewal of the defendant's former representations and warranties, and conducted solely by the defendant itself, the use thereof greatly injured said cows, and permanently ruined many of them. The plaintiff demanded judgment for the sum of $4,512. The jury returned a verdict for the plaintiff in the sum of $3,763.92, and judgment was rendered in accordance therewith.

Willard P. Smith, of San Francisco, Cal., Bicksler, Smith & Parke, of Los Angeles, Cal., and J. J. Dunne, of San Francisco, Cal., for plaintiff in error.

Phil D. Swing, of El Centro, Cal., and M. A. Thomas, of San Francisco, Cal., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] A large portion of the very numerous assignments of error, as well as a large portion of the defendant's voluminous brief, is devoted to discussion of the evidence, under the contention that the same was insufficient to justify the verdict of the jury, and that the verdict was contrary to the court's instructions, thus disregarding the rule that an

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appellate federal court is prohibited from re-examining any fact tried by a jury otherwise than according to the rules of the common law, and has power to review only the rulings of the trial court. The defendant at the close of the testimony having made no motion for an instructed verdict, on the ground of the insufficiency of the evidence to sustain a verdict against it, we are precluded from considering any questions other than the rulings of the trial court in excluding or admitting evidence, and in giving or refusing instructions to the jury.

[2] Error is assigned to the admission in evidence of acts of one Briggs, who was in the employment of the defendant. It is urged that such evidence was inadmissible to bind the defendant, for the reason that Briggs was not shown to be the defendant's agent. The testimony related to the third attempt to use the milking machine, in October, 1914. The complaint had alleged that the third attempt was made in pursuance of the defendant's own request, and that it was carried on under the defendant's sole care and control. This the answer denied. The proof was that Briggs, who was in the employment of the defendant, came to the plaintiff, and that he and Reed, who was also an employé of the defendant, made the arrangements for the last trial of the machine. The defendant took the deposition of one Frank, its sales manager, whose duties were to conduct the sales work and look after the business generally. He testified that Briggs was in the employment of the defendant, and that he sent Briggs to the plaintiff in October, 1914, to see if he could not overcome the plaintiff's difficulty, and that Briggs had instructions to follow out his usual custom or practice in attempting to satisfy customers, or to correct faulty installation and straighten out trouble. This was sufficient, prima facie, to show that Briggs was the agent of the defendant, and was acting under its instructions. If such was not the fact, the defendant had ample opportunity to disprove it. It was not error, therefore, to admit evidence of Briggs' acts, or of the written agreement which was made between the plaintiff and the defendant, by Briggs, as its agent. The provision therein that the defendant would pay the plaintiff "for any damage done to his cows by the use of the machine while in the hands of their operator" went no further than to express the liability that the law imposed upon the defendant in the absence of such an agreement.

[3, 4] Errors are assigned to the admission of testimony as to acts of Reed. It is undisputed that Reed, claiming to represent the defendant, came to the plaintiff's dairy and installed the machine. He testified that he was in the employment of the defendant, and there was no evidence to the contrary. At the conclusion of the last trial of the machine Reed telegraphed to the defendant, stating that the effort had been a failure, that to continue the use of the machine would be taking too big a risk, and that to quit would be the safest way, "or we will have too big a loss according to our agreement." The fact of the failure of the third trial was amply proven by other witnesses, and there was nothing harmful to the defendant in the telegram, unless it be the intimation that the machine might injure the cows. But, Reed having been sent as the agent of the company to demonstrate the machine, it

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was not without the scope of his authority to report, as he did, at the conclusion of his operations, and the report was admissible as of the res gestae. La Abra Silver Mining Co. v. United States, 175 U. S. 423, 498, 20 Sup. Ct. 168, 44 L. Ed. 223.

[5] Error is assigned to the admission in evidence of certain printed pamphlets issued by the defendant, copies of which were delivered to the plaintiff pending the negotiations culminating in the sale of the milker. The guaranty under which the machine was sold contained this clause:

"The company further guarantees this machine to be in all respects as represented in its printed matter, and to be capable of doing the work as claimed therein."

The portions of the pamphlets so admitted in evidence were descriptions of the method in which the machine worked, and representations as to its efficiency and its safety. Under the terms of the guaranty they were made a part of the defendant's undertaking, and were clearly admissible in evidence.

[6] The objection now urged, that they were not all identified as the identical pamphlets which were handed to the plaintiff, cannot avail the defendant, for it was not presented as an objection in the court below.

[7] There is no merit in the contention that the court below erred in refusing to strike out the testimony of the plaintiff that the defendant was to send a demonstrator once a month, to go through the plaintiff's herd and see if everything was working all right. It appeared that the plaintiff was warranted in making the statement, for in one of the printed pamphlets is the following:

"We keep enough experts out on the territory to see that all dairymen do keep their machines in good order."

[8] One of the defenses relied upon by the defendant was that the plaintiff's dairy was unsanitary, and that the injury to his cows was caused thereby, and not by the use of the machine. On the cross-examination of Nye, who had been state dairy inspector, and who testified that the plaintiff's dairy was in a sanitary condition in the fall of 1914, he was asked whether or not the dairy conditions in the Imperial Valley, in which the plaintiff's ranch is situated, were such in 1914 that milk and dairy products therefrom were not permitted to be shipped into Los Angeles for consumption. There was no error in excluding the testimony. The Imperial Valley is large, and has space for many dairies. The reason for the exclusion of milk and dairy products from the Valley was not suggested, and, even if it had been shown that they were excluded for sanitary reasons, it would be no probative evidence against the plaintiff's dairy.

[9, 10] It is contended that the trial court erred in not permitting Dr. Hart, a veterinarian, to testify as to what he observed in the condition of the udders of cows at a dairy in Westchester, Pa., where a similar machine was in use, and in not permitting Kelly, a dairyman, to testify as to his successful use of a machine of the same kind at San Leandro, Cal. The objection to Hart's testimony was that "no

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foundation has been laid," and to Kelly's testimony that the offer of evidence did not include any offer to show that the conditions under which the machine was operated were similar or identical with those under which the machine of the plaintiff was operated. The evidence so offered was res inter alios acta, and many cases hold that such evidence by comparison is inadmissible to prove the efficiency of a machine which is involved in controversy. Osborne & Co. v. Simmerson, 73 Iowa, 509, 35 N. W. 615; Murray v. Brooks, 41 Iowa, 45; Byrne v. Elfreth, 41 Pa. Super. Ct. 572; Osborne & Co. v. Bell, 62 Mich. 214, 28 N. W. 841; Second National Bank v. Wheeler, 75 Mich. 546, 42 N. W. 963; Watkins v. Phelps, 165 Mich. 180, 130 N. W. 618; Fox v. Harvester Works, 83 Cal. 333, 23 Pac. 295; Illinois Surety Co. v. Frankfort Heating Co., 178 Ind. 208, 97 N. E. 158. And several courts have rejected such evidence for the reason that by its introduction collateral matters are brought in which tend to complicate the case, confuse the jury, and surprise the defendant. Watson v. Bigelow Co., 77 Conn. 124, 58 Atl. 741; Brummett v. Nemo Heater Co., 177 Mass. 480, 59 N. E. 58.

That reason applies with unusual force to the present case, for the testimony sought to be introduced related to a dairy in Pennsylvania, and to a dairy in San Leandro, more than 600 miles distant from the plaintiff's dairy. But in all cases where such testimony is admitted its value is held to depend upon the identity of the conditions under which similar machines have been used. Paulson v. D. M. Osborne & Co., 35 Minn. 90, 27 N. W. 203; White Automobile Co. v. Dorsey, 119 Md. 251, 263, 86 Atl. 617; Fountaine v. Wampanoag Mills, 189 Mass. 498, 75 N. E. 738; Ward v. Blake Mfg. Co., 56 Fed. 437, 5 C. C. A. 538; City of Findlay v. Pertz, 74 Fed. 681, 20 C. C. A. 662. In the case last cited the court held that the admission of such evidence was not error, saying:

"Evidence that the same machine upon other wells did work automatically was a circumstance, important or unimportant, as might appear from other evidence that the conditions were similar or dissimilar."

In other words, it was the opinion of the court that, in the absence of proof that the conditions were similar, such testimony was unimportant. In the present case there was no proof, or offer of proof, that the machines used in Pennsylvania and at San Leandro were used under conditions similar to those under which the plaintiff's machine was used, or that they were used in accordance with the defendant's printed instructions, or were operated under the conditions of the defendant's guaranty. In view of the absence of such proof, and in view of the remoteness of the places as to which the witnesses were interrogated, we are not convinced that the court below committed reversible error in excluding the testimony. It is to be added that the court admitted the evidence of two of the defendant's witnesses, who testified to the successful use of the machine in dairies at Corcoran, Cal., and Phœnix, Ariz., and the plaintiff was allowed to show by the testimony of two dairymen and two veterinary surgeons of the Imperial Valley that the use of the machine in the dairies of the valley produced

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the same injury to cows which was testified to by the plaintiff as resulting from his use of the machine.

[11, 12] On the cross-examination of Hart, who was called as expert witness for the defendant, he was asked a long hypothetical question, which covers three printed pages of the record. It is contended that the court below erred in permitting him to answer it; the objection being that the question assumed the existence of conditions not shown by the evidence. There are two reasons why the court's ruling should not be held to be error: First, the objection made to the question did not point out any matter therein which was not pertinent to the case, or which was not shown to be true; second, the answer of the witness was not unfavorable to the defendant.

Several assignments of error are directed to the instructions to the jury. None of the questions so raised are of sufficient importance to require discussion. We find no error in any of them.

The judgment is affirmed.

NATIONAL ENAMELING & STAMPING CO. v. PADGETT.

(Circuit Court of Appeals, Seventh Circuit. April 9, 1918.)

No. 2524

1. MASTER AND SERVANT ⟸356—EMPLOYERS' LIABILITY ACT—REFUSAL TO ACCEPT.

An employer, that declined to accept the provisions of the Workmen's Compensation Act of Illinois, is precluded from asserting the defenses of assumption of risk, contributory negligence, and negligence of fellow servants.

2. MASTER AND SERVANT ⟸121(1)—INJURIES TO SERVANT—GUARDING DANGEROUS PLACES.

A master is not required, either under the common law or the Illinois statutes requiring the guarding of dangerous machinery, etc., to guard all dangerous places, being bound to guard only those places which he may reasonably anticipate will cause injury to servants.

3. MASTER AND SERVANT ⟸286(22)—INJURIES TO SERVANT—GUARDING DANGERS—JURY QUESTION.

If there is any evidence tending to show that the master might have reasonably anticipated that a servant would be injured by coming in contact with a dangerous place, and fails to guard, a jury question is presented.

4. MASTER AND SERVANT ⟸285(4)—INJURIES TO SERVANT—JURY QUESTION.

In an action by an Illinois employé, injured when he grasped the cable of an unguarded pulley, evidence *held* insufficient to take the case to the jury; there being nothing to show that the master could have anticipated that the unusual coincidence of events which caused the injury would occur.

In Error to the District Court of the United States for the Southern Division of the Southern District of Illinois.

Action for damages for personal injuries by Howard Padgett against the National Enameling & Stamping Company. There was a judgment

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for plaintiff, and defendant brings error. Reversed and remanded for new trial.

William E. Wheeler, of East St. Louis, Ill., and J. R. Van Slyke, of St. Louis, Mo., for plaintiff in error.

J. T. Bullington and L. V. Hill, both of Hillsboro, Ill., for defendant in error.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVAN A. EVANS, Circuit Judge. No assignment of error need be considered, other than the one which challenges the sufficiency of the evidence to present a jury question as to defendant's breach of duty. Defendant in error, herein called plaintiff, was employed by plaintiff in error, herein called defendant, as an assistant pipe fitter, and while so employed suffered an injury to one of his hands. His cause of action rests upon the asserted failure of the master to provide him with a safe place in which to work. The Illinois statute is invoked, and reads as follows:

"All dangerous places in or about mercantile establishments, factories, mills, or workshops, near to which any employé is obliged to pass or to be employed shall, where practicable, be properly inclosed, fenced or otherwise guarded." Hurd's Rev. St. 1917, c. 48, § 89.

On the ground floor of defendant's establishment there were several pipes, which ran near and parallel to the ceiling. No employés worked regularly at this place, and only occasionally, to repair or install pipes, did employés go into this room. Along the floor was a system of flues used in connection with a furnace, and these flues were provided with dampers, which were raised or lowered by an operator on the floor above, as the furnace required. In order to make the place more safe for employés an iron boxlike structure housed the dampers. This box extended about 4½ feet above the floor; its surface was flat, being 19 inches wide by 4 feet long. Its purpose was to guard the dampers. Near the ceiling, and 7 feet above the center of this box, was a pulley through which a wire cable ran, extending from the damper to the floor above. The cable passed directly from the damper to the pulley, and then parallel to and near the ceiling for a distance of about 4 feet, thence through another pulley to the floor above. The damper was thus operatable from the upper floor.

Plaintiff and his superior were fitting a pipe at the time of the injury, and plaintiff was holding the pipe midway between its ends. Plaintiff stepped upon the guard box, and while so standing apparently lost his balance, reached out his hand, and grabbed the cable a few inches below the pulley. Just at this moment the operator opened the damper, and the cable was drawn through the pulley, and plaintiff's hand was injured. The total movement of the cable was but a few inches, enough merely to open and close the damper.

[1-3] Defendant had previously declined to accept the provisions of the Workmen's Compensation Act of the state of Illinois (Hurd's Rev. St. 1917, c. 48, §§ 120-152i), and was, therefore, precluded from asserting the defenses of assumption of risk, contributory negligence, and negligence of a fellow servant.

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Was defendant's failure to guard this pulley, under these facts, a violation of the Illinois statute, or a violation of the common-law duty to provide the servant with a reasonably safe place in which to work?

A few rules governing liability in cases of alleged failure to guard a dangerous place are quite well settled. For instance: The master is not required to guard all dangerous places, either under the common law or under a statute similar to the one above quoted. Dillon v. National Coal Tar Co., 181 N. Y. 216, 73 N. E. 978; Robertson v. Ford, 164 Ind. 538, 74 N. E. 1. If there be any evidence in such a case tending to show that the master might have reasonably anticipated that an employé would be injured by coming in contact with a dangerous place, and fails to guard against it, a jury question is presented. The duty to guard is not necessarily dependent on the location of the pulley or other dangerous place. Miller v. Kimberley & Clark Co., 137 Wis. 138, 118 N. W. 536.

[4] To these rules should be added the observation that the master's duty might in certain cases be made to turn upon the character of the so-called dangerous place. Failure to guard gearings, set screws, or similar objects might be a breach of duty, even though such dangerous place be located near the ceiling, when an unguarded pulley so located would not constitute a dangerous place. For obviously some mechanical devices, when unguarded, are so inherently dangerous that, if an employé is required to come in close contact with them, however rarely, resulting injury may well be said to be within the reasonable anticipation of the employer; while other devices, because dangerous only under certain circumstances, would, if located near the ceiling, be wellnigh incapable of causing injury to an employé, and under such circumstances injury to an employé may well be said to be outside the reasonable anticipation of an employer. Applying these rules to the facts in this case, we think a pulley placed near a ceiling, about 11½ feet from the floor, through which a cable moves back and forth but a few inches, and which could not possibly work injury to an employé, except by such employé climbing to an unusual position and seizing the cable within 4 inches of the pulley, and holding it until an operator above happened to move it, is not such a dangerous place as comes within the statute. To occupy a position where an injury might result, the servant was required to step on the housing of the damper (a device to safeguard employés against injury), he must have lost his balance after taking such unusual position, and he must have seized the cable just as it was about to be moved by the operator above.

The injury occurred, and could only occur, by an unusual co-incidence of events. It occurred because at the particular moment the employé stood upon the damper guard, an unusual position, held the heavy pipe midway between its ends, lost his balance, and seized the cable at a point about a foot above his head and within 4 inches of the pulley, and all this must have occurred just as the operator above opened the damper. Grant that the employer should have anticipated that an employé might have stepped upon this box, we believe it would be asking too much to expect such employer to anticipate the occurrence

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of the other concomitant events without which an injury would not have occurred.

A pulley should be guarded when danger to the employé from its use is within the reasonable anticipation of the employer. The realm of reasonable anticipation, though not always well defined, should not be confused with the wider field of speculative possibilities. In the present case, we find no evidence to sustain a verdict that the employer could have reasonably anticipated an injury to an employé by reason of the unguarded pulley.

Judgment is reversed, and cause remanded for new trial.

PORTLAND CATTLE LOAN CO. v. OREGON SHORT LINE R. CO.

(Circuit Court of Appeals, Ninth Circuit. May 6, 1918.)

No. 3103.

1. CARRIERS ⟸30—RATES—SCHEDULES FILED.
 The rate filed, whatever it is, is the only lawful charge, and the carrier must collect the same.
2. CARRIERS ⟸30—RATES—PUBLISHED TARIFFS.
 In an action by a railroad company to recover balances due as freight for shipments of cattle, published tariffs *held* to require that a differential rate from the point of shipment to a central point should be collected.
3. CARRIERS ⟸30—RATES—TARIFFS.
 In determining the rate to be charged by a carrier, all parts of the tariff filed should be considered, and if a plain meaning can be gathered therefrom, effect should be given to it.

In Error to the District Court of the United States for the District of Oregon; Charles E. Wolverton, Judge.

Action by the Oregon Short Line Railroad Company, a corporation, against the Portland Cattle Loan Company. There was a judgment for plaintiff (245 Fed. 214), and defendant brings error. Affirmed.

Writ of error is brought to review a judgment whereby the railroad company recovered a balance of freight charges alleged to be due it by the cattle company for the transportation of a trainload of cattle from Hereford, Tex., to destinations in Idaho and Montana. Hereford is a station on the Pecos & Northern Texas Railway and a short distance from Amarillo. The shipment moved through Amarillo over the connecting lines of the defendant railroad to Pocatello, Idaho. Originally 44 carloads of cattle were shipped, but at Amarillo the 44 carloads were combined into 43. Twenty-seven carloads were delivered by the railroad company at Pocatello, Idaho, and 16 were delivered at a station near Butte, Mont. Payment of freight charges was made by the cattle company for deliveries at Pocatello at a rate of $136.50 per car. This was made up of $116.50 for transportation from Hereford, Tex., to Idaho Falls, Idaho, and $20 for back haul from Idaho Falls to Pocatello. The charges for the part of the shipment delivered near Butte were on the basis of $164.80 per car, or $116.50 from point of origin to Idaho Falls, Idaho, and an added charge of $48.30 from Idaho Falls to Butte. Later the railroad company acknowledged that these were in part erroneous charges, and refunded to the cattle company $20 and interest per car on the Pocatello cars. In the course of time, after examination by the auditor of the railroad company, it was as-

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serted that the published tariffs applicable to the movement of the cars to Pocatello provided for a charge of $142.90 per car, and that therefore there had been a total undercharge on each of the cars of $26.40 for that point, and that on the 16 cars moving from Hereford to Butte the tariff called for $171.20 per car, which left an undercharge on the 16 cars for Butte of $6.40 per car. The $171.20 was made up of a combination of $26.40 from Hereford to Amarillo, plus the rate of $125 applying to Dillon, Mont., plus the rate from Dillon to Butte of $19.80.

Carey & Kerr and Charles A. Hart, all of Portland, Or., for plaintiff in error.

George H. Smith, of Salt Lake City, and A. C. Spencer and W. A. Robbins, both of Portland, Or., for defendant in error.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). [1] The rate filed, whatever it is, is the only lawful charge, for, as has been said by the Supreme Court in L. & N. R. R. v. Maxwell, 237 U. S. 94, 35 Sup. Ct. 494, 59 L. Ed. 853, L. R. A. 1915E, 665:

"Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination."

[2, 3] The learned judge of the District Court confined his consideration largely to the specific question whether the charge of $26.40 from Hereford to Amarillo was correct, and, inasmuch as it is conceded that the solution of the case turns upon that point, we confine ourselves to its consideration.

In the indices of the joint live stock tariffs Hereford is given as a point of origin, and Idaho Falls as a point of destination. In section 1 of the tariff, the list of bases from points of origin for rates on range cattle, there is a grouping of Texas stations, with a rate basis given for each station. Amarillo is given as a rate base point, and the other stations named take either the Amarillo rate or there is differential over or under the Amarillo rate. Hereford is listed as a station which apparently takes the Amarillo rate with no given differential. Page 26 of the Tariff. At a subsequent place in the tariffs the rate from Amarillo and from stations taking the Amarillo rate without a differential in ten car lots or more to Idaho Falls is $116.50 per car. Going back to the printed matter upon the first of the pages which precede the list of stations where the rates appear as based on the Amarillo rate, there is a caption, section No. 1, over a note in the tariff, which reads:

"Section No. 1.-Item 200—Governing Use of Differentials Shown in Section No. 1, Pages 24–31, Inclusive.

"The differentials shown in section No. 1 are to be added to or deducted from the Amarillo, El Paso or Deming rates as shown in section No. 2 hereof, pages 32 to 51, inclusive, to arrive at the through rate, where application and routing is provided on pages 56 to 69.

"Where no differentials are shown, the Amarillo or El Paso-Deming rates as shown in section No. 2 are to be applied *as indicated*." (Italics ours.)

The contention of the cattle company is that this explanatory note "prescribes a limitation on the use of the Amarillo rates as basic rates

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in certain instances, that is, where a station does not take the Amarillo rate, but there is a differential, an arbitrary addition to or subtraction from the Amarillo rate, the rate can thus be made upon only where application and routing is provided on pages 56 to 69 of the tariff"; and it also said that, where there is no differential, the Amarillo rate is to be applied, with no condition imposed that the use of the Amarillo rate is conditioned upon the existence of application and routing, as provided elsewhere in the tariff.

A full understanding of the tariffs can only be had, however, by following the direction indicated in item 200, supra, and referring to pages 56 to 69 of the tariffs themselves. On page 56, under the caption "Application of Rates," we find this note:

"Rates provided herein from points of origin shown in section 1 to points of destination shown in section 2 will apply only via the routes indicated in the chart on page 57, except as provided in item 350, note 1, where route number is not shown, there are no through rates applicable from the originating line to the destination line via any route except as specifically provided in section No. 3."

Section 3 being immaterial, it becomes necessary to refer to the route and application chart shown on page 57 of the tariffs to ascertain whether there are any applicable through rates from points on the Pecos & Northern Railway to points on the Oregon Short Line. Page 57 has the caption "Routing and Application," and on line 12 appears "Pecos, Nor. Tex. Ry.," and in the list of routes the Oregon Short Line Railroad appears at the head of a column, but without any routing number being inserted. We therefore have an instance which is precisely within note 1, page 56, of the tariff just heretofore quoted; that is, as no route number is shown, there are no through rates applicable from the Pecos & Northern Texas Railway, the originating line, to the Oregon Short Line points on the destination line. It would therefore follow that, no through rate or through route being authorized by the tariff, the rate which would be applicable would have to be made up by a combination of the rates published in the tariff sheets. Pocatello is not named as a point of destination; hence it is necessary to make an intermediate application of the Idaho Falls rate as under certain items of the tariff which need not be specially cited. Hereford is 47 miles from Amarillo, and, as provided by the tariff sheets, when the exact destination is not shown, the next greater destination is to be used. The next greater destination mentioned in the tariff being 50 miles, the rate specified on cattle in carload lots would make the local rate $26.40 from Hereford to Amarillo.

There is no ambiguity in the language itself. Whatever difficulty arises is in relating one feature or note in the tariff with another. They must all be considered, and if a plain meaning can be gathered, of course it will control. We think the judge of the District Court applied this doctrine by regarding the later explanatory notes (pages 56–59) as but a "development of the intention" of the rate maker that shipments from Amarillo common points, whether with or without differentials, would not take the through rates unless application and routing are provided for on pages 56 to 69. Our judgment

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agrees with his final view that, there being no through rates or through routes from points on the Pecos & Northern Texas Railway to Oregon Short Line points, the notes (quoted above) on page 56 apply in their limitations of the applicability of the rates from points in section 1 to destination points in section 2 to the routes indicated on page 57.

Affirmed.

PORTLAND FEEDER CO. v. OREGON SHORT LINE R. CO.

(Circuit Court of Appeals, Ninth Circuit. May 6, 1918.)

No. 3104.

In Error to the District Court of the United States for the District of Oregon; Chas. E. Wolverton, Judge.

Action by the Oregon Short Line Railroad Company against the Portland Feeder Company, a corporation. There was a judgment for plaintiff (245 Fed. 214), and defendant brings error. Affirmed.

Carey & Kerr and Charles A. Hart, all of Portland, Or., for plaintiff in error.

George H. Smith, of Salt Lake City, and A. C. Spencer and W. A. Robbins, both of Portland, Or., for defendant in error.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge. This is a companion case to Portland Cattle Loan Company v. Oregon Short Line Railroad Company, 251 Fed. 33, — C. C. A. —, heretofore decided, and upon the authority of the decision in that case the judgment of the District Court herein is affirmed.

Affirmed.

ROSTWICK et al. v. MUTUAL LIFE INS. CO. OF NEW YORK.

(Circuit Court of Appeals, Fifth Circuit. April 15, 1918. Rehearing Denied June 8, 1918.)

No. 3178.

CORPORATIONS ⇐426(10)—CONTRACTS—AUTHORITY OF OFFICERS.

Plaintiffs sued defendant, a large life insurance company, for services rendered in adjusting and settling certain claims against defendant, amounting to several hundred thousand dollars. They were employed by the assistant superintendent of one of defendant's departments, who during the time the services were being rendered was in constant correspondence with plaintiffs, and also with the superintendent, who knew of the employment, and both knew, as appeared from their letters, that plaintiffs expected to be paid, and intended that they should be. The letters were also of record in the office of defendant. *Held*, that whether the controlling officers of defendant had actual knowledge of the services, as was probable in view of the sums involved, or left the matter entirely to the department, they were chargeable with notice, and that defendant could not accept the benefit of the acts of the department, necessarily vested with large discretion, and repudiate its obligations incurred, by denying its authority.

In error to the District Court of the United States for the Southern District of Florida; Rhydon M. Call, Judge.

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Action at law by William M. Bostwick, Jr., and others, against the Mutual Life Insurance Company of New York. Judgment for defendant, and plaintiffs bring error. Reversed.

A. H. King and George C. Bedell, both of Jacksonville, Fla., for plaintiffs in error.

W. E. Kay and J. L. Doggett, both of Jacksonville, Fla., for defendant in error.

Before PARDEE and BATTS, Circuit Judges, and FOSTER, District Judge.

BATTS, Circuit Judge. Plaintiffs in error sued defendant in error for the value of their services in the adjustment of claims against the latter. The issues involved in the case and the basis of the instructions to the jury to return a verdict for the defendant are indicated by the following statement of the trial judge:

"It is my opinion that this evidence does not show a special authorization by the defendant to Price to employ the plaintiffs to perform the services in the Painter cases, or bringing about the settlement of same; nor does this evidence show the holding out by defendant of Price as such agent in such manner as to justify the plaintiffs to have assumed or presumed such authority; nor does this evidence show a voluntary acceptance of the benefits of any services rendered by plaintiffs in attempting to bring about any such settlement in such manner as to raise the implied promise necessary to make the defendant liable at the suit of the plaintiffs, for a reasonable compensation of such services; nor does this evidence show such ratification of the acts of Price as would dispense with prior authorization."

Price was assistant superintendent of the department of revision and inspection of the defendant company. Dr. P. N. Foshay was superintendent. The claims in which services were rendered by plaintiffs against defendant and other companies involved approximately $800,000. Price was in charge of the adjustment, and was in constant communication with the superintendent by letter and in person. The relationship of the plaintiffs to the work in hand was disclosed in the correspondence. The correspondence between Price and Bostwick indicates that plaintiffs expected to be paid for their services. The correspondence between Price and Foshay shows that the latter knew that plaintiffs expected pay and that Price and Foshay intended that they should be paid. Some of the correspondence indicating these facts is as follows:

Letter of May 14, 1914, from Price to Bostwick, contains this sentence:

"Your fee to be additional, if matter concluded through you."

Letter from Price to Foshay, dated April 15, 1915, after referring to work by Bostwick:

"He also says that, if he wins this case, the company will have to pay him what he asks."

Letter from Foshay to Price, dated April 22, 1915:

"I can see that one of your big troubles ahead is going to be the handling of B. We know that he is entitled to a reward; but, of course, we cannot

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agree to its being excessive. However, that may take care of itself as the situation moves along."

Letter from Price to Foshay, dated May 2d:

"Now, of course, Bostwick and Jones have been of service to me."

Bostwick testified that, upon a suggestion from Price, he went to New York to see Dr. Foshay; that he met Foshay in the office of the insurance company in New York; that Foshay wanted to know if he could bring about the settlement; that he explained the whole situation to Foshay; that upon his return Price, in accordance with an understanding with Foshay, reported to him; that Price then assured him that his fees would be taken care of on the basis of a fair settlement by the company, Price representing that he was authorized to make this statement.

The evidence indicates that much correspondence (including the letters heretofore referred to) passed between Price and Foshay, and between Price and Bostwick, which became records of the company. These records were produced by the president of the company as the result of an ancillary contested proceeding in the Southern district of New York. These letters, disclosing information with reference to the important cases in which they were written, were accessible to the higher officers of the company, and, unless the matters were intrusted entirely to Foshay and Price, were doubtless read by them. The president probably had a personal knowledge of the case. He testified:

"Q. And you rarely come in contact with his work (referring to Price), or know what he is doing in any particular case? A. Not often. Q. Did you know those in this case? A. I presume I was told whatever the facts were in the case. I did not know from Mr. Price at the time it was going on, but I presume I was told."

The cases were important, involving the payment of many thousands of dollars. They were settled out of court, many thousands of dollars being paid. The negotiations were supervised and the settlement concurred in by the head of an important division, who knew of the work of Bostwick, and who accepted and utilized the work, who knew that Bostwick was entitled to, and expected, compensation, and who intended that the compensation should be paid. The records of the corporation disclosed to the president, and all officers to whom Foshay was subordinate, the activities of Bostwick and his expectations, and the utilization of his work by Foshay and Price, and their intentions as to compensation.

The business was either of a character intrusted to heads of a division or of a kind disposed of by still higher officials. The controlling officers, in either case, had knowledge of the facts, or should have known them. The presumption of knowledge could properly be indulged. It was a character of business for the corporation necessarily involving the expenditure of money by the corporation. The controlling officers had, or could and should have had, knowledge of the obligations being incurred. All that was said and done by Foshay and Price was in furtherance of the important work with which they were intrusted. They were selected by the controlling officers of the

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corporation for the work. The controlling officers either supervised what they were doing or entirely intrusted the matter to them. Corporations engaged in as large a business as that of defendant cannot have all corporate action through directors or the ordinary executive officers. They will not be permitted to take advantage of benefits accruing from the acts of officers, necessarily invested with large discretion and acting within the scope of their authority, and repudiate the obligations incurred in their acquisition, by denying the authority of the officers. Mere denial of authority will not be conclusive; and one undertaking to enforce his claims against the corporation may establish by circumstances an authority which exists in fact, though it may never have been conferred by any single affirmative act. Acquiescence and confirmation may also be established by circumstances.

Reference has been made to a part only of the pertinent evidence in the instant case. There is, however, no occasion to controvert the quoted conclusions of the trial judge. It is enough to say that, if the issues had been submitted to the jury, and different conclusions reached, the verdict would not have been without substantial supporting evidence. The reason for excluding the letters of May 3 and 4, 1915, from Foshay to Price, does not appear.

The judgment is reversed, and the cause remanded for proceedings in conformity herewith.

Reversed.

BEYER v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 6, 1918.)

No. 3106.

1. PROSTITUTION ⇐1—WHITE SLAVE ACT—OFFENSES.
The transportation of women from the United States to Mexico, to dance as entertainers in a resort where liquor was sold and other women engaged in prostitution, is a violation of the White Slave Act (Comp. St. 1916, §§ 8812–8819), though the contract with the entertainers specifically provided that they should not engage in prostitution.

2. CRIMINAL LAW ⇐1023(8)—ERROR—DENIAL OF MOTION IN ARREST.
In a prosecution in a federal court, the denial of a motion in arrest of judgment is not assignable as error.

3. CRIMINAL LAW ⇐1059(2)—INSTRUCTIONS—OBJECTIONS.
Where exceptions to each and every instruction offered on behalf of the prosecution did not show what instructions were given, and if deemed to apply to those given failed to draw the attention of the court to the particular portions objected to, such exceptions raised no question for review.

4. CRIMINAL LAW ⇐762(3)—INSTRUCTIONS—OPINION AS TO EVIDENCE.
In a prosecution for violation of the White Slave Act (Comp. St. 1916, §§ 8812–8819), the expression of the court's opinion as to the evidence was permissible; the jury being further charged that they were not bound by the court's opinion.

In Error to the District Court of the United States for the Southern Division of the Southern District of California; Benj. F. Bledsoe, Judge.

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Frank Beyer was convicted of a conspiracy to transport females from the United States to Mexico for the purpose of debauchery, in violation of the White Slave Act, and he brings error. Affirmed.

The plaintiff in error was convicted under an indictment charging that he, with certain others, conspired to transport women and girls from the United States to Mexico for the purpose of debauchery. The evidence was that the defendants were conducting a bar, a gambling hall, a dance hall, and a house of prostitution in a building in Mexicali, Mexico, and that they hired several women and girls at Los Angeles to go to their establishment in Mexicali to act as entertainers, and furnished transportation for some of them. The duties of the entertainers were to sing and dance, and to dance with the male habitués of the place, and although there was no evidence that the entertainers were to sell liquor, there was evidence that they did in fact invite men to dance, and that the men knew that "if they danced they had to buy a drink." The girls were to derive a profit of from 40 to 50 per cent. of the selling price of the liquors sold. Back of the dance floor was a hall. The first door leading from the hall was a dressing room for the entertainers. Beyond, on both sides of the hall, were rooms occupied by prostitutes. The prostitutes were permitted upon the dance floor and in the café and at the bar. The entertainers were bound by contracts not to engage in prostitution, and they were instructed that, if men should approach them and make improper suggestions to them, they were to say that they were not there for that purpose, but that there were others there.

Earl Rogers, Milton M. Cohen, Jerome S. Kahn, O. G. Kuklinski, and Charles Scholz, all of Los Angeles, Cal., for plaintiff in error.

Robert O'Connor, U. S. Atty., and Clyde R. Moody, Asst. U. S. Atty., both of Los Angeles, Cal.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] It is contended that the indictment is insufficient for its failure to set forth particulars and specify acts which bring the plaintiff in error within the purview of the statute, and that it is not sufficient to charge the offense in the language of the statute. But the indictment goes further than the language of the statute. It sets forth in sufficient detail the features of the offense, the manner in which the business of the accused was to be conducted, and the facts and circumstances showing that the women and girls were to be transported for the purpose of sexual debauchery. It is difficult to perceive how further details could have been set forth for the information of the accused. The indictment is no less specific than the indictment which we sustained in Simpson v. United States, 245 Fed. 278, 157 C. C. A. 470.

It is contended that neither the acts charged to have been contemplated by the conspiracy, nor the acts shown to have been committed, were such as to bring the plaintiff in error within the meaning of the statute upon which the indictment is founded. Thereby is presented the principal question in the case, which is whether the facts charged and proven are such as to show that the intention of the conspirators was to transport the women and girls for the purposes denounced by the statute. The case differs from Athanasaw v. United States, 227 U. S. 326, 33 Sup. Ct. 285, 57 L. Ed. 528, Ann. Cas. 1913E, 911, only in that there is no proof here that any of the girls was actually solicited to engage in sexual debauchery, and that there is no charge that such

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debauchery was contemplated by the accused in transporting the girls to Mexicali. But we think there is enough in the charge and in the proofs to show that the purpose of the accused was within the prohibition of the statute. They intended to and did place the girls in a house of prostitution. They subjected them to all the evil influences of such surroundings. They required them to dance on the same floor with prostitutes. There was evidence that they were instructed, in case they were solicited to engage in sexual intercourse, to refuse, and to say in substance that there were others there for that purpose, and thus to advertise the prostitutes. They were to be in the dance hall for the purpose of luring men to dance with them, and to induce men to purchase intoxicating liquors, and thereby to aid in maintaining the business of prostitution in which the plaintiff in error was engaged. They placed the girls in an environment in which they were likely to be solicited to engage in prostitution, and their contracts with the girls indicate that they expected that such solicitations would be made. In Simpson v. United States, 245 Fed. 278, 157 C. C. A. 470 (certiorari denied 245 U. S. 667, 38 Sup. Ct. 133, 62 L. Ed. ——), we held that one who induced a woman to travel from California to Mexico to manage a house of prostitution was punishable under the White Slave Act (Act June 25, 1910, c. 395, 36 Stat. 825 [Comp. St. 1916, §§ 8812–8819]). There is no difference in principle between that case and this. While the girls who were transported to Mexicali were not engaged in managing the house of prostitution, they were engaged in luring men to it, and probably were as essential to its success as a manager would have been.

[2] Error is assigned to the denial of the motion of plaintiff in error in arrest of judgment. To this it is sufficient to say that the ruling of the trial court on that motion is not assignable as error. Street Railroad Company v. Hart, 114 U. S. 654, 5 Sup. Ct. 1127, 29 L. Ed. 226; Andrews v. United States, 224 Fed. 418, 139 C. C. A. 646.

[3] It is said that the court below erred in giving certain instructions to the jury. No such error was brought to the attention of the court below. At the close of a comprehensive charge on all the features of the case, counsel for the plaintiff in error noted "exceptions to each and every instruction offered on behalf of the government." We have no means of knowing what instructions were offered on behalf of the government, and, even if the exceptions are to be deemed to have been taken to the instructions actually given, they are wholly insufficient. "A general exception to a charge, which does not direct the attention of the court to the particular portions of it to which objection is made, raises no question for review." Holder v. United States, 150 U. S. 91, 14 Sup. Ct. 10, 37 L. Ed. 1010; Masonic Ben. Ass'n v. Lyman, 60 Fed. 498, 9 C. C. A. 104; Baggs v. Martin, 108 Fed. 33, 47 C. C. A. 175.

[4] Error is assigned to the remarks of the court in instructing the jury, in which it was said that, if the defendants contracted with the women that the latter should not engage in prostitution, or advised them what to do in the event that they were solicited by men, that would be very strong evidence that the defendants knew that the surroundings

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and environment in which the women were to be placed would naturally lead to debauchery and immoral sexual relations. Such an expression of opinion as to the evidence in the case was permissible. Rucker v. Wheeler, 127 U. S. 85, 93, 8 Sup. Ct. 1142, 32 L. Ed. 102; Lovejoy v. United States, 128 U. S. 171, 173, 9 Sup. Ct. 57, 32 L. Ed. 389. The jury were told that they were not bound by what the court said concerning the weight to be given to the evidence, but that it was their right to determine the weight of the evidence, and the credibility of the witnesses.

The judgment is affirmed.

CONETTO v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 6, 1918. Rehearing Denied July 1, 1918.)

No. 3087.

1. CRIMINAL LAW ⊜101(1)—FEDERAL COURTS—REMOVAL OF ACCUSED TO OTHER DISTRICT FOR TRIAL.

 In proceedings for the removal of one charged with crime from one federal district to another for trial, merely technical objections to the sufficiency of the indictment should not be considered.

2. BANKRUPTCY ⊜192—OFFENSES—PARTNERSHIP—CONCEALMENT OF PROPERTY BY PARTNER—"PERSON."

 A member of a bankrupt partnership, although not himself adjudged a bankrupt, is subject to prosecution for the fraudulent concealment of property of the partnership from its trustee, under Bankruptcy Act July 1, 1898, c. 541, § 29b (1), 30 Stat. 554 (Comp. St. 1916, § 9613), since, as under section 1 (Comp. St. 1916, § 9585), a partnership is a "person," it is also a "person," within the meaning of section 29b.

 [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Person.]

In Error to the District Court of the United States for the First Division of the Northern District of California; Wm. C. Van Fleet, Judge.

Criminal prosecution by the United States against Ciro Connetto. From an order for the removal of defendant to another district for trial, he brings error. Affirmed.

The plaintiff in error and Alfonzo Conetto were indicted in the District Court of the United States for the Southern District of Florida for violation of section 29b (1) of the Bankruptcy Act. The plaintiff in error was thereafter arrested in the Northern district of California, and after a hearing before a United States commissioner was remanded to the custody of the United States marshal for the Northern district of California, and thereafter an order and warrant of removal was made by one of the judges of the District Court for the Northern District of California, directing the marshal to deliver the plaintiff in error into the custody of the United States marshal for the Southern district of Florida. On the hearing before the commissioner it was stipulated that the indictment constituted all the evidence offered, and the commissioner's commitment was based solely upon a copy of the indictment, except that the identity of the plaintiff in error was admitted, and no further evidence was adduced at the hearing before the District Court.

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The indictment in six counts charges the accused therein with concealing a large quantity of groceries of different kinds. It alleges that the defendants were copartners in business, that they filed a voluntary petition in bankruptcy, and that on December 6, 1916, the said accused, naming them, "trading as aforesaid, were duly adjudged bankrupts"; that a trustee was appointed, who on January 6, 1917, duly qualified and gave his bond; that between the date of the adjudication in bankruptcy and the appointment of the trustee the accused did unlawfully and fraudulently conceal certain property "belonging to the said estate in bankruptcy of them the said Ciro Conetto and Alfonzo Conetto, and trading as aforesaid and bankrupt as aforesaid." The indictment described the property and charged that the same belonged to the bankrupt estate of the said Ciro Conetto and Alfonzo Conetto, trading as aforesaid, and was in their possession and under their control, and was concealed by them within the Southern district of Florida, and that neither they nor either of them have disclosed to the trustee the possession of the said merchandise by them, and have not turned over and delivered the same to the trustee or accounted to him for the same; that at the time of concealment they well knew the same to be the property of the bankrupt estate, and that no accounting has been made to the trustee thereof."

Nathan C. Coghlan, of San Francisco, Cal., for plaintiff in error.

John W. Preston, U. S. Atty., and Annette Abbott Adams, Asst. U. S. Atty., both of San Francisco, Cal.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] It is contended that the indictment does not charge the commission of an offense against the United States, and that where an indictment is the sole basis for removal, and fails to charge an offense, the District Court has no jurisdiction to order the removal of the accused. The extent to which inquiry may be made into the validity of an indictment on removal proceedings is outlined in Benson v. Henkel, 198 U..S. 1, 10, 25 Sup. Ct. 569, 570 (49 L. Ed. 919), as follows:

"We have had frequent occasion to hold generally that technical objections should not be considered, and that the legal sufficiency of the indictment is only to be determined by the court in which it is found. * * * Of course, this rule has its limitations. If the indictment were a mere information, or obviously, upon inspection, set forth no crime against the United States, or a wholly different crime from that alleged as the basis for proceedings, * * * the commissioner could not properly consider it as ground for removal. In such cases resort must be had to other evidence of probable cause."

The objections to the indictment are, in brief, first, that it does not appear therefrom that the plaintiff in error has ever been adjudged a bankrupt, and that, not having been adjudged a bankrupt, he is incapable of committing the offense for which he is indicted; and, second, that it does not appear from the indictment that at any time since the appointment of the trustee the plaintiff in error has concealed from the trustee any of the property belonging to the estate in bankruptcy. Assuming that the indictment does not allege that either of the individual members of the firm was adjudged a bankrupt, and that from the language of the indictment it is to be inferred, as the plaintiff in error contends, that the partnership only was adjudged a bankrupt, and that the property alleged to have been concealed belonged to the partnership estate in bankruptcy, it does not follow

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that the individual members of the firm were not subject to indictment for concealing the property.

[2] We think the proper answer to the first objection is this: The partnership was adjudged bankrupt. The property belonged to the partnership, and the members of the partnership are alleged to have concealed it. As so alleged, the concealment was a partnership act. The members of the copartnership cannot claim immunity from the consequences of their acts on the ground that they individually were not adjudged bankrupts. A partnership is a "person," under the provisions of section 1 of the Bankruptcy Act, and it should be held to be a person within the meaning of section 29b. The question whether officers of a corporation may be prosecuted for concealing the property of a bankrupt corporation has been the subject of several decisions, and although in United States v. Rabinowich, 238 U. S. 86, 35 Sup. Ct. 682, 59 L. Ed. 1211, the court said that it was at least doubtful whether the crime of concealing property belonging to the bankrupt estate can be perpetrated by any other than a bankrupt, the decided weight of authority, and we think the weight of reason, affirm the liability of such officers to criminal prosecution under section 29b. United States v. Young & Holland Co. (C. C.) 170 Fed. 110; United States v. Freed (C. C.) 179 Fed. 236; Roukous v. United States, 195 Fed. 353, 115 C. C. A. 255; Kaufman v. United States, 212 Fed. 613, 129 C. C. A. 149, Ann. Cas. 1916C, 466; Wolf v. United States, 238 Fed. 902, 152 C. C. A. 36. If the officers of a corporation may thus be held answerable for concealment of the corporation property, by the stronger reason the members of a partnership should be held answerable for the concealment of partnership property.

In answer to the second objection, it is sufficient to say that the indictment charges that the property alleged to have been concealed was the property of the bankrupt, that it was concealed knowingly and unlawfully, and that although concealment began before the appointment of the trustee, and was therefore at that time no offense, it continued after the appointment of the trustee. The concealment is alleged to have consisted in the failure of the accused to deliver the property to the trustee, or to account for the same, or to disclose their possession thereof, and thereby concealment from the trustee was charged, and the completion of the offense was sufficiently set forth. Kaufman v. United States, 212 Fed. 613, 129 C. C. A. 149, Ann. Cas. 1916C, 466; Warren v. United States, 199 Fed. 753, 118 C. C. A. 191, 43 L. R. A. (N. S.) 278; Cohen v. United States, 157 Fed. 651, 85 C. C. A. 113.

The order is affirmed.

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THE EROS.

(Circuit Court of Appeals, Second Circuit. February 20, 1918. On Motion for Reargument, March 30, 1918.)

No. 158.

1. SHIPPING ⟸39—CHARTERS—CONSTRUCTION.
A provision in a charter party that it shall be construed according to the law of a particular country is valid, but merely supplies the rule of construction, and does not limit the remedies of the parties.

2. CONTRACTS ⟸127(2)—EFFECT OF ARBITRATION CLAUSE.
Under the law of the American admiralty courts, a provision in a charter party that any dispute arising shall be submitted to arbitration does not deprive the parties of the right to appeal to the courts.

3. ADMIRALTY ⟸124—COSTS—FEES OF MARSHAL.
Under Rev. St. § 829 (Comp. St. 1916, § 1386), allowing the marshal a smaller commission where a decree in admiralty is settled without a sale, the marshal is entitled to have such reduced commission included in the decree as part of the costs.

4. SHIPPING ⟸51—CHARTER—BREACH.
Refusal of master of a French yacht in New York, under charter to an American, under instructions from the owner, to proceed with the charter on declaration of war between France and Germany, on the ground that the crew were subject to call for the French army and the yacht to requisition by that government, *held* an unjustified breach of the charter, where the vessel was not requisitioned, and only about half the crew taken, and charterer offered to pay for substitutes.

On Motion for Reargument.

5. SHIPPING ⟸58(3)—BREACH OF CHARTER—DAMAGES.
Measure of damages for breach by the owner of a charter for a pleasure yacht *held* the extra cost of procuring another vessel, with the incidental expense of transfer from one to the other.

Appeal from the District Court of the United States for the Eastern District of New York.

Suit in admiralty by Eugene Higgins against the yacht Eros; Julian H. Everard, master, claimant. Decree for libelant, and claimant appeals. Affirmed.

For opinions below, see 241 Fed. 186, and 245 Fed. 814.

Kirlin, Woolsey & Hickox, of New York City (Charles Steward Davison, of New York City, of counsel), for appellant.

Selden Bacon, of New York City, for appellee.

Before WARD and HOUGH, Circuit Judges, and LEARNED HAND, District Judge.

PER CURIAM. [1, 2] We concur in Judge Veeder's finding of law that the charter is to be construed by English law, and that the provision as to arbitration is not enforceable in our courts. We decline to consider the correctness of the damages awarded. That matter was formally and properly referred to the commissioner, who made a report in accordance with a stipulation as to facts executed between the

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parties, and no exceptions to that report were ever filed. The correctness of the commissioner's conclusion was never presented to the District Court, and is not before us in such shape as to require consideration.

[3] The clerk refused to include in the libelant's bill of costs the marshal's poundage, calculated at the lesser rate allowed on a settlement under section 829, subd. 15, Rev. St. U. S. (Comp. St. 1916, § 1386), and upon exceptions the District Judge overruled the clerk. It seems to us that the court made a very reasonable disposition for the protection of the marshal. If the case be settled by the parties, this poundage will have to be paid before satisfaction of the decree. On the other hand, if the libelant has to collect by execution, the marshal will tax his full poundage and give credit for the amount allowed in the decree as upon a settlement.

[4] This leaves but two questions for brief consideration: (1) Was there a refusal to perform the contract of charter party on the part of the claimant or his agent? and (2) if there was such refusal, was the breach excused by the outbreak of war between France and Germany? The libel alleged, and the lower court definitely found, that on August 5, 1914, the master of the Eros, under instructions of her owner, refused to recognize the charterer's orders, and withdrew the yacht from charterer's control. We have examined the evidence carefully; its legal effect is fairly stated in the opinion of Judge Veeder, and, after making every allowance for the disadvantage under which claimant labored in having a breach of charter party spelled out of the conversation of a French ship captain, speaking in English, with an American lawyer, we are compelled to accept the finding of the lower court.

Whether the outbreak of war excused this breach is a matter which a majority of this court consider disposed of by the actual facts of this case rather than by the application of any inexorable rule of law. The charter party contains no proviso excusing nonperformance caused by "acts of princes" or other matters equivalent to declared hostilities. It is thought that the recent ruling in The Kronprinzessin Cecilie, 244 U. S. 12, 37 Sup. Ct. 490, 61 L. Ed. 960, has mitigated the rigidity of contract sometimes inferred from the absence of the "restraint of princes" clause.

Applying that decision to this case, the majority hold that, if the French consul in New York had actually taken by order or requisition on the yacht master all, or substantially all, of his crew, that governmental act would have been an excuse for declination to further perform the terms of charter. Such, however, was not the fact; a considerable number of the crew were taken, and did go to join the French military forces. We find that, before the charterer had finally committed himself to a new fixture, it had become possible to put the yacht at his disposition so far as he had then indicated. This the yacht master made no effort to do, and his conduct was entirely approved by the claimant herein, who not only ratified his captain's substantial refusal to perform, but added the condition (wholly inadmissible) that the

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charterer should only use the yacht during the pendency of war within the territorial waters of the United States.

Therefore the decree must be affirmed, with interest and costs.

On Motion for Reargument.

PER CURIAM. [5] Having fully considered the record in respect of damages, no reason is seen to disturb the conclusion reached below. Though a yacht is used for pleasure only, a contract for her use is as much a property right as the hiring of a cargo boat, and a breach of contract entails the same consequences. Our decision in Sanders v. Munson, 74 Fed. 649, 20 C. C. A. 581, is controlling and was followed.

That we have now disposed of this question as though it had been properly raised does not signify any change of view as to the necessity of excepting to a commissioner's report and presenting to the trial court any errors alleged to have occurred in assessing damages. But in this instance, as appellee did not in brief or otherwise insist on the point, we have deemed it waived, and on the merits deny any relief in respect of amount.

In re KOMARA.

DRABANT v. CURE.

(Circuit Court of Appeals, Third Circuit. May 16, 1918.)

No. 2350.

BANKRUPTCY ⇐175—TITLE TO PROPERTY—SALE BY BANKRUPT.

Under the law of Pennsylvania a sale of personalty by a bankrupt in good faith to his mother-in-law, with whom he and his wife lived as one family and for whom he worked, is not invalid as to creditors because there was no visible change of possession.

Appeal from the District Court of the United States for the Middle District of Pennsylvania; Chas. B. Witmer, Judge.

In the matter of John Komara, bankrupt, John W. Cure, trustee. Appeal by Mary Drabant from a decree awarding a fund in court to the trustee. Reversed.

J. Julius Levy and Harry Needle, both of Scranton, Pa., for appellant.

J. E. Sickler, of Scranton, Pa., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. This case involved the disposition of a fund in the bankruptcy court. Such fund was the proceeds of the sale of certain personal property which came into the possession of John W. Cure, trustee in bankruptcy of John Komara, which property was also claimed by Mrs. Mary Drabant. The claim of the latter was, by consent of the parties, referred by the court to a referee as

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special master, who reported against the claim of Mrs. Drabant. On exceptions to his report the court adopted the report of the master and entered a decree awarding the fund to the trustee. Thereupon Mrs. Drabant took this appeal.

The questions before us fall within a narrow compass. Mrs. Drabant was the mother-in-law of Komara, the bankrupt, and they had a common home on a farm. The proofs tended to show that Mrs. Drabant more than four months prior to bankruptcy, in good faith, purchased from her son-in-law certain farm implements and stock used on the said farm, and received certain bills of sale therefor. After the purchase of such property it remained on the farm as it theretofore had been, and while Mrs. Drabant exercised control and ownership of it, the property was used by John Komara, who worked for her. In this general situation of the parties and the property, the master held that Mrs. Drabant's title under the bill of sale would not avail because of a lack of change of possession. In that regard the referee held, and the court adopted his opinion as the opinion of the court, that:

"Notwithstanding claimant's contention that she loaned large sums of money to John A. Komara, and secured from him in return two bills of sale transferring the title in his personal property to her, she was in my opinion to go farther; by leaving the vendor in possession and neglecting to do anything to indicate a change of ownership, she made the proceedings invalid as against creditors."

In so holding we are of opinion the master failed to give due regard to the decisions of the Supreme Court of Pennsylvania which govern a situation like the present, namely, where there could not be a valid sale of personal property made between persons who lived together in a common family, unless their family relation was broken up, and either the vendor or vendee gave up his or her home. Who was to do it in this case—the old woman of 70, whose money had bought and paid for the property, or the daughter's husband, whose labor to use the property was necessary? Is such dismemberment of a common home necessary, under the Pennsylvania decisions, to make a sale of personal property valid as between persons thus situate? Clearly not. Undoubtedly the Pennsylvania decisions, from Clow v. Woods, 5 Serg. & R. 275, 9 Am. Dec. 346, with the intervening cases, to Barlow v. Fox, 203 Pa. 114, 52 Atl. 57, hold that retention of possession when actual delivery is practical is a fraud in law, and will not avail against creditors. But, on the other hand, there is a line of cases arising out of situations where change of possession was not practicable and possible. McKibbin v. Martin, 64 Pa. 352, 3 Am. Rep. 588; Huffman v. McIlvaine, 13 Pa. Super. Ct. 108. In such cases, viz., where change of possession is not practically possible, it is not required. The general principle of such cases is best illustrated by McClure v. Forney, 107 Pa. 414, which, so far as material facts are concerned, is not unlike the situation in the court below. In that case the syllabus states the facts as follows:

"An insolvent father sold his daughter a mare for a valuable consideration, which was promptly paid. The father and daughter lived together on a farm, and the mare was kept at the time of the purchase with the father's other

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live stock. No formal transfer of possession ever took place. The mare remained upon the farm, and was kept and used as before by the father and daughter and other members of the family. * * * It was testified * * * that after the sale the father used the mare as before—as one witness said, 'most all the time'; that on one occasion he claimed to own her, and offered to sell her as his property; and that the blacksmith's bill for shoeing her was charged to his account. * * * The father and daughter separated; the daughter moving to another farm and taking the mare with her. The father continued, however, to occasionally use the mare."

Referring to such state of facts, the court said:

"In determining the kind of possession necessary to be given to the vendee, to be good against the creditors of the vendor, regard must be had not only to the character of the property, but also to the nature of the transaction, the position of the parties, and the intended use of the property. No such change of possession as will defeat the fair and honest object of the parties is required."

From the above it will be seen the referee was in error in holding, as he did, that Mrs. Drabant, who lived on the farm with her son-in-law, "by leaving the vendor in possession and neglecting to do anything to indicate a change of ownership, made the proceedings invalid as against creditors," and by failing to apply to this case the principle of the Pennsylvania decision cited above, namely:

"Regard must be had, not only to the character of the property, but also to the nature of the transaction, the position of the parties, and the intended use of the property. No such change of possession as will defeat the fair and honest object of the parties is required."

Finding, as we do, the good faith of the parties, and that the change of possession the master held necessary would have defeated the fair and honest sale the parties had in view, we are of opinion the proceeds of the personal property sold should have been awarded Mrs. Mary Drabant, its owner.

The decree below will therefore be reversed, and the cause remitted for further proceedings in accordance with this opinion.

REDPATH LYCEUM BUREAU v. PICKERING.

(Circuit Court of Appeals, Seventh Circuit. March 6, 1918.)

No. 2546.

INTERNAL REVENUE ⟸9—SPECIAL TAXES—LYCEUM COURSES—"LECTURE LYCEUM."

Under Act Oct. 22, 1914, c. 331, § 3, cl. 8, 38 Stat. 751, declaring that proprietors or agents of all other public exhibitions or shows for money, not enumerated in the section, shall pay $10, provided that the paragraph shall not apply to Chautauquas, lecture lyceums, agricultural or industrial fairs, or exhibitions held under the auspices of religious or charitable associations, a corporation using the term "Lyceum Bureau" in its title, engaged in the business of supplying Chautauqua and lyceum courses throughout the country with lecturers and entertainers, is subject to the tax on professional show features, for they do not fall within the exception; the expression "lecture lyceum" not including independent show units engaged for the occasion.

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In Error to the District Court of the United States for the Southern Division of the Southern District of Illinois.

Action by the Redpath Lyceum Bureau against John L. Pickering, Collector. Judgment for defendant, and plaintiff brings error. Affirmed.

For convenience the parties are termed plaintiff and defendant, as in the lower court. The writ of error is sued out of the District Court from an order of the court, entered on an agreed state of facts, the jury being waived, denying judgment for the recovery of certain federal taxes paid under protest by plaintiff to defendant August 31, 1916, and September 22, 1916, assessed under section 3, clause 8, of the Act of October 22, 1914 (38 Stat. 745), and acts amendatory thereof, wherein it is provided:

"That on and after November first, nineteen hundred and fourteen, special taxes shall be, and hereby are, imposed annually as follows, that is to say: * * *

"Eighth. Proprietors or agents of all other public exhibitions or shows for money not enumerated in this section shall pay $10: * * * Provided further, that this paragraph shall not apply to Chautauquas, lecture lyceums, agricultural or industrial fairs, or exhibitions held under the auspices of religious or charitable associations."

It is the claim of plaintiff that its attractions come within the terms of the exceptions of the statute. Plaintiff is a corporation engaged in the business of supplying Chautauquas and lyceum courses throughout the United States. As a part of this business it makes contracts whereby certain lecturers, dramatic readers, musicians, and other entertainers, known under the term "talent," agree to appear at designated places for a fixed compensation, in the churches, Y. M. C. A. halls, or other selected places outside the usual professional entertainment halls; the plaintiff usually dividing receipts with the local organization. The entertainments purport to be both educational and entertaining, and intended to increase the local culture. They constitute well-known and popular features, such as lectures, instructive and amusing, and the many light numbers familiar to the public.

The taxes were not assessed and collected upon all the entertainments offered by plaintiff, but upon only such as the collector decided did not come within the statutory exception, a list whereof is set out in the declaration and in Exhibits B and C to the declaration, together with the amount of the tax. On hearing, the District Court sustained the action of the collector, and found the issues for the government, with costs. This action was assigned for error, as also the holding that plaintiff was amenable to the payment of federal taxes in more than one district in the state of Illinois.

Albert M. Kales, of Chicago, Ill., for plaintiff in error.

Edward C. Knotts, of Carlinsville, Ill., and John E. Daugherty, of Peoria, Ill., for defendant in error.

Before KOHLSAAT, ALSCHULER, and EVANS, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). There is no system of entertainments known as "lecture lyceums." The term defines no well-known method of public entertainment, save as we may gather meaning from the aggregation of the two words. The District Court evidently construed the exemption as appertaining to such features as the lyceum itself produced, not deeming the exemption to apply to professional show features, in and of themselves being complete entertainments. We see no reason why a performance, which in one case might be a vaudeville performance and subject to the tax, should, when hired and produced by a so-called lyceum company, be exempt therefrom. Of course, a Chautauqua, agricultural or indus-

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trial fair, or exhibitions held under the auspices of religious or charitable associations might present the same attractions. In such case, it would seem that Congress has described a distinct entity. We are not advised what a lecture lyceum means, but are of the opinion that it does not include mere independent show units engaged for the occasion, whether shown alone or as an antidote for somnolence.

The act expressly provides that the tax shall be imposed annually, and only once within any given state. We discover in the record no attempt to transgress that provision, notwithstanding the assignment of error to that effect. The ultimate facts are apparent upon the record. The assessment of a part of the tax on two separate dates does not show that the tax was demanded twice in one year.

The judgment of the District Court is affirmed.

In re SINGER et al.

(Circuit Court of Appeals, Second Circuit. April 24, 1918.)

No. 221.

1. BANKRUPTCY ⟸458—DISCHARGE—SPECIFICATIONS—OBJECTIONS.
Where no exception was taken in the court below on the ground of the generality of the specifications of objections to discharge, and the questions intended to be raised were fully gone into before the special master and District Judge, such objection cannot be raised on appeal.

2. BANKRUPTCY ⟸408(4)—DISCHARGE—TRANSACTIONS WITH INTENT TO HINDER, DELAY, AND DEFRAUD CREDITORS.
Where partners incorporated a successful department of their business and, having received the stock, transferred it to relatives for apparently nominal considerations at a time when the firm was obviously insolvent, the transaction must be deemed one intended to hinder, delay, or defraud creditors, and, having occurred within four months of bankruptcy, warrants denial of discharge under Bankruptcy Act, § 14(4) (Comp. St. 1916, § 9598).

3. BANKRUPTCY ⟸408(3)—DISCHARGE—DENIAL.
Though property transferred by bankrupts within four months of insolvency was subsequently on demand surrendered by the transferees to the trustee in bankruptcy, a finding that the previous transfer was made with intent to hinder, delay, or defraud creditors, within Bankruptcy Act, § 14(4) (Comp. St. 1916, § 9598), is in no way affected, and discharge may be denied.

Appeal from the District Court of the United States for the Southern District of New York.

In the matter of the bankruptcy of Samuel J. Singer, Meyer Singer, Daniel Singer, and Samuel J. Singer, Jr., individually and composing the firm of S. J. Singer & Sons. From an order denying the application of three of the bankrupts for discharge, they appeal. Affirmed.

Myers & Goldsmith, of New York City (E. J. Myers and Gordon S. P. Kleeberg, both of New York City, of counsel), for appellants.

Hays, Hershfield & Wolf, of New York City (H. H. Kaufman, of New York City, of counsel), for appellee.

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Before WARD and ROGERS, Circuit Judges, and LEARNED HAND, District Judge.

WARD, Circuit Judge. This is an appeal from an order of the District Court denying the applications of three of the bankrupts for discharge. The firm consisted of Samuel J. Singer, Meyer Singer, Daniel S. Singer, and Samuel J. Singer, Jr., and did a wholesale woolen business under the name of S. J. Singer & Sons. Long before the events to be considered it had incorporated one branch of its business under the name American Specialty Tailoring Company, and October 8, 1914, it incorporated another branch, which had been separately carried on its books as the Shaw-Brown Department, under the corporate name of the Shaw-Brown Company. The capital stock of the company, amounting to $2,000, was equally divided between the four partners.

November 28, 1914, a fire occurred in the firm's place of business, which destroyed much of its goods and many of the books, both of S. J. Singer & Sons and of the Shaw-Brown Company. Negotiations with the insurance company to recover the loss and pressure of creditors for payment caused the firm to make an assignment for the benefit of creditors December 31, 1914, which was followed by an involuntary petition in bankruptcy January 1, 1915, and an adjudication of the partners individually and of the firm February 25, 1915. July 7, 1915, the four bankrupts filed petitions for discharge, to which creditors interposed specifications of objection. The ninth specification only need be considered. It is as follows:

"Ninth. That the said bankrupts, at a time subsequent to the first day of the four months immediately preceding the filing of the petition herein, transferred, with intent to hinder, delay, and defraud their creditors, such merchandise and property to persons whose names are unknown to your petitioners, to hold same for the use and benefit of the bankrupts herein, and that the purpose of the said transfer on the part of the said bankrupts was to hinder, delay, and defraud their creditors to the amount of the value of the said property. That the said property so transferred was property which could have been transferred by the bankrupt to his trustee in bankruptcy. That among the persons to whom such property was so transferred are Shaw-Brown Company and Emily Singer."

[1] The special master sustained this specification on the ground that it disclosed an unlawful preference under section 60b, Bankr. Act July 1, 1898, c. 541, 30 Stat. 562 (Comp. St. 1916, § 9644), whereas Judge Mayer sustained it on the ground that the transactions referred to were made with the intent to hinder, delay, or defraud creditors, which disentitled the bankrupts to a discharge under section 14(4) (Comp. St. 1916, § 9598). The appellants now contend that the specification was insufficient because of its generality; but as no exception was taken on that ground in the court below, and the questions intended to be raised were fully gone into before the special master and the District Judge, it is too late to make the objection now. If the exception had been taken earlier, the specification might have been amended.

[2, 3] The incorporation of the Shaw-Brown Company, a successful department of the firm's business, and the transfer by the partners of its capital stock to relatives for what were apparently nominal con-

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siderations, when the firm was obviously insolvent, together with the various and unsatisfactory explanations made for the incorporation and the transfer of the stock, indicate an intent to keep this branch of the firm's business for the benefit of the bankrupts and to deprive the firm's creditors of its assets. The fact that the shares of the capital stock of the Shaw-Brown Company were subsequently, on demand, surrendered by the transferees to the trustee in bankruptcy, in no way impairs the finding of the District Judge that the previous transfer was with the intent to hinder, delay, and defraud creditors under section 14(4) of the act.

The order is affirmed.

In re H. M. LASKER CO., Inc.

(Circuit Court of Appeals, Third Circuit. April 24, 1918.)

No. 2341.

BANKRUPTCY ⟸314(1)—PROVABLE CLAIMS—RENT—TERMINATION OF LEASE.
A landlord cannot be allowed from the estate of a bankrupt rent for the use of premises while he himself is in possession.

Appeal from the District Court of the United States for the Western District of Pennsylvania; W. H. Seward Thomson, Judge.

In the matter of the H. M. Lasker Company, Incorporated, bankrupt. On claim by Louis A. Meyran for rent. From a decree confirming disallowance by the referee, claimant appeals. Affirmed.

William Macrum, of Pittsburgh, Pa., for appellant.

Leonard S. Levin, of Pittsburgh, Pa., for trustee in bankruptcy.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. This is an appeal by a landlord from the decree of the court below, confirming the action of a referee in bankruptcy denying his right to collect some $7,000 of rent alleged to be due from the bankrupt estate. The claim was based on this clause in the lease:

"The parties hereto mutually covenant and agree that the work of constructing said arcade (furnishing an entrance to Fifth avenue) shall be begun and prosecuted to completion with due diligence by said landlord substantially in accordance with plans and specifications prepared by F. J. Osterling, architect, and heretofore approved by said parties, as soon as possession and free opportunity for the purpose will be afforded by said lessee; the cost of all showcases placed in said arcade, and of fittings or equipment in same, special to lessee's business, to be ascertained by said architect immediately upon completion, and repaid by said lessee to said landlord in five yearly installments equal as respects principal, with interest on unpaid balance added to each installment; such five installments to be collectible as rent."

The referee upheld the claim of the landlord for the amount of rent due at the time of the filing of the petition, plus rent for the premises while they were occupied by the receiver, but denied that

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part of the rent which was payable subsequent to August 27, 1917. In that respect the referee said:

"It is argued by the learned counsel for the landlord that the whole sum for the improvements having been paid by the landlord should be considered as rent due, and therefore should be allowed in full. But the referee is unable to agree with this contention, for by the other terms of the lease, making this sum due as rent, it is provided that it shall be payable in five equal annual installments, and which was further modified by making it due in monthly installments as rent. The landlord, having taken possession of the premises at the termination of the receiver's occupancy, and having re-rented it, is not entitled to take advantage of the clause in the lease making the whole rent for the entire term become due on the happening of this bankruptcy proceeding, under the authority of Wilson v. Pennsylvania Trust Co., 114 Fed. 742, 52 C. C. A. 374, 8 Am. Bankr. Rep. 169."

The court subsequently adopted and approved the action of the referee, saying:

"The case of Wilson v. Pennsylvania Trust Co., 114 Fed. 742, 52 C. C. A. 374, 8 Am. Bankr. Rep. 169, cited by the referee, is supported by the opinion of the Circuit Court of Appeals for the Third Circuit in the case of South Side Trust Co. v. Watson, 200 Fed. 50, 118 C. C. A. 278, 29 Am. Bankr. Rep. 446. Both on principle and under the authorities, I think a landlord cannot be allowed rent for the use of premises while he himself is in possession."

As we view the case, the present appeal in substance asks us to reverse the case of South Side Trust Co. v. Watson, 200 Fed. 50, 118 C. C. A. 278. The question involved in that case, as there stated by us, was whether "the landlord may resume possession and still claim rent for the remainder of the term," and we held that "a landlord cannot be allowed rent for the use of premises while he himself is in possession." We think the same question is here involved, and that the present case accordingly narrows down to the issue whether a landlord, who has retaken possession of demised premises, can maintain a claim for rent for the residue of the term. Without entering into a discussion of the numerous cases cited by the brief for the appellant, or discussing at length those cases and answering in detail the contention of counsel, we may say that we see no reason to differ from the opinions and conclusions of this court in Wilson v. Pennsylvania Trust Co., 114 Fed. 742, 52 C. C. A. 374, and South Side Trust Co. v. Watson, 200 Fed. 50, 118 C. C. A. 278.

We believe those decisions are based on sound and common-sense principles, and that we should adhere, as we do, to our former view that "a landlord cannot be allowed rent for the use of premises while he himself is in possession."

The decree of the court below, approving the action of the referee, is therefore affirmed.

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UNITED STATES v. MacMILLAN et al.

(Circuit Court of Appeals, Seventh Circuit. November 1, 1917.)

No. 2180.

CLERKS OF COURTS ⟸61—CLERKS OF FEDERAL COURT—LIABILITY FOR INTEREST ON DEPOSIT—"EMOLUMENT."

Interest accruing on money collected by a clerk of the federal court for official services rendered, and held by him pending his semiannual return, do not constitute emoluments of the clerk's office, to be accounted for to the United States.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Emolument.]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Action by the United States against Thomas C. MacMillan and others. Demurrers to defendants' pleas being overruled (209 Fed. 266), judgment was entered for defendants, and the United States brings error. Affirmed.

Charles F. Clyne, of Chicago, Ill., and Sylvester R. Rush, of Omaha, Neb., for the United States.

George T. Buckingham, of Chicago, Ill., for defendants in error.

Before BAKER, KOHLSAAT, and ALSCHULER, Circuit Judges.

PER CURIAM. Suit was brought by the United States on the official bond of Thomas C. MacMillan, clerk of the United States District Court for the Northern District of Illinois; the alleged breach of the bond being that for the period between January 27, 1910, and August 1, 1910, he received and did not turn over to the government interest to the amount of $368.86 on public moneys which came to him as such clerk, such moneys being (a) fees paid to him under the bankruptcy laws of the United States; (b) moneys paid to him as his emoluments and fees under various statutes of the United States; and (c) moneys paid to him as clerk by various litigants, under various statutes and under the rules of the Department of Justice. To the plea of the defendant, the government interposed a demurrer, which the court overruled, and, the government electing to stand by its demurrer, judgment was entered for defendant. The issues are more fully stated in the opinion of Judge Geiger in the District Court, upon the overruling of the demurrer. 209 Fed. 266.

We are in accord with the views expressed in that opinion, and with the conclusion reached by the District Court. Since the oral argument in this court, our attention has been directed to an opinion of the Comptroller of the Treasury (volume 23, p. 732, June 13, 1917) wherein the question considered was the charging of the account of the clerk of the United States District Court for the district of Massachusetts with interest received by him on deposits in banks of the earnings of his office, pending the making of his returns. Mainly on the authority of United States v. Hill, 120 U. S. 169, 7 Sup. 510, 30 L. Ed. 627, and

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123 U. S. 681, 8 Sup. Ct. 308, 31 L. Ed. 275, and United States v. Mason, 218 U. S. 517, 31 Sup. Ct. 28, 54 L. Ed. 1133, as well as on the authority of Judge Geiger's opinion (which opinion was based largely upon the cases cited), the Comptroller found that it "seems to be fairly well established that interest moneys accruing on money collected by a clerk for official services rendered, and held by him pending his semiannual return do not constitute emoluments of the clerk's office to be accounted for to the United States," and he affirmed the prior decision of the department auditor, which was against the government's contention.

The judgment of the District Court is affirmed.

WATERS-PIERCE OIL CO. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. April 17, 1918.)

No. 4964.

PUBLIC LANDS ⇐8—TRESPASS ON—ACTIONS—INSTRUCTIONS.

In an action by the United States for the value in manufactured form of turpentine and rosin taken from timber on unperfected homesteads, a charge, in language approved by the Supreme Court, that the boxing of trees by a settler on public land covered by an unperfected homestead, etc., and extraction of turpentine therefrom, was a willful and intentional trespass, etc., is not open to attack.

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Consolidated suits by the United States against the Waters-Pierce Oil Company. Judgment for the United States, and defendant brings error. Affirmed.

George T. Priest, of St. Louis, Mo. (Boyle & Priest, of St. Louis, Mo., on the brief), for plaintiff in error.

W. H. Woodward, Asst. U. S. Atty., of St. Louis, Mo. (Arthur L. Oliver, U. S. Atty., of St. Louis, Mo., on the brief), for the United States.

Before SANBORN, Circuit Judge, and TRIEBER and YOUMANS, District Judges.

YOUMANS, District Judge. The United States brought five separate suits in conversion against the plaintiff in error in the court below for the value in manufactured form of turpentine and rosin taken from timber on unperfected homesteads. These suits were consolidated and tried as one. The first two assignments of error are based on the contention that the testimony was not sufficient to sustain a recovery on either one of the five suits separately, or as consolidated. We have carefully read the evidence, and find that there was testimony sufficient to sustain the verdict of the jury.

The six assignments of error following the first two related to alleged erroneous instructions to the jury. The essential part of the

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instructions embodies the identical language used by the Supreme Court of the United States in the case of Union Naval Stores v. United States, 240 U. S. 284, 36 Sup. Ct. 308, 60 L. Ed. 644. In that opinion the Supreme Court approved the following charge:

"The boxing of trees by a settler on public land covered by an unperfected homestead entry, or by any person who knew it was public land (which an unperfected homestead entry is), and the extracting of crude turpentine therefrom, constitutes in law an intentional, willful trespass, although he may have acted without knowledge of the illegality of the act, and that from such persons the United States are entitled to recover the value of the product manufactured from such crude turpentine by the settler, or from any person into whose possession the same may have passed."

The testimony clearly shows that the turpentine and rosin in question were taken from public lands, and that in so doing the persons so taking the same committed willful trespass, and that the turpentine and rosin so taken passed into the possession of the plaintiff in error.

We have examined the other assignments of error, and find them to be without merit.

The case will be affirmed.

HUGHITT et al. v. WAYNE COUNTY SECURITIES CO.

(Circuit Court of Appeals, Seventh Circuit. November 26, 1917.)

No. 2390.

APPEAL AND ERROR ⟸1073(7)—REVIEW—HARMLESS ERROR.

Where, in an action tried to the court without a jury, interest on the amount due plaintiff was wrongfully withheld, and that amount exceeded an item asserted to have been erroneously allowed, the judgment may be affirmed by the reviewing court; for where the trial court in an action at law, where a jury has been waived, commits an error in his conclusions of law, but renders such judgment as is clearly right, the appellate court is justified in ordering an affirmance.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Action on contract for sale of ties by the Wayne County Securities Company, a corporation, against Marvin Hughitt, Jr., and others. There was a judgment for plaintiff, and defendants bring error. Affirmed.

Harry A. Biossat, of Chicago, Ill., for plaintiffs in error.

Otto Gresham, of Chicago, Ill., for defendant in error.

Before BAKER, KOHLSAAT, and EVANS, Circuit Judges.

PER CURIAM. Upon consent of parties, this action was tried by the court without a jury, and resulted in judgment for defendant in error for $8,462.32 and costs. This aggregate represented the sum total of several items, all but one of which are now conceded to be established by the evidence. The complaint of plaintiffs in error in respect

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to this one item seems well taken. But it affirmatively appears that the court wrongfully withheld interest on the amount clearly due defendant in error, and this interest exceeds the alleged error in the item to which reference has been made.

Upon this state of the record, counsel for plaintiffs in error challenge our right to affirm the judgment, insisting that we are required to reverse and direct the granting of a new trial. This contention we must reject. Where the trial court in an action at law, where the jury has been waived, commits error in his conclusions of law, but renders such judgment as is clearly right, this court is amply justified in ordering an affirmance. Anglo-American Land M. & A. Co. v. Lombard, 132 Fed. 735, 68 C. C. A. 89; Fort Scott v. Hickman, 112 U. S. 150, 165, 5 Sup. Ct. 56, 28 L. Ed. 636.

The judgment is affirmed.

WILLIAMS v. SPENSLEY et al.

(Circuit Court of Appeals, Seventh Circuit. November 1, 1917.)

No. 2494.

BANKS AND BANKING ⊂=253—NATIONAL BANKS—LIABILITY OF DIRECTORS.

The liability of directors of a national bank for voting and declaring dividends out of the capital is not absolute, and they are not liable if they exercise reasonable diligence and acted in good faith, in the belief that the dividends were payable from net profits.

Appeal from the District Court of the United States for the Western District of Wisconsin.

Suit in equity by Christopher L. Williams, as receiver of the First National Bank of Mineral Point, Wis., against Calvert Spensley, James Brewer, John L. Gray, William P. Gundry, Frederick Vivian, and others to enforce liability of directors of a national bank. From the decree, complainant appeals. Affirmed.

John B. Sanborn, of Madison, Wis., for appellant.

Aldra Jenks, of Dodgeville, Wis., and Thomas M. Priestley, of Mineral Point, Wis., for appellees.

Before BAKER, KOHLSAAT, and EVANS, Circuit Judges.

PER CURIAM. Appellant seeks to reverse the decree of the District Court in so far as it relieves the appellees as directors of the defunct national bank from liability for dividends voted by them out of the capital of the bank.

The special master, whose findings were approved by the District Court, and whose findings are not attacked in this court found each of the defendants—

"did not knowingly violate, or knowingly permit any of the officers, agents, or servants of the First National Bank of Mineral Point, Wis., to violate any of the provisions of the National Bank Act [Act June 3, 1864, c. 106, 13 Stat. 99]; that each, so far as his duty as a director devolved upon him, diligently and honestly administered the affairs of said bank, and that each direc-

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tor gave to the affairs of the bank such diligence and supervision as the situation and the nature of the business required; that they exercised ordinary care and prudence in the administration of the affairs of the bank."

Appellant contends that the liability of a national bank director for voting and declaring dividends out of the capital is an absolute liability, and no question of good faith, diligence, or knowledge on the part of a director that such dividends may impair the bank's capital is involved. This contention must be rejected both on principle and authority. See Yates v. Jones National Bank, 206 U. S. 158, 27 Sup. Ct. 638, 51 L. Ed. 1002; Thomas v. Taylor, 224 U. S. 73, 32 Sup. Ct. 403, 56 L. Ed. 673; Witters v. Soules (C. C.) 31 Fed. 1.

Appellant further contends that the general finding quoted above must give way to a special finding made by the master to the effect that the "profit and loss account" was at times "swollen" by the credit of so-called "dummy" notes signed "Interest and Discount," which notes represented the earned, but uncollected, interest on many obligations running to the bank, and such practice was known to the directors.

This contention must likewise be rejected, because it does not appear from the record in this case that the apparent net profits, exclusive of this item of uncollected interest, did not equal or exceed the amount of the dividend so declared. In other words, the general findings are not inconsistent with the special finding.

Whether the directors were justified in including the earned, but uncollected, interest in determining net profits, we need not decide. The directors were justified in declaring an annual dividend out of the net profits. The record fails to show that any dividends were declared or paid out of the uncollected interest account.

The decree is affirmed.

MURRAY v. DETROIT WIRE SPRING CO.

(Circuit Court of Appeals, Sixth Circuit. May 17, 1918.)

No. 3109.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—SPRING SEAT.
The Murray patent, No. 692,535, for a spring seat, in view of its narrowness, *held* not infringed.

2. PATENTS ⟸310(10)—SUIT FOR INFRINGEMENT—AMENDMENT OF PLEADINGS.
Denial of motion by complainant in infringement suit to amend bill to show marking of his goods in compliance with statute *held* discretionary, where motion was made after testimony had been taken on accounting, and that did not show such compliance.

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Suit in equity by William A. Murray against the Detroit Wire Spring Company. From final decree, complainant appeals. Reversed.

W. F. Murray, of Cincinnati, Ohio, for appellant.

Barthel & Barthel, of Detroit, Mich. (C. R. Stickney and Otto F. Barthel, both of Detroit, Mich., of counsel), for appellee.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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Before KNAPPEN and DENISON, Circuit Judges, and SATER, District Judge.

KNAPPEN, Circuit Judge. Appeal from the accounting decree in suit for infringement of patent No. 692,535 to Murray upon spring seat. Defendant's so-called "four-hole strip," which was originally the only structure in issue, had been held to infringe. Murray v. Detroit Wire Spring Co., 206 Fed. 465, 124 C. C. A. 371. On the accounting it appeared that defendant had discontinued the manufacture and sale of the four-hole strip at about the time the bill for infringement was filed, and had since been making and selling a "three-hole strip," which it claimed did not infringe. The master held the three-hole strip to infringe. Plaintiff had not alleged in his bill that he had marked with the word "Patented" his articles made under the patent, as provided by section 4900 of the Revised Statutes (U. S. Comp. Stat. 1916, § 9446); and the master found that defendant had received no notice of the patent previous to notice of the infringement suit. Plaintiff's motion for leave to amend the bill by averring such marking was denied by the master, and his action sustained by the District Judge. The master found and assessed plaintiff's damages on account of the three-hole construction at upwards of $59,000, computed from the date of notice to defendant of the infringement suit. The District Judge, by reason of the decision of this court in Murray v. Greeno, 234 Fed. 91, 148 C. C. A. 107, announced since the master's decision, held the three-hole construction not to infringe, and accordingly awarded plaintiff 6 cents damages, requiring each party to pay one-half the special master's fee.

Appellant contends, first, that the three-hole construction infringes, and that the master's award of damages should be sustained; second, that he should have been allowed to amend his bill as asked; third, that the accounting with respect to the four-hole construction should run from the time actual infringement began, or at least from the time of a claimed notice of infringement in the fall of 1908; and, fourth, that plaintiff should not have been required to pay one-half the master's fee on accounting.

[1] 1. Infringement. The dominant element of all the claims in suit is the metallic cross-strip with inturned or downturned edges (forming in cross-section an inverted V or U), with perforations in the edges engaged by the lower end of a spiral or helical spring seated thereon. The specification shows and describes the perforations as "four holes" "in the same horizontal plane," and the application of the spring by inserting its lower end in one of the holes, whereupon "the spring is rotated in a manner similar to that used in driving a screw, thereby carrying the end of the spring forward successively through the three remaining holes, the spring being locked thereby securely in place because of the rise in the spiral."

The patent was first before this court in Murray v. D'Arcy, 161 Fed. 352, 88 C. C. A. 364. It was there held valid, but entitled to only a narrow range of equivalents. It was construed as "extending, in respect to patentable novelty, only to [the patentee's] particular

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method or means of attaching the springs to their support," which resulted in their becoming "fixed in their position by friction induced by the rise in the spiral of the coils." The patent was held not infringed by a structure in which the spring was seated by first collapsing it at the lower end and pushing it in under tension through perforated slots in the supporting strip.

The instant case, as first here (206 Fed. 465, 124 C. C. A. 371), involved the question of infringement by the O'Brien structure. We again held Murray's patentable novelty to consist "in that support against lateral bending in any direction and that vertical maintaining of the spring, which support and maintenance were given by the four perforations in the arched strip," saying:

"Having these four bearing points in the same horizontal plane, the rise in the spiral between bearing points caused, at these four points, top and bottom friction, which, when the lower coil was screwed in through the holes, would tend to prevent it from unscrewing and to hold it rigidly with reference to the spring's vertical axis."

We held that the O'Brien structure, which had, as had Murray's, four perforations in pairs and in the same horizontal plane, embodied the characteristic invention of Murray, and that infringement was not escaped by the fact that this function was impaired by slightly narrowing the arch and enlarging the perforations—such impairing being compensated by adding horizontal flanges at the lower edges of the strips and offsetting the bottom spiral coil between the arch walls, so that the spring cannot unscrew. This we held not substitution, but addition.

In the Greeno Case, supra, the alleged infringing strip had four perforations, through which the lower coil of the spring was inserted; but the perforations were not in the same horizontal plane, the difference between the horizontal planes of the two sets of perforations being the same as the rise of the spiral. The spring was required to be locked in position by compressing the lower coil of the spring against the support. We found that there was no appreciable distortion of the spring due to its entering the support, and no appreciable friction due to the rise of the spiral, and thus that the device lacked the feature of Murray's patent which alone gave it validity, viz. the holding of the spring in position by friction due to the rise of the spiral.

Defendant's three-hole construction, now in issue, is the O'Brien strip with one of its four perforations (the last used in the original process of seating the spring) omitted. Its three holes are thus in the same horizontal plane. The question is: On which side of the line, as defined in our former decisions, does the case fall?

Assuming that infringement would not be avoided by dispensing with one of the four perforations, provided the characteristic feature of Murray is nevertheless retained, that is to say, provided the spring is locked in position by the "top and bottom friction induced by the rise of the spiral," the determinative question is whether it is so locked. We think it obvious that the lower coil would not be distorted by merely passing it through the three points in the supporting strip.

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It is true that, when the spring is in position perpendicularly to the strip, there is a very slight distortion in the lower coil, which would enable the spring, when not in use, to stand alone, as indeed was the case with the Greeno construction; but it seems clear from inspection that the distortion is not such as to contribute to any appreciable extent in holding the spring in position for actual use. Its contribution in that direction seems to us no more appreciable than that of the structure held in the Greeno Case not to infringe. In the three-hole device in question the spring is actually locked in position by means of a slight upsetting of the coil between the first and second perforations, and by a turning down of the end of the wire (after passing through the three perforations) against the inner wall of the arched strip. It is obvious that without some substantial holding means additional to the insertion of the coil of the upright spring through the three perforations no practicable seating is effected. These considerations, to our minds, effectively distinguish the three-hole construction from the four-hole O'Brien structure.

In view of the narrowness of the patent, and its history in this court, we think the District Court rightly held it not infringed by defendant's three-hole construction.

[2] 2. The Motion to Amend the Bill. It is the settled construction of the statute (Rev. Stat. § 4900; U. S. Comp. Stat. 1916, § 9446) that if a patentee makes or sells the article patented he—

"cannot recover damages against infringers of the patent, unless he has given notice of his right, either to the whole public by marking his article 'Patented,' or to the particular defendants by informing them of his patent and of their infringement of it. * * * By the elementary principles of pleading, therefore, the duty of alleging, and the burden of proving, either of these facts is upon the plaintiff." Dunlap v. Schofield, 152 U. S. 244, 247, 248, 14 Sup. Ct. 576, 38 L. Ed. 426; Coupe v. Royer, 155 U. S. 565, 584, 15 Sup. Ct. 199, 39 L. Ed. 263.

Upon the accounting before the master plaintiff testified, apparently without objection, that:

"All goods containing my patented construction were packed in cases and were shipped in bundles to the trade. In the cases I put a memorandum bearing the date of the patent, and upon the bundles I secured a tag bearing the date of the patent. * * * After the bundle was opened for use, there were no means of telling from the supports or strips whether or not they were patented."

There was produced a copy of the memorandum said to have been put inside the cases, as well as a copy of the so-called "shipping tag" put on the bundles of strips. Neither of these documents is in the record, or sent up with it, and we are not informed, except as stated, of their contents. It was not until after the master had held (nearly four years after the bill was filed) that the plaintiff had failed to give valid notice to defendant of its infringement prior to notice of the infringement suit that plaintiff moved to amend his bill, by inserting an averment "that such spring constructions, sold by your orator, were marked with the words, 'Patented February 4, 1902.'" The motion was not accompanied by any statement of reason for failure to so aver in the bill, or for the delay in asking leave to amend. When its

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omission was discovered does not appear. It satisfactorily appears that the individual strips were not marked "patented." The record does not contain enough to clearly show that plaintiff in fact complied with the statute. No reason was given by either the master or the District Judge for denying the motion to amend. It may have been either for delay in applying, or because statutory compliance was not thought to be shown. Upon this record it cannot be said that discretion was abused.

3. The Date at Which the Accounting as to the Four-Hole Construction should Start. The substance of so much of the testimony requiring mention as relates to notice to defendant previous to the infringement suit is this: Mr. Young, president and general manager of defendant, who was an officer of that company from July 15, 1908, in answer to a question whether he had correspondence with plaintiff "a year or so prior to the filing of the suit in relation to the construction which you were manufacturing," testified:

"Speaking from a personal standpoint, I did not. My predecessors [presumably meaning the National Cutlery Company] had some communication from an attorney, I believe, representing the William A. Murray Company, and the matter, as I understand, was turned over to E. S. Wheeler, a patent attorney here, to take up the matter with them, with the result that they did nothing further at that time."

There was testimony that in 1906 Wheeler mailed defendant, apparently at the request of the National Cutlery Company, several patents, including "two to Murray," one of which would seem quite naturally to be the patent in suit. Plaintiff testified, on the hearing previous to the interlocutory decree, that prior to bringing this suit he had notified defendant that it was infringing upon complainant's patent. There was no testimony in denial. On the accounting he testified that in the fall of 1908 he had sent defendant a copy of a circular notice containing the decision in the D'Arcy Case, which he says was a general notice to manufacturers of springs that the Circuit Court of Appeals had declared his patent valid, and a warning to such manufacturers to cease manufacturing at once and to account to him. Later he said the notice was sent in "the latter part of 1909." Plaintiff had, however, no copy of the letter claimed to have been sent defendant; his copy book having been destroyed by fire. Young testified that he never saw any National Cutlery Company correspondence, that he had no correspondence himself with plaintiff before the infringement suit was begun, and that, while he had previously seen the Murray strip at different times, he had never examined it, to the extent of knowing its features, until after suit was begun. We are not cited to, nor have we found, any denial otherwise of plaintiff's testimony referred to, nor of the receipt by defendant in 1906 of the Murray patents.

The master was of opinion that plaintiff had failed "to bring any positive notice of the alleged infringement home to the defendant prior to the commencement of this suit," that plaintiff's letter to the National Cutlery Company was not the notice of infringement contemplated by the patent laws, and that defendant's successorship to

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the National Cutlery Company was not sufficient to warrant accounting by defendant from the date of plaintiff's letter to that company, especially as complainant, with knowledge of defendant's alleged infringement, permitted it, by his own inaction, to continue infringing for nearly four years, and until the bill was filed, and that there was no "good and sufficient proof" of the mailing to defendant of the alleged notice of 1909.

Had there been specific denial of the receipt by defendant, first, of the Murray patents in 1906 (not mentioned by the master), and, second, of Murray's notification by letter in 1908 or 1909, and had all the testimony been taken before the master, we should be disposed to accept his conclusions. But in the absence of such denials, and as some of the testimony was not taken before the master, we are constrained to believe that defendant had at some time before the infringement suit was begun notice fairly apprising it of plaintiff's claim that it was infringing. It may well be that the bare receipt of the Murray patents in 1906 did not mean much to defendant as matters then stood; but it would seem that the subsequent notification of the result of the D'Arcy suit, coupled with a warning to cease manufacturing, in connection with the previous receipt of the patents and defendant's interest in the subject-matter, was a sufficiently substantial notification to require defendant to act at its peril. In view of the uncertainty as to the precise date of the notice of the decision in the D'Arcy Case, we are disposed to think that justice will be done by carrying the accounting date back to the end of the year 1909; and to that extent the decree for accounting as to the four-hole structure will be modified.

4. We see no reason for disturbing the action of the court below with respect to the division of the master's fee.

The decree of the District Court will be reversed, and the record remanded to that court, with directions to award an accounting as to the four-hole construction from December 31, 1909, and to take further proceedings not inconsistent with this opinion. The costs of this court, including expense of preparing and printing transcript, will be divided.

SOLVA WATERPROOF GLUE CO. et al. v. PERKINS GLUE CO.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1918. Rehearing Denied March 11, 1918.)

No. 2327.

1. PATENTS ⇐109—AMENDMENTS TO CLAIMS—VERIFICATION.

Amendments to patent claims made after the death of the inventor, where related to the original purposes and objects set out in the original specifications, are not invalid because not verified as required by statute.

2. PATENTS ⇐328—VALIDITY—INFRINGEMENT—STARCH GLUE.

The Perkins reissue patent No. 13,436 of No. 1,020,655, and the Perkins Patent No. 1,020,656, for a starch glue base and a glue base process, *held* not to disclose invention; the formula being a hit or miss one

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which would not enable those skilled in the starch glue or adhesive art to practice its manufacture without experimentation.

3. PATENTS ⟸328—VALIDITY—INFRINGEMENT—STARCH GLUE.

The Perkins reissue patent No. 13,436 of No. 1,020,655, and the Perkins patent No. 1,020,656 for a process of making starch glue and the resultant product, *held* valid as to the finished glue product as well as the process for that article, and not to have been disclosed by the prior art, and also infringed.

4. PATENTS ⟸259—INFRINGEMENT—CONTRIBUTORY INFRINGEMENT.

Where a manufacturer produced a glue base which was not the subject of a valid patent which could be and actually was used in a process which was patented, the manufacturer, though it did not take the final step itself, should be deemed a contributory infringer; the base being sold for use in the process that was patented.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit by the Perkins Glue Company against the Solva Waterproof Glue Company and others. From a decree for complainant (223 Fed. 792), defendants appeal. Affirmed in part, and in part reversed, with directions.

Livingston Gifford, of New York City, and John B. Macauley, of Chicago, Ill., for appellants.

Wm. Houston Kenyon and Gorham Crosby, both of New York City, for appellee.

Before KOHLSAAT, ALSCHULER, and EVANS, Circuit Judges.

KOHLSAAT, Circuit Judge. Appellants seek to reverse the decree of the District Court enjoining them from infringing any one of claims 13, 16, 19, 24, 28, and 38 of reissue patent No. 13,436 of patent No. 1,020,655, termed the acid patent, and also of claims 2, 6, 7, and 9 of patent No. 1,020,656, known as the alkali patent, and for other relief; the patent last named and said patent No. 1,020,655 having both been granted March 19, 1912, upon applications filed respectively November 2, 1908, and said reissue having been granted July 2, 1912, upon application filed May 17, 1912, subsequent to the death of the original patentee, Frank G. Perkins, who died in September, 1910, testate, leaving his widow, Gertrude S. Perkins, as his executrix, who duly qualified as such and assigned said inventions to appellee on March 31, 1911.

All of said claims pertain to starch glue and the manufacture thereof. It will be sufficient for our purposes to set out claims 7 and 9 of patent 1,020,656, which are typical of the subject-matter of this suit. Said claims read as follows:

7. The process of making a wood glue which consists in agitating a starchy carbohydrate or its equivalent with a solution of sodium peroxid and caustic soda to decrease the water absorptive properties of the carbohydrate without rendering the carbohydrate materially soluble in water to properly proportion the viscosity, adhesiveness and cohesiveness resulting when the carbohydrate is dissolved to form glue and dissolving the product thus produced with caustic soda or its equivalent and about three parts of water or less to produce a glue for application.

9. The process of making glue which consists in treating a suitable amylaceous material in two stages, in the first stage treating it with sodium peroxid

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or its equivalent and caustic soda or its alkali equivalent, and in the second stage treating with caustic soda or its equivalent to form an alkaline wood glue.

The gist of appellee's contention, as stated by counsel, is that Perkins discovered that there is a point of degeneration of starch at which, when degenerated to that degree, the starch is treated to not to exceed three parts of water and a solvent there is produced veneering glue as good as or better than animal glue, and that appellants have appropriated that discovery and the application of it.

Some of the claims in suit cover the process and product of the so-called first step, or glue base of the patent. Others cover the process of the so-called second step of the patent, while others cover the process and product of the complete processes and product of the patent.

The defenses are: (1) That both patents are invalid in view of the prior art; (2) that both patents are invalid by reason of prior use more than two years before the applications were filed; (3) that infringement is not shown.

[1] Owing to the facts that the inventor died in 1910, before the amendments were made which enter into the claims in suit, and that such amendments were made by his executrix without their being sworn to as required by statute, appellants insist that the same are invalid, as new matter. For appellee it is insisted that said amendments are not new matter but merely elaborations of the process and product claims of the original patents in suit.

While the added matters may in a sense be new, we do not regard them of so important a character as to constitute that class of new matter which would be invalid for want of an oath under the circumstances. They are related to the original purposes and objects set out in the original specification and claims, though some of them approach the border line.

For some time prior to Perkins' alleged invention, it was old to form adhesives by dissolving starch in different degrees of fluidity and strength, according to the use it was sought to put them to, as substitutes for animal glue. The increasing scarcity of animal substances which had theretofore been adequate and the consequent growing cost thereof stimulated this development in the art, and the result was a number of patents purporting to cover adhesives of every degree of strength and for every purpose, made from starch or starchy substances. It was also an established and well-known fact years prior to the patents in suit that raw, undertreated starch was not suitable for the manufacture of the better grades of adhesives, such as glue; and also that all grades of adhesives could be obtained from starch somewhere between raw starch and overtreated starch, just as they could be obtained from animal matter. It is the theory of the patent that the starch grain and its enveloping pellicle are rendered less amenable to water absorptiveness by degeneration or treatment under the patent process, so that the fluent glue may result from the addition of a minimum of water, since the water must eventually be eliminated.

[2] The two patents in suit differ mainly in the chemicals used in securing the desired degree of degeneration, the reissue patent calling

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for sulphuric acid treatment among other chemicals, and patent No. 1,020,656 calling for treatment with an alkali—leading the District Court to the use of the term "acid patent" with regard to the reissue patent, and "alkali patent" with regard to the other patent, designations which we find it convenient to follow. The same degenerated condition of the starch is obtained in each patent, it being claimed by the patentee that there is less danger of over degeneration in the use of an alkali. Resultants from treated starch and similar carbohydrates supply the whole gamut of adhesives from the strongest glue to dextrine and glucose according to the treatment applied and result desired. This was clearly set out in the prior art, though the record does not show that the Perkins article was ever exactly produced prior to the glue in suit. Perkins experimented in the glue production from starch extensively. His present claims, as above stated, are for a veneer glue as good or better than animal glue. For a long time prior to filing the applications for his patent he furnished an article for the manufacture of veneered barrel heads, at Poplar Bluff, Mo., and other places. This glue is not fully described in the record, but it seems clear that such as it was it proved fairly satisfactory, supplanting other articles and holding its place to the present time. It can hardly, under such circumstances, be said to have been experimental, having been supplied in vast quantities. It does not, however, yield to less than three or less parts of water and a solvent, requiring four parts of water. It appears from the evidence that it was not suitable for fine work on furniture, and the like.

Counsel for appellants thus sums up the prior art situation at the time the alleged invention was discovered, from the appellants' point of view:

"At the time Perkins entered this field, it had long been old to form adhesives by dissolving starch in a suitable aqueous solution in different proportions of starch to solution, according to the use to which the adhesive was to be put. The starch solutions so formed were used in various relations as substitutes for animal glue, as in sizings and coatings of various kinds, as well as in the gluing together of bodies of wood, and the like. The solvents more commonly employed were hot water and cold dilute aqueous solutions of caustic soda, the former being used where it was desirable to avoid staining or other injury by the caustic and the latter to dispense with heat. The caustic solvents were also sometimes heated.

"Starches as found upon the market, then, as now, had different degrees of solubility, depending on the sources from which they were derived, the processes by which they had been separated from the plant and their subsequent treatment. Consequently, when dissolved under the same conditions, they would yield adhesives of different degrees of fluidity, dependent upon the solubility of the starch. It was established commercial practice to treat the less soluble raw starches, which would not, without excessive water, yield sufficiently fluid solutions for the various purposes for which they were designed, with reagents to increase their solubility, after which they were dried and placed upon the market. The degree of solubility of the starch depended on its original condition and the extent to which the treatment was carried, and varied from the substantial insolubility of raw starch to the ready solubility of soluble dextrin or glucose. For some uses of such adhesives one degree of solubility was desirable, and for other uses, another. Thus, where a very thin, penetrating, easily absorbed coating, readily soluble in cold water, was desired, as, for example, for envelopes, postage stamps and the like, glucose or soluble dextrin was best. For starches for certain laundry

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purposes and sizings, a material less soluble in cold water was advantageous. Different sizings demanded different degrees of solubility. By stopping the process of degeneration or modification of the starch at the proper point any required degree of fluidity within wide limits could be attained. The process is a progressive one, as before pointed out, and since some of the starch grains are more readily affected by the reagent than others, at any particular stage of the treatment a batch contains grains in different stages of degeneration or solubility. Thus, at one point of the treatment the batch will contain dextrin along with other less modified starch granules. It had long been known at the time Perkins entered the field that dextrin was a weaker adhesive than less fully treated starch, and that, therefore, to get a maximum strength of product, the treatment should not be carried to the point where dextrin, which is soluble at ordinary temperature, is formed. Therefore when an adhesive with great strength was desired, care was taken to stop the treatment at a point where little or no dextrin had been formed in the batch. Now, as before stated, it is desirable in all adhesives to obtain the necessary degree of fluidity with as little water as possible, since the latter must be eliminated by drying in setting the material. For this reason it was recognized as desirable to carry the process as far as possible without the formation of the objectionable dextrin, and thus secure a maximum fluidity without detriment to the strength and adhesive qualities of the material.

"Many different reagents can be and have been employed to effect this degeneration, and among them the very reagents employed by defendant. We find in a single prior art patent the preparation of the identical glue base or material by degenerating starch to the same point to which defendants' material is modified, by the same reagents and by the same method. This material, as stated by the patent, was put upon the market in the same form that defendants' material is put upon the market and was sold, to be dissolved by the user in a solvent containing the same aqueous solution, of the same reagent, of the same concentration as defendants' customers employ. The only difference between the process of this particular patent and the practice of defendant is in the use to which the glue material is put and the consequent difference of dilution of the solution thereof. The patentee refers to the use of his adhesive for dressing or finishing, i. e., sizing or stiffening fabrics, while defendant and its customers employ the material for sticking veneer layers together. Therefore the prior art patentee uses and describes a relatively dilute solution, while the defendant employs a relatively heavy solution, just as the more familiar adhesive, animal glue, is used in dilute solution for sizing, etc., and in heavy solution as a glue for veneers, etc. No other difference exists. It is the defendants' view that this difference is an immaterial one, especially in view of the fact that similarly modified starch had been dissolved in aqueous solution in substantially the same proportion of starch to solvent employed by defendant, to make a glue for the same purpose as that for which defendants' glue is employed, to wit, to glue wood together, and otherwise as a substitute, for animal glue."

This summary the trial court found to be substantially correct, subject to certain equities and presumptions favorable to appellee. In view of the fact that large quantities of starch in a natural state are in a more or less degenerated state, some much below the degree required for the manufacture of the glue of the patents, it is not deemed possible to establish a fixed standard of treatment. Some starch must be fully treated, some partially, and some restored to a better grade. The former process is accomplished by the use of chemicals and the varying of the degree of application thereof, according to the quality of the starch. The overdegenerated must be restored mainly by the intermixture thereof with more or less untreated starch—a matter of general average. There is no way of knowing what the condition of this starch to be used is, except that when experimented with it responds satisfactorily to tests furnished by the patentee, calculated to deter-

mine whether the proper degree of degeneration is attained. The most satisfactory of these is to apply the second step of the patent, and, if the result is the veneering glue of the patents, the operator has guessed right. If the glue is not up to standard, further treatment must be applied. In the prior use case of the Poplar Bluff barrel head, workmen claim to have been able to tell by the feeling of the glue in the hand and on the rollers of the distributing machine whether the starch was in the effective condition. At that plant no treatment seems to have been applied, except to thin the starch by the addition of raw or partly degenerated starch, if it ran too thick, or to strengthen it by admixture of other starch if too thin. Nothing but experiment avails in the successful production of the glue base. If the patent were for the preparation of a proper glue base from entirely raw starch, it may be the processes of the two patents in suit might be valid. As it is, we see no disclosures which entitle appellee to a patent for any of his claims for the manufacture of the glue base. It is a hit or miss formula and not such a disclosure to those skilled in the starch glue or adhesive art as would enable them to practice its manufacture without experimentation. They may not be required to resort to experimentation. Panzl v. Battle Island Paper Co., 138 Fed. 48, 53, 70 C. C. A. 474; General Electric Co. v. Hoskins Mfg. Co., 224 Fed. 464, 140 C. C. A. 150; Chemical Rubber Co. v. Raymond Rubber Co., 71 Fed. 179, 182, 18 C. C. A. 31. The patents in suit disclose no advance upon the prior art in the creation of a proper glue base. That must be discovered anew on each occasion. For the same reasons the glue base process cannot be deemed an invention or an original discovery, under the facts of this case.

[3] With regard to the Poplar Bluff prior use, there seem to be some unexplained causes which differentiated the glue processes of the patent from those of the Poplar Bluff practices. The appellee claims that his formulæ for the patent glue base have, as above intimated, some advantage arising out of the acid and alkali processes which makes the starch less absorptive and thus more amenable to solution and smooth distribution in a minimum of water and a solvent, while in the Poplar Bluff case more liquid is and was required to secure the proper spread on the rolls. But a large body of the starch, both of appellee and particularly of appellants, was furnished in a degenerated state, without treatment. We therefore find no merit in this contention. It will be recalled that the Poplar Bluff veneering was rough work; all that was required was that the veneering of barrel heads should hold. The veneer layers were rough and the glue was variable. There was no need of a high grade of glue. It was, however, necessary that the glue be of a consistency to flow through the pipes onto the rollers of the gluing machine. In changing from animal glue into casein and from casein into starch glue, changes of a more or less serious nature were required in the devices used in order that the work should be smoothly performed. The tendency, in view of these things, would naturally be and was to be less careful in the preparation and use of the glue, resulting in a corresponding uneven result. However that may be, the record shows that the glue used was not found

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suitable for fine cabinet work. Whether any of it was found adequate does not appear. We apply the term "glue" above to the finished prepared article, ready for application. The parties all concede that the Poplar Bluff glue base was treated to four parts of water to one of base in addition to a solvent. This, appellee insists, resulted in a too watery and weak adhesive, hardly adequate for the successful operation of the Poplar Bluff gluing machines. The object sought in the latter case was the same as that sought in the patents in suit, i. e., a glue that was as good as good animal glue. The starch was degenerated. As here, the degree of degeneration was subject to all the conditions above set out. As in the patent, so in the Poplar Bluff use, the proper article could have been obtained, and sometimes was, by experimentation. From the record it is fairly shown that after making certain changes in the glue and machinery, the result was satisfactory in that plant, and, indeed, it seems, as above stated, that the same glue is still in practically exclusive use there. It was used in such quantities and so generally that, whatever its use was, it was not an experimental use. It was an unqualified use of the glue. We are not at liberty, in the state of the record, to assume to find that there is and was not a substantial difference between the glue of the patent and that of Poplar Bluff.

In 1903 the French patent to Verneisel, No. 337,001, was granted, covering a starch adhesive termed "vegetable agglutinant" in the solid state. "It is known," says the patent, "that by means of oxidizing agents the pellicles containing the starch can be converted into the state of substances soluble in water and in alkali, and it is upon this property that are based divers processes for the manufacture of soluble starch." After providing for subjecting the starch to various chemicals, the patent proceeds, "The product obtained by the operation just described forms an intermediate between natural starch and so-called 'soluble' starch," which when shaken with water forms a milk, which indicates that the starch is held in suspense and has not gone into solution. After some further treatment, the starch becomes soluble in boiling water and also in a cold sodium solution, but does not go into solution in cold water at any time. The patentee as well as the prior art caution the manufacturers of glue against permitting the starch to be treated to the point in which dextrine is produced. For weak applications, such as backing postage stamps, the use of glucose is desirable. It is thus apparent that Verneisel was aware that different strengths of adhesives would be obtained between raw starch and dextrine. The same is true of the Gerson & Sachse German edition of the Verneisel patent for a solid vegetable mucilage, which denominates the product of the patent as vegetable glue. The trial judge was of the opinion that the Gerson & Sachse glue base was degenerated to the same degree as the Perkins glue base. If so, of course it would respond to less than three parts of water and an alkali.

The difference between adhesives, such as mucilage, sizing, etc., and glue suitable for veneering, seems to consist largely in the degree of dilution. Higgins patent, No. 579,827, granted March 30, 1897, discloses processes for the production of an improved paste or adhesive

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compound directly from common flour or starch, used in the proportion of one gallon of water to four pounds of starch, or two parts of water to one part of starch, which should possess greater adhesive power and durability than pastes made directly from dextrine. "It will," says the patent, "unite wood to wood nearly as firmly as gelatin, that is, the joint cannot be separated without breaking the wood at some point." This adhesive, further says the patent, will spread with great ease when hot. The patent further says that it would be hard "to convince the ordinary observer that it is not a remarkably white and fine glue instead of being purely a starch cement." At line 92, p. 3, it is said:

"By arresting the digesting action earlier or later, that is, anywhere between the point where the mixture becomes a fluent jelly to the point where it becomes a thin liquid, different degrees of body or consistency can be imparted to the finished product."

The patentee further says that, when from five to seven pounds of cornstarch to the gallon of water are used, he produces a glue like paste which is almost equal to the best animal glue, with extraordinary cementing power for fibrous substances. The paste is prepared for use in one process. The patentee terms his products an improved paste, an adhesive compound, etc. The patentee divides the starch into five stages—the gelatinous, the glutinous, in which it becomes glue-like and fluent and has extraordinary adhesiveness, like glue—the soluble stage, the dextrine stage, and the glucose stage.

Kantorowicz and Neustadt German patent, No. 88,468, issued August 27, 1896, for a process for the preparation of opened-up (degenerated) starch in the dry condition, calls for a cementitious product the power of which is claimed to be almost as great as that of animal glue.

The Brueder & Co. patent, No. 114,978, issued November 21, 1900, sets up its one claim for a process for a starch adhesive material "comparable with animal glue," in dry form. This patent is termed "process for the preparation of a substitute for glue from starch." "By the following process," says the patent, "it is possible to prepare from starch a stuff that can be used as a substitute for animal glue. The process rests on an interaction between starch on the one hand and the solution of a hypochlorite of an alkali on the other. The solution of the material occurs in a way similar to the solution of glue. To one hundred parts by weight of water are added twenty to fifty parts by weight of the adhesive."

The claim reads:

"Process for the preparation from starch of an adhesive material comparable with animal glue consisting in the following: The starch in the cold condition is mixed with a solution of potassium or sodium hypochlorite. After the reaction is ended the mass is allowed to settle, is decanted and dried."

The patent provides that:

"If the product is to be used for dressing colored textiles, the material may advantageously be neutralized by a slight addition of ascetic acid."

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It is thus apparent that Perkins was advised by the prior art that to obtain veneering glue from starch he need only secure glue with a minimum of water content. It does not appear, however, that any one had obtained a good article of starch or vegetable glue as compared with animal glue. The patents cited were not in search of veneering glue but of other and weaker adhesives. In course of this quest several of them hit upon a starch glue good enough for veneering glue. Higgins describes the appearance of it, so he must have had it. A fair article of veneering glue was made at the time of the hearing below from the glue base disclosed in the prior art patents. There may have been some confusion of names in the terms cement paste, etc. Starch glue, however, as compared with animal glue, does not appear to have been treated as an article of commerce prior to Perkins. Its location somewhere on the line of starch characteristics was pointed out by the condition of the art. It was known what it was. The steps to it were practically graduated. They led unerringly to it if followed —only requiring the adjustment of liquid to the requisite quality and quantity of degenerated starch.

The case differs from the cases cited in the opinion of the District Court. Kuehmsted v. Farbenfabriken, etc., Co., 179 Fed. 701, 103 C. C. A. 243. In that case the medicinal properties of the purified article, as well as the article itself, were unknown to Hoffman. His experiments were so full of new results as to eventuate in not only a valuable article but one having new characteristics and properties. Moreever, the new formula was made plain and certain, requiring no experimentation. In General Electric Co. v. Hoskins Mfg. Co., supra, the patent covered a new device made from old materials. The device in that case was new, and as such was sustained, and the process was plainly disclosed. Here we have a glue base which the court finds to be old. To this appellee adds a second step for the purpose of throwing the base into solution—three or preferably less parts of water and a solvent to one part of glue base, which results in a deliverance as good as animal glue, from starch base, a process which appellants employed surreptitious means to discover. If the glue and its production from the base were just at hand, why this underhand invasion? There was nothing new in the second step.

If the patent for the product and that for the process are valid, then it must be that the glue of the patent is new. The District Court, having heard the evidence at first hand, found it was new. It also sustained the claims for a glue base which we do not find to be valid. The question is thus narrowed to the following propositions: (1) Was the glue of the patents new? (2) Does the process constitute a valid invention?

It is true: (1) That the adhesive of the prior art patents, although adverted to in those patents as glue, was never placed on the market as a substitute for animal glue or otherwise; (2) that prior to the patents in suit, while its location on the line of starch adhesive products was pointed out, nobody actually rescued the glue of the patents from its undeveloped state.

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From the evidence it appears that there was a demand on the market for starch glue as good as animal glue and suitable for veneering, and that appellee had built up a large business in that article; that the claims of the prior art patents, except the Brueder French patent No. 114,978, aforesaid, all were in fact limited to pastes, sizings, mucilage, and other weaker forms of adhesives; that appellee's process was not so evident as to be discovered by appellants without subsidizing appellee's employés; that there seems to have been great difficulty in getting at the correct formula; that Perkins labored years to get the latter just right; that, as stated by his expert, Carmichael:

"He proportioned the various steps to one another according to the selection of raw material, in the conversion of the raw material and in the solution of the material, being particular about the various sub-steps by which, in the main step effecting the solution, he obtained a uniform and homogeneous product."

All these, considered in connection with the presumption arising from the grant of the patent, lead us to hold, though with some hesitation, that the claims covering the finished glue product as well as the process claims for that article are valid and should be sustained.

[4] With reference to the claim of contributory infringement, there is some difficulty. Appellants manufactured and sold only a glue base. In their effort to get it on the market they represented to the trade that their glue base was the same as that of the patents in suit, and advised purchasers that it could be used with appellee's second step to make glue, as witness the letters from appellants to Gorham Bros. of January 5 and April 12, 1912, which respectively read:

"For some time we have been trying to interest you in our Solva glue, and due to the fact that we are today making glue identically as that which you are getting from Perkins Glue Co., in other words, we have in our employ the glue maker and chemist who were with the Perkins Co. for eleven years past, we can furnish the same glue as what you are using."

"This glue you can use at the rate of 2½ or 2¾ lbs. of water to one lb. of glue, caustic to be used 7 per cent., to the cold mixture and 3 per cent. with heat. Some of the trade are using the 3 per cent. mixture which avoids the staining of wood."

Can a manufacturer, by producing a glue base under the conditions of this case, which is not an invention but which may be used, and some of which, the court finds from the evidence, is intended to be used in a process which is not in itself, but only in combination entitled to patent protection, be decreed guilty of contributory infringement, notwithstanding no attempt is made by the alleged contributory infringer to so use the final step himself, and which glue base can be and is sometimes used to manufacture other commercial adhesives than glue, though appellee uses it for making glue only? We think so, and hold that appellant, the Solva Glue Manufacturing Company, was a contributory infringer of the final product and of the final process. The rule of law in such case is that one who makes and sells one element of a patented combination with the intention and for the purpose of bringing about its use in such a combination is guilty of contributory

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infringement, and is equally liable with him who organizes the complete combination. Thompson-Houston Electric Co. v. Ohio Brass Co. et al., 80 Fed. 712, 26 C. C. A. 107, citing many cases.

The decree of the District Court sustaining the claims for a glue base process and product and for the so-called second step as such is reversed, and that part of it which upholds the claims of the patents for the final process and the resultant product respectively is affirmed, with direction to the District Court to proceed further in accordance herewith.

BARRETT et al. v. SHEAFFER.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1918.)

No. 2519.

1. PATENTS ⊂=328—VALIDITY—INFRINGEMENT—FOUNTAIN PENS.

The Sheaffer patent, No. 1,118,240, for improvements in attachments for fountain pens, consisting of a spring means arrangement within the casing to lift the presser bar in a fountain pen, independent of the compressible reservoir, and firmly holding the lever in open or closed position, *held* valid, showing invention, and claims 1 and 2 to have been infringed.

2. PATENTS ⊂=259—CONTRIBUTORY INFRINGEMENT.

Where, prior to the issuance of complainant's patent for improvements in fountain pens, one of the defendants entered into a contract to make holders for its codefendant, which was manufacturing and selling fountain pens infringing complainant's patent, and such defendant, on the day after the patent was issued, and with knowledge that it was about to be issued, delivered incomplete holders, which could be used only for the infringing device, and evinced an intention to deliver other holders, such defendant must be deemed guilty of a contributory infringement, and the patentee is entitled to injunctive relief and an accounting as to both defendants.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit by Walter A. Sheaffer against C. E. Barrett and the Kraker Pen Company. From a decree for complainant, defendants appeal. Affirmed in part, and in part reversed.

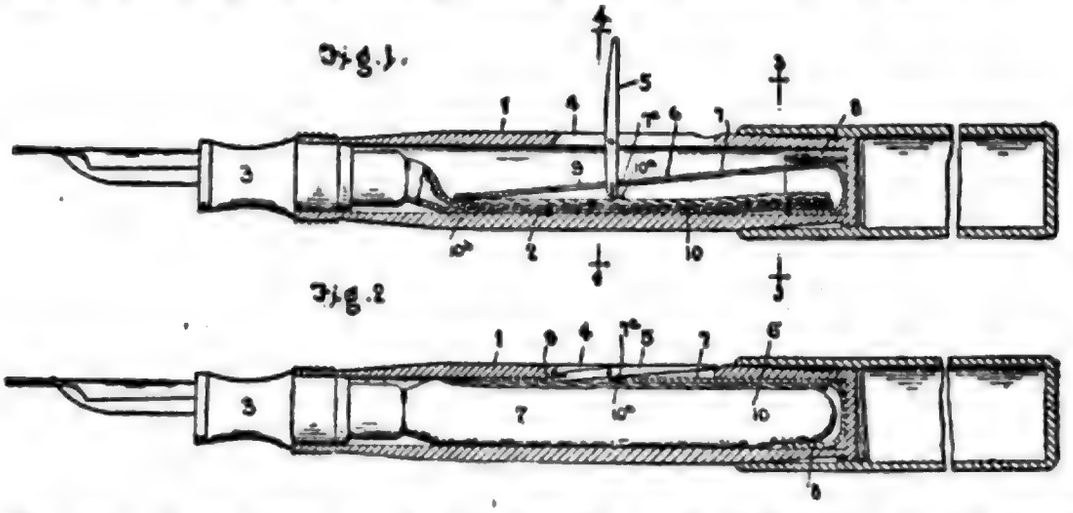
This appeal involves the decree of the district court sustaining the validity of claims 1, 2, 3, 4, 5, 7 and 11 of patent No. 1,118,240, issued to W. A. Sheaffer on November 24, 1914, for improvements in attachments for fountain pens, and awarding the same to appellee, entered May 23, 1917. The gist of the invention consists in spring means arranged within the casing to lift the presser bar in a fountain pen, independent of the reservoir, and firmly hold the lever in open or closed position. Claim 1 reads as follows:

"1. In combination with a fountain pen having a hollow casing with a slot extending longitudinally thereof and a lever fulcrumed in said slot, a compressible ink reservoir inserted within said casing, of means operable independent of said reservoir and arranged within said casing for firmly holding said lever in either open or closed position."

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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Figs. 1 and 2 of the drawings will serve to illustrate the device:



The pens of the prior art were provided, some with filling means operable by depressing the presser bar upon the ink reservoir with the finger, a coin, or a pin provided for that purpose from outside the case, having no lever, as in Hamilton patent, No. 781,649, issued February 7, 1905, and Kaufmann patent, No. 827,022, issued July 24, 1906. These have lifting means for raising the presser bar, independent of the ink reservoir. Barnes patent, No. 726,495, issued April 28, 1903, Sheaffer patent, No. 896,861, issued August 25, 1908, and Swedish patent to Johansson, No. 5,380, issued August 18, 1894, disclose the use of a lever in compressing the ink reservoir and spring means for lifting the presser bar from the reservoir; compression and release being steps common to all self-filling fountain pens, in order that a vacuum may be created in the rubber ink container to facilitate the inflow of ink thereinto.

Conceiving that all the devices of the prior art failed to firmly hold in place the lever, whether open or closed, as well as to provide efficient means for uniformly operating the presser bar—both without the aid of the resilient rubber ink reservoir—Sheaffer, by combining the lever of the prior art with a spring and presser bar within the case, brought the presser bar up against the lower end of the lever and kept it there, both in open and closed positions, by spring action in such a manner as to control the lever firmly in either position. In so doing he took the flat removable spring bar shown in Duryea, cut a longitudinal slot therein under the lower end of the lever as pivoted, passed the previously adjusted lower end thereof through the slot in the spring bar, the flat bar like Duryea's, and thus caused the lever foot to be firmly rested upon the top of the presser bar, when in action causing certainty of movement, and when not in action housed in the slot, and also, when it was released from lever pressure, lifting the presser bar firmly against the foot or lower part of the lever; all without any strain upon the ink reservoir.

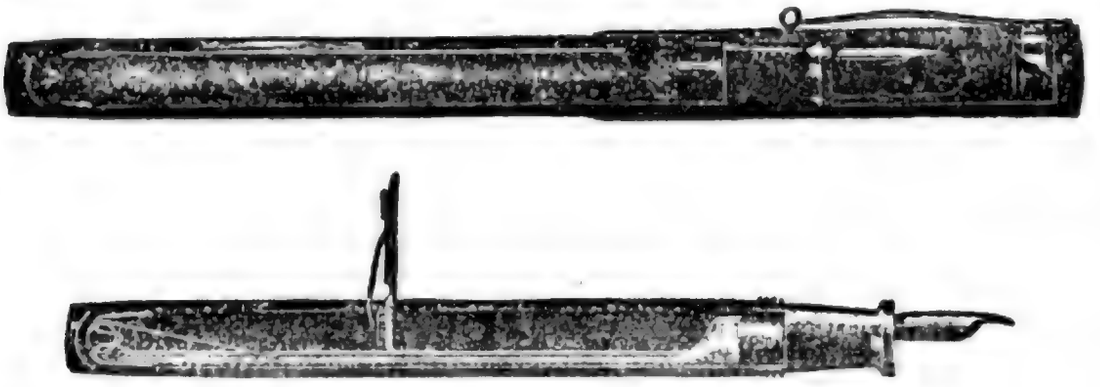
It seems to be very desirable in fountain pens that there be certainty of movement of the parts in order to avoid leakage and other disarrangement. The spring bar of the patent is of such construction that the locking means is very reliable. This is in substance the interpretation given to the first claim. Claim 2 is practically the same as claim 1, except that it calls especially for a tubular reservoir, and also for means arranged between the inner wall of the casing and the reservoir for yieldingly compressing the reservoir. Claim 3 likewise is the same as claim 1, with the addition of means for limiting the opening movement of the lever, as disclosed in the drawings, a detent raised on the top surface of the presser bar to engage and limit the extent of the movement of the lower end of the lever and also the adjustment of the outer end wall of slot 9 in the spring bar through which the lever passes, so that said end wall will co-operate with the detent on the presser bar in limiting the movement of the lever. Claim 4 has special reference to the adjustment of the friction, i. e., split ring-held spring and presser bar in operative position—the spring bar slotted as above described, the slot being so arranged as

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to limit the movement of the lever, and yieldably hold the same in open or closed position. Claim 5 covers specifically the co-operation of the end wall of the slot in the spring bar and the detent on the presser bar above mentioned, to limit movement of the lever and to protect the same. Claim 7 covers the provision fulcruming the lever in the casing slot and locating the lower end of the lever within the slot in the spring bar at all times, thereby preventing rotation of the spring bar. Claim 11 covers the improvements of claims 1, 2, 3, 4, 5, and 7 as a combination, and reads as follows:

"11. The combination with a slotted fountain pen casing having a compressible ink reservoir and a lever operable in said slot, of a reservoir compressing device comprising a double bar provided with means for removably holding it within the casing, said double bar being composed of a resilient arm having a slot therein to at all times receive the lever and to be thereby held against turning or lateral movement in the casing, and another arm secured to one end of said resilient arm and extending parallel therewith for engagement with the compressible ink reservoir, one end wall of the slot in said resilient arms being positioned to limit the swinging movement of the lever in one direction."

Appellants' alleged infringing device—Kraker's present pen—contains within its case means, operable independent of its reservoir, for firmly holding its lever in either open or closed position. Its spring means consist of a wire loop extending from a position near to the end of the presser bar, where its spring head is located, to a tongue on the bottom of the presser bar, about one-third of the length of the latter, in which tongue it is caught and loosely held whereby the presser bar is controlled when not under the influence of the lever. There is no open slot in a spring bar through which the lever end operates upon the presser bar. The presser bar is rigid, and, when depressed by the lever, descends uniformly upon the reservoir to exclude ink and air. When released, the bar is lifted by the spring into contact with the prostrate lever, firmly holding it in closed position. When the lever is in an open position, its foot rests and moves on the presser bar, and by upward tension of the spring within the casing is held firmly in an open position. The reservoir is free to inflate without interference of the presser bar or the lifting means. In addition to the spring device in the casing for lifting the bar and holding the lever in position, the lever carries, resting within the slot, but working outside the casing when open, a supplemental spring for holding it in open and closed position. This spring is mainly relied on by appellants to differentiate their pen from that in suit, while appellee insists that it is surplusage, and only used for misleading the court and public. The following drawings of appellants' alleged infringing device are taken from appellants' brief:



The usual defenses of invalidity and noninfringement are pleaded, and, in addition, that Sheaffer was not the first inventor of the substantial subject-matter of the patent, or, as appellants put it, the invention did not originate with Sheaffer. It appears that appellants' assignor, one Craig, had, on February 27, 1914, and April 9, 1914, respectively, filed applications for patents pertaining to the subject-matter here involved after the patent in suit was issued, and about December 9, 1914, he amended his applications by inserting

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claims 1, 2, 3, 4, 7, and 11 from appellee's said patent. Thereafter such proceedings were had that the examiner in interference and the examiners in chief awarded the invention to Sheaffer. Since the commencement of this suit this action has been affirmed by the Commissioner of Patents. The pendency of this proceeding is urged by appellants as a reason for not disposing of this suit at the present time, they insisting that the patent was inadvertently issued inasmuch as the interference has not been disposed of.

Appellee seeks to hold one Barrett, manufacturer of the pen barrels or casings for Kraker Pen Company, as a contributory infringer. He supplied casings to appellant pen company, prepared for and adapted to the insertion by appellant of the alleged infringing parts, only. The district court entered a decree for the appellee.

The errors assigned are (1) that the District Court sustained the patent; (2) that it held appellants' device to infringe the patent; (3) that it charged appellant Barrett & Co. to be guilty of contributory infringement; (4) that it awarded the claims in suit to appellee.

Other facts appear in the opinion.

Hans v. Briesen, of New York City, for appellants.

Frank T. Brown, of Chicago, Ill., for appellee.

Before BAKER, KOHLSAAT, and ALSCHULER, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). [1] The substance of claims 1 and 2 in suit consists in adding to the prior art self-filling pen means for holding the pen lever of a self-filling pen in position, or, as expressed in claim 1, "firmly holding said lever in either open or closed position." The lever works against the tension of the spring bar and the resiliency of the rubber reservoir to exclude the ink from the latter. The reaction of this tension serves to yieldingly hold the presser bar firmly up against the lower end of the lever when in open position and firmly hold the lever in that position. When released, the spring bar, without any aid from the resiliency of the rubber reservoir, lifts the presser bar from the top of the reservoir up into snug contact with the spring bar against the inner wall of the casing and such portions of the lever as rest in the casing slot flush with or even slightly below the plane of the under face of the spring bar, thereby preventing vertical or other movement of the lever, and firmly holding the same in closed position, besides facilitating the insertion and removal of the ink reservoir.

The objects sought are to prevent accidental pressure upon the ink reservoir through a careless handling of the lever, and keep the lever handle from leaving the casing slot. In the former case, the presser bar may be depressed, with consequent leakage, and in the other the lever handle, coming in contact with the pocket, would be likely to tear it, and itself be lifted toward open, and consequently operative, position, when not desired, and subjected to strain and other injury.

It was not new to employ barrels, or casings, rubber reservoirs, presser bars, levers fulcrumed in the casing slot, spring-actuating devices for lifting the presser bar, and other means for operating and relieving the rubber ink reservoir, but there nowhere appears any pen containing the combination of the patent in suit. Hamilton and Kaufmann call for lifting means independent of the ink receptacle, and employ a spring in the casing, but have no lever for depressing the ink sack, nor lever locking means. Nor do their devices make any sug-

gestion to that end. Barnes, Sheaffer (1908), and Johansson are provided with compressing levers, but rely upon the resiliency of the ink tank for whatever lifting or holding means they employ, and make no provision for locking the lever. These latter methods are liable to result in wear and disarrangement of the ink tank, and eventually in unfitting it for use. In the self-filling fountain pen art accuracy is very desirable. Accidental lifting of the lever causes depression of the presser bar and effects an escape of ink, which soils the pocket, wastes the ink, and serves to make the pen unpopular. Therefore claim 1 of the patent calls for "firmly holding," and claim 2 for "holding," the lever in open or closed position.

Claims 1 and 2, we think, cover a new combination of old parts and a new result. It was not new to substitute the lever for the finger pressure of Hamilton or the pin of Kaufmann, unless a new result was obtained thereby. The examiner so held. It is this new result that Sheaffer claims, viz., means operable within the casing and independent of the reservoir for firmly holding the lever in either open or closed position, as above described.

The invention is narrow, but in view of its value to the self-filling pen art, the presumption implied in the grant, and in view of the fact that, notwithstanding the approaches to it in the art, no effort was made to carry forward the improvements preceding it the one step further which has brought it out from the undiscovered, we are satisfied that the device of claims 1 and 2 was patentable, and therefore entitled to protection. The contention of the appellants that it is disclosed in the Johansson Swedish patent is not well made. The meager statements of that patent, as well as the drawings, fail to satisfy us that the presser bar rests against the eccentric base of the lever. Considerable space above the bottom of the presser bar is shown in figure A of the drawings. There is no spring-lifting means; the rubber reservoir being the only lifting element. The presser bar is in the form of a V-shaped trough, made of tin, and does not constitute a spring. Very clearly, this patent does not at all anticipate the claims in suit.

Appellants' device may be considered without the supplemental spring located on the lever handle. We are of the opinion from the evidence that the spring elements within the casing of the alleged infringing penholder sufficiently control and hold the movements of the lever for the purposes of this proceeding, without the intervention of the lever spring. Speaking of the alleged infringing device, appellants say:

"This presser bar is under spring control as the result of the coil spring at the left hand of the figure; this being in accordance with the teachings of Hamilton and generally what is shown in the Swedish patent or the Duryea."

It appears from the drawings of appellants' pen, shown in the brief, that the inner end of this coil spring is beneath the presser bar when the lever is open, and therefore presses upwardly against it, and consequently tends to yieldingly crowd the lever foot upwardly, thus holding it firmly in open position. On the other hand, the tension of the spring lifts the lower end of the lever when released, and securely holds it against the upper wall of the pen casing, or snugly within the slot, or

both, as in the claims in suit. While appellants' device lacks the specific spring bar of the patent, their double wire spring arms are clear equivalents therefor and for appellee's lifting elements; they create a firm, upward tension against the lever, whether in open or closed position and hold it in place.

We therefore are of the opinion that the so-called commercial device of appellants, that is, appellee's cross-exhibit Kraker Pen Company's present pen, if made after the patent was obtained, infringed claims 1 and 2 thereof, but did not infringe any of the other or specific claims of the patent, as it contains none of the improvements set out therein. There is in the alleged infringing device no means for limiting the opening movement of the lever as in claims 3, 4, and 5; no means for locating the foot of the lever within the slot in the spring bar for preventing turning in the casing, as in claim 7; none of the provisions of claim 11, except such as are common to all the claims in suit. Such being the case, we therefore find appellants not guilty of infringement as to each of the claims 3, 4, 5, 7, and 11 in suit.

[2] It will be remembered that the patent was issued, but not yet delivered, on November 24, 1914. In August, 1914, prior to the issue of the patent in suit, appellant Barrett accepted an order from the Kraker Pen Company to make 10,000 holders for fountain pens, upon which he secured a payment of $5,000. He expected to make the holders so they should take the double bar, like a sample holder given Sheaffer before the suit was brought. The sample was introduced in evidence as "Complainant's Exhibit Defendants' Sample Holder." Of these holders, he delivered about 1,000 to the Kraker Pen Company in the early part of November, prior to the date of the patent, and on November 25, 1914, delivered 108 holders to the Kraker Pen Company, the day after the issue, all of which were slotted, and 14 of which were drilled for the lever pivot. He testified that he expected to deliver the balance of about 9,000 to the Kraker Pen Company some time, since they were paid for. In December, 1914, appellants' foreman delivered to appellee on request a pen like one of the 108 delivered November 25, 1914, which was introduced in evidence by appellee as "Complainant's Exhibit Defendants' Incomplete Holder." Appellant Barrett still has on hand 304 holders like the 108, all slotted and some drilled. Three thousand of the other holders on hand have the metal parts inserted, but are not slotted or drilled.

The case for infringement presents itself somewhat like this: The Kraker Pen Company was marketing, and, of course, manufacturing, the fountain pen introduced in evidence as Kraker Pen Company's present pen, after the suit was begun, and such manufacture and marketing of that pen constituted an infringement of the fountain pen of claims 1 and 2 of the patent in suit. Appellant Barrett & Co. delivered 108 pens to Kraker Pen Company the day after the patent was granted. It does not appear that at that time Barrett & Co. knew the patent was granted, though Barrett was told it was expected. Fourteen of these were slotted and drilled—the rest were only slotted. Barrett understood these holders would be made into the alleged infringing pens. In December, 1914, appellant Barrett delivered a sample like the 108,

presumably slotted and drilled, to Sheaffer. It does not appear that Barrett delivered any other pens after November 24, 1914. Barrett still has on hand 304 pens like the 108 which he says he expects to deliver to Kraker Pen Company. Appellant Barrett & Co. expect some day to turn over to Kraker Pen Company all the penholders on hand. The Kraker Pen Company inserts the pen, reservoir, and lifting devices.

It appears that the holders delivered by Barrett to Kraker Pen Company, while only slotted, fitted with metal nonrotating devices, and in some cases drilled for lever pivots, were nevertheless not available for use in connection with other makes or designs of fountain pens, and capable of being used only in manufacturing infringing devices. Taking into consideration that appellants openly appropriated appellee's claims; that about 1,000 holders had been delivered by Barrett & Co. to Kraker Pen Company before the patent was issued; that the penholders put out by the latter prior to November 24, 1914, would be infringing devices, as shown by defendants' sample holder, if made after such issue of the patent; that no change had been made in appellants' business at the date of the issue of the patent; that Kraker Pen Company accepted the 108 incomplete holders after the grant; that appellants had been warned to desist from making appellee's penholder, and had indicated an intention to disregard the patent; and in view of the large number of incomplete penholders in Barrett & Co.'s hands, partly made up in accordance with appellee's construction, and suitable only for manufacturing the pens like the sample holder, together with the plain imminence of infringement—we are of the opinion that appellant Barrett & Co. was guilty of contributory infringement thereof, and that the appellee, Sheaffer, is entitled to injunctive relief and an accounting as to both appellants.

The proceedings in the nature of interference now pending in the Patent Office having eventuated in findings favorable to appellee here by the examiner in interference, the examiners in chief, and the Commissioner, and the record, so far as we can gather therefrom, fully justifying the conclusions of the Patent Office in that finding, we concur in the several findings of that Office in respect to the issues of the interference and on the question of origin. In view of the failure of appellee to show infringement of claims 3, 4, 5, 7, and 11, the appellee will be required to pay one-third of the costs of this proceeding.

The decree of the District Court is affirmed as to claims 1 and 2. As to the other claims in suit, it is reversed.

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BLETTNER v. GILL et al.

(Circuit Court of Appeals, Seventh Circuit. February 1, 1918. Rehearing Denied March 11, 1918.)

No. 2549.

1. PATENTS ⟸324(5)—INFRINGEMENT—DECREE—REVIEW—CONFLICTING EVIDENCE.
A decree in an infringement suit, in so far as based on conflicting evidence, will not be disturbed on appeal.

2. PATENTS ⟸328—VALIDITY—INFRINGEMENT—PACKING RINGS.
The Gill patent, No. 1,188,370, for improvements in elastic packing rings, and patent No. 1,210,371, for improvements in the processes of making packing rings, *held* valid and infringed.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit by Edwin R. Gill and others against George H. Blettner. From a decree for complainants, defendant appeals. Affirmed.

Joshua R. H. Potts, Arthur A. Olson, and Brayton G. Richards, all of Chicago, Ill., for appellant.

Wallace R. Lane, of Chicago, Ill., for appellees.

Before KOHLSAAT, ALSCHULER, and EVANS, Circuit Judges.

PER CURIAM. The appeal is from a decree finding valid and infringed claim 1 of United States patent No. 1,188,370, June 20, 1916, to Gill, for "improvements in processes for making packing rings," and the four claims of United States patent No. 1,210,371, December 26, 1916, to Gill, for "improvements in elastic packing rings." The patents relate to the joints of expansible packing rings, which rings comprise a single piece of resilient metal, and are used for packing the cylinders and pistons of automobile engines. Claim 4 of last-named patent is typical and reads as follows:

"An elastic packing ring having a joint formed by overlapping check pieces having underhung projections whose upper surfaces are formed to depart inward from the normal circular form, said ring having suitably formed recesses adapted to receive said projections and to form a tight fit therewith when the joint is closed by compression of said ring."

While invalidity in the prior art is asserted, we are satisfied that, notwithstanding the packing ring art is greatly crowded, the patented product shows meritorious advance in respect to the particular thing which is here principally in issue, viz. the "underhung projections whose upper surfaces are formed to depart inward from the normal circular form," which the prior art does not disclose.

[1] The main contention for appellant is that the rings he manufactured and sold differ from the rings of the patent, in that the upper surfaces of the underhung portions did not "depart inward from the normal circular form," and in proof of this he contends that his ring blanks, before being processed, are not of circular form, but at the point where the joint is made are heart-shaped, so that, in cutting

the ring there to form the joint, when it is compressed for insertion in the cylinder, the entire ring not only becomes a true circle for fitting into the cylinder, but the upper surface of the underhung portions does not depart inward from the normal circular form, or, in other words, are not beveled or sloped from their shoulder toward the ends of the projections. If they are not so beveled or sloped, they do not infringe. The court heard the evidence of the witnesses, and had before it alleged infringing devices, as well as the ring-shaped blanks out of which appellant makes them. The evidence of the witnesses was contradictory, and, in so far as the decree is predicated thereon, we cannot disturb it.

[2] Alleged infringing product rings, and ring blanks from which they are made, which were in evidence in the District Court, were brought here with the transcript, and we, like the District Judge, are unable to see or understand that the ring blanks are heart-shaped to any degree. In the matter of the bevel or slope, it is plain from the evidence, as well as from the patent, that the degree of it must needs be very slight to produce an operable device. That it is present in slight degree, in at least some of appellant's finished rings in evidence, is conceded. Where present in any degree, there is infringement. We see no reason to disturb the finding of the decree that appellant made and marketed rings in which the bevel or slope was present, and that thereby he infringed the product patent.

What has been said above with reference to the product patent will apply as well to the process patent. If in making appellant's ring he does not in any degree bevel or slope downward from the shoulder the upper surface of the underhung projections, his process does not infringe; otherwise, it does. The record satisfying us, as it does, that appellant has made and marketed rings which show this bevel or slope, claim 4 of the process patent was likewise by the decree properly found infringed.

Respecting that part of the decree wherein it is stated that appellees were entitled to recover punitive damages, it appears that no amount of such damages was in fact fixed, even if under the law and practice such damages could at that stage of the proceeding have been fixed. If and when any such damages are found and fixed in any decree which may hereafter be rendered on the subject of damages, any party feeling thereby aggrieved may have such decree reviewed agreeably to law and the practice in such case.

The decree of the District Court is affirmed.

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VIRGINIA & WEST VIRGINIA COAL CO. v. CHARLES.

(District Court, W. D. Virginia. July 14, 1917.)

1. SEALS ⊂=6—COPY OF DEEDS—INDICATION OF SEAL.

In view of Code Va. 1904, § 2841, declaring that a scroll affixed by way of a seal by a natural person has the same force as a seal, a copy of a deed written on a typewriting machine, which showed the signature of the grantor, followed by parenthesis marks, is prima facie evidence that the original instrument had a scroll used by way of seal, and that the deed book so shows, though there was merely a blank between the two marks.

2. ACKNOWLEDGMENT ⊂=16—OFFICERS—COMMISSIONER IN CHANCERY OF COUNTY COURTS.

The provision of Code Va. 1860, c. 175, § 2, allowing each court from time to time to appoint commissioners in chancery or for stating accounts was continued by various enactments and remained in force until adoption of Code of 1887. Act April 2, 1873 (Acts 1872–73, c. 395), abolished the equity jurisdiction of the county courts. *Held*, that an acknowledgment taken before a commissioner in chancery appointed by a county court after its equity jurisdiction had been abolished, but before the power to appoint commissioners in chancery had been withdrawn was sufficient; commissioners in chancery being authorized by Act of June 17, 1870 (Acts 1869–70, c. 138), to take and certify acknowledgments.

3. ACKNOWLEDGMENT ⊂=61—SUFFICIENCY—PROOF OF STATUS OF OFFICER.

Where a deed purported to have been acknowledged before a commissioner in chancery of the county court, no evidence that the one taking such acknowledgment was then a commissioner was necessary.

4. EVIDENCE ⊂=343(1)—CERTIFIED COPIES—RECORDS.

Where the original deed was recorded in 1883, and thereafter it was recorded anew from the original deed, a certified copy taken from the last record is admissible in evidence under Code Va. 1904, § 3339, providing for the re-recording of an instrument, where the book in which it was recorded shall have been lost or become illegible, etc.

5. EVIDENCE ⊂=343(7)—COPIES—ADMISSIBILITY IN EVIDENCE.

A certified copy of a deed, taken from the deed book of a county other than that in which the land was located and the conveyance was originally recorded, is not admissible in evidence under Code Va. 1904, § 2506, or section 3339, where it appeared from the registration certificate of the clerk that the paper presented to him for record was not the original deed, but was merely a copy, and hence not entitled to record under the statutes.

6. EVIDENCE ⊂=343(8, 9)—RECORDS—COPIES.

Where a certified copy of the original deed, which had been duly recorded, was thereafter, the record being lost, recorded under Code Va. 1904, § 3339, a certified copy taken from the second record is admissible in evidence without any showing of the loss or destruction of the first certified copy, which was used for making the second record.

7. EVIDENCE ⊂=343(8, 9)—HEARSAY—DESTRUCTION OF PRIMARY EVIDENCE.

Testimony that a witness tried to find the original deed in the office of the clerk of the county court, and that the then clerk informed him the original deed was destroyed by the fire which had destroyed the courthouse, is admissible, as is testimony that the grantee in the deed told him that the original had been burned in the clerk's office, for, while hearsay, such evidence shows a diligent and unsuccessful search for the original justifying the introduction of other evidence.

8. EVIDENCE ⊂=343(8, 9)—ADMISSIBILITY—SECONDARY EVIDENCE.

Where a party proposing to offer secondary evidence of undoubted accuracy has no interest to hold back the original, and there is no ground

for suspicion that the original could be produced, if desired, the law does not require convincing evidence of the loss of the original document, so proof that on search for an original deed the searcher was informed that it had burned in a fire, warrants admission of secondary evidence.

9. EVIDENCE ⟸343(10)—DOCUMENTARY—ADMISSIBILITY.
Where a copy of a deed to the land in controversy was recorded in a county remote from the county where the land lies, a certified copy of the records of the said county was inadmissible, the deed having been duly recorded in the county where the land was situated, for recordation of a deed at a place remote from the land conveyed would give no notoriety to the transfer of title among people interested.

10. EVIDENCE ⟸40—JUDICIAL NOTICE—COURTS.
The federal District Court for the Western District of Virginia takes judicial notice that a circuit court of Virginia is, and was in 1856, a court of record and of general jurisdiction.

11. EVIDENCE ⟸383(12)—DOCUMENTARY—PART OF RECORD—EFFECT.
A decree of a circuit court of Virginia, which is a court of the widest possible original jurisdiction, directing its commissioner to convey lands unless the defendant in a chancery suit convey the same, is sufficient to establish the authority of the commissioner, and evidence of the loss of the remainder of the record is unnecessary.

12. EVIDENCE ⟸383(3)—DEEDS—RECITALS—EFFECT.
Where a decree authorized the court commissioner to convey lands, if the defendant in a chancery suit did not himself make the conveyance by a date fixed, a recital in the commissioner's deed that the defendant had not made the conveyance, as the commissioner was informed by complainant, should, after the lapse of more than 50 years, be treated as a recital merely that the defendant had not made the conveyance, which recital is prima facie true under Acts Va. 1899–1900, c. 1145 (Code Va. 1904, § 3333a).

13. EVIDENCE ⟸343(10)—UNAUTHORIZED RECORDATION OF A DEED—AS ACT OF OWNERSHIP.
A copy of a deed taken from the deed book of the county in which a part of the land was located, though the record was made from an attested copy of the original taken from the deed book of another county, is admissible as tending to show an assertion of ownership in plaintiff's predecessor, who was the only person interested in the land at the time the second record was made, and whom it is inferred went to the expense of recording the copy.

14. EVIDENCE ⟸343(10)—DEED RECORDED IN WRONG COUNTY—ADMISSIBILITY OF COPY.
Where an attested copy of a deed taken from the deed book of one county is recorded in a second county, Code Va. 1904, § 3329, does not apply and the copy from the records of the second county is inadmissible as evidence of transfer of title.

15. ACKNOWLEDGMENT ⟸20(1)—DISQUALIFICATION OF OFFICER.
Where a deed executed by a commissioner of court was acknowledged by him in open court as commissioner, and the court ordered it to be recorded, the indorsement on the deed of those facts by the commissioner in his capacity as clerk of the court did not invalidate the certificate of acknowledgment, on the ground that it was made by the grantor, for in making the indorsement showing the action of the court the clerk was acting merely in a ministerial capacity.

16. ACKNOWLEDGMENT ⟸15—SUFFICIENCY—TWO MAGISTRATES.
1 Rev. Code Va. 1819, c. 99, § 7, relating to certificates of acknowledgment, remained in force until Code 1849, c. 121, § 3, and a deed executed in 1839 in accordance with the earlier statute is not subject to attack on the ground that the law did not then authorize an acknowledgment before two magistrates.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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17. EVIDENCE ⟸343(7)—CERTIFIED COPIES—RECORDS.

Where, after a conveyance had been recorded in the county in which the land was then located the county was divided and the land included in the new county, a certified copy of the deed, taken from the deed book of the second county, in which an attested copy taken from the deed book of the original county had been recorded, is not admissible, under Code Va. 1904, §§ 2506, 3339, to show title, where there was no affidavit, produced to the recording officer, as to the loss of the original deed, for, while the clerk's certificate is conclusive as to any fact certified, it will not supply an omission.

18. JUDGMENT ⟸495(1)—COLLATERAL ATTACK—WANT OF JURISDICTION—WAIVER OF OBJECTIONS TO VENUE.

As under 1 Rev. Code Va. 1819, c. 71, § 7, the Russell county court in quarterly session was a court of general jurisdiction, and until 1849 (Code 1849, c. 124, § 1) there was no statutory provision giving jurisdiction in partition to the court of the county where the land was located, a decree of the Russell county court, in a consent proceeding prior to 1849, partitioning land located in another county, is not subject to attack on the ground that it was void for want of jurisdiction, for, the proceeding having been by consent, objections to the venue were waived.

19. EXECUTORS AND ADMINISTRATORS ⟸145—CONVEYANCE BY EXECUTOR—EXECUTION—REPRESENTATIVE CAPACITY.

A deed which shows on its face that it was executed by the grantors in their capacity as executors is valid and admissible to record, although signed and acknowledged as if the grantors had been acting in their individual personal right.

20. ACKNOWLEDGMENT ⟸38—SUFFICIENCY.

In view of Code Va. 1904, §§ 2500, 2501, declaring that, where any writing purports to have been signed in any representative capacity, a certificate of acknowledgment shall be sufficient, without expressing that such acknowledgment was in a representative capacity, which at least was declaratory of the pre-existing rule, an acknowledgment of a conveyance by executors, which in all ways conformed to 1 Rev. Code Va. 1819, c. 99, § 7, is sufficient, though it did not recite that they were acting in a representative capacity.

21. EXECUTORS AND ADMINISTRATORS ⟸138(1)—CONVEYANCES—AUTHORITY.

Where the testator's will declared that his just debts should be paid out of money arising from the sale of any part of his real estate that his executors might deem most proper to be sold, the executors were authorized either under the will or by 1 Rev. Code Va. 1819, c. 104, § 52, declaring that the sale and conveyance of lands devised to be sold shall be made by the executors, or such of them as shall undertake the execution of the will, to convey the lands of the testator sold by them without any order of court.

22. EXECUTORS AND ADMINISTRATORS ⟸335—CONVEYANCES—VALIDITY.

Where, either under the will or 1 Rev. Code Va. 1819, c. 104, § 52, the executors of a testator were authorized to sell his lands, but one of them refused to convey without order of court, a conveyance thereafter made in accordance with the decree of court is not subject to attack because devisees of the testator were not parties to the proceeding, for, the executors having joined in the conveyance, they needed no authority to render the same valid.

23. EXECUTORS AND ADMINISTRATORS ⟸145—CONVEYANCE BY EXECUTORS—DESCRIPTION—SUFFICIENCY.

Where a deed described the land of the testator as having been sold and conveyed to him by a tax collector by a specified deed, and the intention of the executors to convey a 200,000-acre tract conveyed by the collector to their testator was manifest, the instrument is not subject to attack on the ground of insufficiency of description.

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24. ACKNOWLEDGMENT ⟸6(1)—ADMISSIBILITY AS EVIDENCE OF DEFECTIVELY ACKNOWLEDGED INSTRUMENT.
A copy of a power of attorney, executed by one of plaintiff's predecessors in title before one justice of the peace prior to Code Va. 1849, is inadmissible; the law in force at the time of the execution of the power of attorney requiring it to be acknowledged before two justices.

25. EVIDENCE ⟸271(18)—DECLARATIONS—ACTS OF OWNERSHIP.
Conveyances executed by plaintiff's predecessors in interest, as well as powers of attorney for the sale of the lands claimed, are admissible in evidence as acts of ownership.

26. EVIDENCE ⟸271(18)—DECLARATIONS—ACTS OF OWNERSHIP.
Where land had been partitioned in 1837, and the conveyance by one of the parceners was not recorded until 1848, original tax receipts, showing payment by or for her of taxes on one-half of the land for 1840 and 1841, are admissible in evidence as acts of ownership by her.

27. EVIDENCE ⟸372(3)—ANCIENT DOCUMENTS—ADMISSIBILITY.
Original receipts showing payment in redemption of delinquent taxes on land coming from the possession of one who made the payments are properly admitted in evidence; the originals being much over 30 years of age.

28. EVIDENCE ⟸341—CERTIFIED COPIES—ADMISSIBILITY.
Where plaintiff deraigned title from a deed executed by the designated collector of the federal direct tax of 1816, an extract from the Journal of the Executive Proceedings of the United States Senate, certified in accordance with Rev. St. § 895 (Comp. St. 1916, § 1508), showing that the nomination of the grantor in the deed relied on as collector of direct taxes was confirmed in 1814, is admissible, though not showing that he was appointed designated collector.

29. EVIDENCE ⟸334(2)—OFFICIAL CERTIFICATES.
Code Va. 1904, § 3334, authorizing the auditor to certify copies of any paper or record, does not authorize the auditor of public accounts to certify as to facts not shown by any document on file in his office, and a certificate by the auditor as to facts not so appearing is inadmissible in evidence.

30. EVIDENCE ⟸341—CERTIFIED COPIES—SURVEY.
A certified copy of a survey and plat for the original patent under which plaintiff in ejectment deraigned its title, which was certified under Code Va. 1904, § 3334, and has a tendency to show the county in which the sundry deeds introduced by plaintiff should have been recorded, is admissible in evidence.

31. EVIDENCE ⟸158(4)—SECONDARY EVIDENCE—ADMISSIBILITY.
Where plaintiff deraigned title based on a deed by the designated collector for federal direct taxes, depositions which, in conjunction with other evidence, at least circumstantially showed that the person executing the deed relied on was the designated collector, and that the papers directly relating to the tax sale were not to be found, are admissible.

32. LOST INSTRUMENTS ⟸5—JURISDICTION—SCOPE OF.
While the mere destruction of a deed will not give equity jurisdiction, yet, where a party in possession of land has by accident lost the evidence of his title, a court of equity has jurisdiction to establish the former existence and contents of the lost document.

33. JUDGMENT ⟸497(3)—PRESUMPTION—REGULARITY.
In view of the presumption of regularity, a decree purporting to be against nonresidents of the state of Virginia, which recited that the order of publication had been duly published and executed, is not open to collateral attack on the ground that the affidavit on which the order was made is not in the record; Code Va. 1904, § 3230, not in terms requiring the affidavit to be reduced to writing.

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34. PROCESS ⇐86—SERVICE—PUBLICATION—"QUASI IN REM."
A suit to establish the existence and contents of a lost document evidencing the title of one in possession of land is to be regarded as quasi in rem, and an order of publication against nonresident defendants gives a court of equity jurisdiction over them for the purpose of establishing the contents of the lost document.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Quasi in Rem.]

35. JUDGMENT ⇐712—CONCLUSIVENESS OF DECREE—PARTIES BOUND.
As a suit to establish the contents of a lost muniment of title is not strictly in rem, the judgment is binding only on parties.

36. JUDGMENT ⇐712—CONCLUSIVENESS AGAINST PERSON NOT PARTY.
The general rule is that a judicial record is not admissible as evidence against a stranger, although it ordinarily may be used in evidence against a stranger, when it is a link in the chain of title of the party offering it.

37. JUDGMENT ⇐712—PARTIES CONCLUDED—EVIDENCE.
Where land sold as delinquent and bid in by the commonwealth of Virginia was later conveyed to plaintiff's grantor by the clerk of the court, a decree in a suit establishing a lost muniment of title in favor of those against whom the land was assessed for taxes is conclusive only on parties, and as to others is, in the older sense of the term, merely res inter alios acta.

38. JUDGMENT ⇐712—ADMISSIBILITY AS AGAINST PERSON NOT PARTY.
A decree in a suit establishing a lost muniment of title of one in possession is not admissible against third persons not parties, on the theory that the record showed an admission against interest on the part of the defendants in such suit, for to allow a party or a privy of a party to use an admission by another party to the record against a stranger would make the danger of collusion too great.

39. EVIDENCE ⇐271(18)—DECLARATIONS—CLAIM OF OWNERSHIP.
A partial record of an ejectment suit by one through whom plaintiff deraigned title is admissible as evidence of an assertion of ownership by plaintiff's predecessor.

40. DEPOSITIONS ⇐100—DEPOSITION TAKEN IN FORMER SUIT—ADMISSIBILITY.
The general rule in Virginia is that depositions taken in a former suit cannot be read in evidence in a subsequent suit, unless there be substantial identity both of parties and issues.

41. DEPOSITIONS ⇐100—ADMISSIBILITY IN OTHER ACTION.
Contrary to the general rule, a deposition of a witness now dead, taken in a suit between strangers, if tending to prove ancient possession of land, is admissible in evidence.

42. DEPOSITIONS ⇐100—ADMISSIBILITY IN OTHER ACTION.
A deposition of the then clerk of the United States Circuit Court for the Eastern District of Virginia as to destruction of the records of that court in 1865, taken many years before trial, in another action, is inadmissible to prove that fact, as it might be shown by the custodian in charge of the records at the time of trial.

43. EVIDENCE ⇐317(9)—HEARSAY—ADMISSIBILITY.
Where plaintiff relied on a deed executed by the designated collector of federal taxes for 1816, testimony as to statements made by the Treasury Department officials concerning the supposed location of the original documents relating to sales made under the direct tax act was admissible to show the good faith of the witness in his search and to warrant the receipt of secondary evidence.

44. EVIDENCE ⇐271(18)—DECLARATIONS—MAPS—ADMISSIBILITY.
In ejectment, a map of the property involved is admissible in evidence as an act of ownership, where it is almost a necessary inference either

that plaintiff's predecessor had it made or that some one authorized by him to try to sell the property had it made.

45. EVIDENCE ⊂=333(1)—OFFICIAL STATEMENTS—ADMISSIBILITY.
An excerpt from a reporter's statement of fact in the report of a Virginia case is inadmissible to establish a fact recited therein.

46. APPEAL AND ERROR ⊂=1057(1)—REJECTION OF EVIDENCE—HARMLESS ERROR.
Where the court found that a fact was established by other evidence, the rejection of evidence offered to show such fact was harmless, if erroneous.

47. EVIDENCE ⊂=359(1)—PHOTOGRAPHS—ADMISSIBILITY.
Photographic reproductions of parts of issues of a newspaper, in which were published notices of sale of lands on account of nonpayment of federal direct taxes for 1816, are admissible in evidence, where the validity of the collector's tax deed was involved.

48. INTERNAL REVENUE ⊂=28—PRESUMPTIONS—VALIDITY OF TAX DEED.
Where a collector of federal direct taxes for 1816 sold land for nonpayment, a party claiming under such deed must, in the circumstances here, affirmatively show that every prerequisite to the execution of the deed was complied with; there being no presumptions in favor of such conveyances, where there has been no long-continued open possession under such deed.

49. TAXATION ⊂=788(8)—PRESUMPTIONS—VALIDITY OF TAX DEED.
The long-continued possession under an ancient muniment of title, which creates a presumption of validity, is a bold, open, and notorious possession, such as attracts the attention of and challenges attack by all adversary parties, and the mere fact that one asserting title under a tax deed arranged with an adverse possessor of a small portion of the land that he should hold possession for the claimant, and that, if claimant's title was established, he could remain, does not show such possession as will establish a presumption in favor of the validity of the tax deed.

50. TAXATION ⊂=788(8)—PRESUMPTIONS—ANCIENT TAX DEED.
Lapse of time, where the claimant is out of possession, will raise no presumption of the validity of an ancient tax deed; the long neglect of claimant to assert his title warranting an inference of a defect therein.

51. EVIDENCE ⊂=57—PRESUMPTIONS—POSSESSION OF LAND.
A presumption that land has been in possession does not arise from the mere fact that the land has been conveyed a number of times during a long period by deeds of bargain and sale.

52. TAXATION ⊂=788(1)—TAX TITLES—COLLATERAL ATTACK.
The rule against collateral attack upon judgments does not apply to a tax deed executed by a collector without any judicial proceedings.

53. DEEDS ⊂=81—EFFECT OF RECORD—REPEAL OF STATUTE.
As Act Va. March 13, 1912 (Acts 1912, c. 235), prescribing the effect as evidence to be given to deeds recorded prior to 1865, was directly repealed by Act March 14, 1914 (Acts 1914, c. 100), Code 1904, § 6, prescribing a rule of construction in case of repeals, has no application; there being no ambiguity in the repealing statute.

54. TAXATION ⊂=727—TAX TITLE—REPEAL OF STATUTE.
Act Va. March 13, 1912 (Acts 1912, p. 524), was absolutely repealed by Act Va. March 14, 1914 (Acts 1914, p. 186), even as to one who purchased a claim under an ancient tax deed while the act of 1912 was in force, and section 6, Code Va. 1904, does not save the benefit of the Act of 1912.

55. DEEDS ⊂=81—STATUTE—REPEALS.
The intention of the Virginia Legislature to repeal Act March 13, 1912, relating to the effect to be given as evidence to deeds recorded prior to 1865, as shown by Act March 14, 1914, cannot be overthrown by Code 1904, § 6, prescribing a rule for the construction of statutes in case of repeals.

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56. STATUTES ⊂=274—REPEAL—ACCRUED RIGHTS.
Code Va. 1904, § 6, prescribing a rule of construction as to repeals, saves not only accrued rights, but inchoate rights, so long as they are substantive in their nature; but a statute which prescribes merely a mode of procedure gives no person any right in the strict sense of the word to that particular mode, unless he avails himself of it while the statute is in force.

57. CONSTITUTIONAL LAW ⊂=139—"IMPAIRING OBLIGATION OF CONTRACTS."
In order that a state statute may impair the obligation of a contract, the statute must affect the validity, construction, discharge, or enforcement of the contract, and hence Act Va. March 14, 1914, repealing Act March 13, 1912, prescribing a rule of evidence as to deeds recorded before 1865, is not invalid as impairing the obligation of a contract, in derogation of the rights of one who purchased a tax title while the act of 1912 was in force.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Impairing Obligation of Contract.]

58. CONSTITUTIONAL LAW ⊂=311—DUE PROCESS OF LAW—RULE OF EVIDENCE.
There is no want of due process of law in the enactment of a reasonable rule of evidence.

59. CONSTITUTIONAL LAW ⊂=311—DUE PROCESS OF LAW—RULE OF EVIDENCE.
The repeal by Act Va. March 14, 1914, of Act March 13, 1912, which prescribed the effect as evidence to be given deeds recorded before 1865, did not work deprivation of due process of law as to one purchasing a tax title while the act of 1912 was in force, for it merely restored the common-law rule of evidence, which had been changed by the act of 1912.

60. POWERS ⊂=34(2)—EXECUTION OF—VALIDITY—REFERENCE TO POWER.
As a general rule it is not necessary that a deed made in execution of a power should even refer on its face to the power.

61. TAXATION ⊂=757—TAX DEEDS—VALIDITY.
While a tax deed, showing on its face that some essential requirement of the law has been disregarded or disobeyed, is void on its face, a failure to recite that every essential step leading up to the delivery of the deed has been complied with does not render the deed void on its face, though a stricter rule prevails in case of tax deeds than ordinary instruments.

62. INTERNAL REVENUE ⊂=26—LIENS—STATUTES.
The two-year limitation on the lien created by the assessment of federal direct taxes, provided in Act July 22, 1813, c. 16, § 19, 3 Stat. 30, and repeated by Act Jan. 9, 1815, c. 21, § 24, 3 Stat. 172, was kept in force by Act March 5, 1816, c. 24, § 2, 3 Stat. 255, for Act April 26, 1816, c. 82, § 1, 3 Stat. 302, in no way repealed the limitation.

63. INTERNAL REVENUE ⊂=28—DIRECT TAX—LIEN—STATUTES—CONTINUANCE—DEED.
Act March 5, 1816, imposing direct federal taxes adopted the provisions of Act Jan. 9, 1815, except as changed by later acts. Section 4 of Act Jan. 9, 1815, as amended by Act March 3, 1815, c. 91, § 1, 3 Stat. 231, required the assistant assessors to commence the making of the assessment lists for the tax of 1816 on April 1, 1816. Section 13 required the list to be put in the hands of the principal assessor within 60 days thereafter, while section 14 required the principal assessor to immediately advertise the fact that the lists were in his hands subject to correction; 25 days being allowed for appeals. By section 16 each principal assessor was required to make out corrected lists and lay them before a board, consisting of all the principal assessors, which board was to meet at such time and place as the Secretary of the Treasury should appoint. A collector's deed to land sold for nonpayment of federal direct taxes showed that the sale was made in 1820. *Held*, it not appearing what time was fixed by the Secretary of the Treasury for the meeting of the board of

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assessors to act upon the tax of 1816, that the deed was not void on its face, as showing that at the time of the sale the two-year lien had expired.

64. INTERNAL REVENUE ⇐28—DIRECT TAX—DEED—CONSTRUCTION—PUBLICATION.

Though the notice that direct taxes for 1816 were due was by law required to be published in every newspaper in the state in which the laws of the United States were by public authority published, a tax deed reciting publication in a newspaper, which declared that such paper was one in the state in which the laws of the United States were by public authority published is not void on its face, as showing that publication was not made in every newspaper in the state in which the laws of the United States were authorized to be published, for the recital does not warrant an inference that the paper in which the notice was published had not been designated, or that any other newspaper in the state had been designated.

65. INTERNAL REVENUE ⇐28—DIRECT TAX—TAX DEEDS—PRESUMPTION THAT COLLECTOR'S POWERS HAD CEASED.

A deed, showing that land was sold for nonpayment of federal direct taxes in 1820 by the designated collector, is not void on its face, on the theory that Act Dec. 23, 1817, c. 1, 3 Stat. 401, Act April 20, 1818, c. 80, § 5, 3 Stat. 440, containing conditional provisions for retiring collectors of direct taxes, raised a presumption that the collector's tenure of office had ceased at the time he made sale.

66. INTERNAL REVENUE ⇐28—DIRECT TAX—TAX TITLES—TAX DEEDS—SIGNATURE.

A tax deed for federal direct taxes is not void on its face, because the tax officer did not annex to his signature his official title; the deed clearly showing that it was his act as a taxing officer.

67. INTERNAL REVENUE ⇐28—DIRECT TAX—TAX TITLES—DEEDS—ACKNOWLEDGMENT.

A deed to land sold for nonpayment of federal direct taxes, which clearly showed that the sale was made by the tax collector in his official capacity, is not void on its face because the grantor's official title was not mentioned in the certificate of acknowledgment.

68. INTERNAL REVENUE ⇐28—DIRECT TAX—TAX TITLE—DEEDS.

Where an entire parcel of land was sold for nonpayment of federal direct taxes, and the deed recited that the grantee was the only bidder who would pay the taxes with the per cent. thereon for the quantity so purchased of the land, the deed is not void on its face for failure to recite that a part of the land would not sell for a sum sufficient to pay the taxes.

69. INTERNAL REVENUE ⇐28—DIRECT TAX—TAX TITLES—DEEDS—CONSTRUCTION.

A deed to land sold for nonpayment of federal direct taxes, the granting clause of which recited, "doth grant unto the said ——— the said two hundred thousand acres of land in the county of Russell, and state of Virginia, being the land which was assessed," must be construed to cover the entire 200,000 acres, and not merely a part.

70. TAXATION ⇐764(1)—TAX TITLES—DEEDS—DESCRIPTION.

The rules governing the description of the land conveyed are the same, whether the deed be made by a party in his own right or by a taxing official, who disposes of the land as a means for collecting the taxes.

71. INTERNAL REVENUE ⇐28—DIRECT TAX—TAX DEEDS—PROPERTY CONVEYED.

A tax deed to land sold for federal direct taxes, though it incorrectly stated the Christian name of one of the owners, in whose name the

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property was assessed, sufficiently described the property, where the advertisement referred to in the deed identified the land.

72. INTERNAL REVENUE ⇐28—DIRECT TAX—TAX TITLES—VALIDITY—RECITAL IN DEED.

A recital in a deed to lands sold for nonpayment of federal direct taxes, to the effect that the land had been duly assessed, is not evidence of that fact.

73. INTERNAL REVENUE ⇐28—DIRECT TAX—TAX TITLES—PRESUMPTION.

The fact that land was advertised for sale for federal direct taxes of 1816 authorizes no more than an inference that the local collector may have reported the land as delinquent, and does not show that it was ever assessed.

74. INTERNAL REVENUE ⇐28—DIRECT TAX—TAX DEEDS—VALIDITY.

Where it did not appear that any notice of assessment of land for federal direct taxes was made in accordance with Act July 22, 1813, or Act Jan. 9, 1815, §§ 13, 14, a tax deed to the land which had been sold must be held void; assessment and notice, with an opportunity to contest an erroneous assessment, being important rights of the taxpayer.

75. INTERNAL REVENUE ⇐28—FEDERAL DIRECT TAXES—LOCAL ADVERTISEMENT.

The requirements of Act Jan. 9, 1815, § 26, for local advertisement of federal direct taxes due, apply to nonresidents; the provision of section 28 for additional publication for the benefit of nonresidents not doing away with the requirement of local notice, in view of the proviso of the latter section as to payment within one year after the day on which the collector of the district where the property lies had notified that the tax had become due.

76. EVIDENCE ⇐343(3)—CERTIFIED COPY—SEAL—PRESUMPTION.

Where a deed, acknowledged by nonresident before the mayor of Philadelphia, as authorized by Act Va. Dec. 13, 1792 (Code 1803, p. 160), as amended by Act Dec. 25, 1794 (Code 1803, p. 327), recited that the mayor had attached thereto the mayoralty seal, it will be presumed that the seal was duly attached, and a certified copy, taken from the deed book in which the same was recorded, is admissible in evidence, though neither the copy nor deed book showed any seal, for it may be inferred the seal was omitted in recording.

77. DEEDS ⇐85—RECORDING—TIME FOR.

Though a deed recited that the grantor was of the city of Richmond, in the commonwealth of Virginia, yet where it was acknowledged before the mayor of a city in a foreign state, Code Va. 1803, p. 327, allowing two years after sealing and delivering for recordation, where the grantor did not reside in Virginia, applies, instead of the provision requiring conveyances by residents to be recorded within eight months.

78. PRINCIPAL AND AGENT ⇐19—PRESUMPTION—POWER OF ATTORNEY.

Where a conveyance by one of two patentees of land recited that the patentee executing the conveyance acted as attorney for the other, but no power of attorney was shown to have been executed and acknowledged, a presumption to that effect cannot be indulged in merely because the record book in which the same could have been recorded had long since been destroyed by fire.

79. PRINCIPAL AND AGENT ⇐19—PRESUMPTION—POWER OF ATTORNEY.

Where two own land, and one conveyed the same as grantor and as attorney for the other owner, the mere fact that the owner not joining in the conveyance paid no taxes thereafter raises no presumption that he had given a power of attorney to convey his interest.

80. PRINCIPAL AND AGENT ⇐19—PRESUMPTION—POWER OF ATTORNEY—STATUTE.

Code Va. 1904, § 3333a, declaring that whenever the title to any property claimed under a conveyance or deed purporting to be in execution of a

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sale under a deed of trust, mortgage, or any judicial proceedings is attacked or called in question, if it shall appear from the face of such conveyance or deed that such sale has been regularly made, etc., such deed or conveyance shall be prima facie evidence that such sale was regularly made and that other recitals in the deed are true, does not apply to a conveyance by one of two owners of land, who recited that he conveyed as attorney for his co-owner.

81. EVIDENCE ⇐82—PRESUMPTION—JUDICIAL PROCEEDINGS.

As the Virginia county courts, in ordering deeds to be recorded, never undertook to judicially pass on the validity of the instrument, the recordation of a conveyance of land executed by one of two owners, who signed as grantor and as attorney of his co-owner, raises no presumption that a power of attorney was produced, for the instrument was in any event entitled to record as the deed of the grantor in his own right.

82. NEWSPAPERS ⇐1(4)—FEDERAL DIRECT TAXES—PUBLICATION.

Evidence *held* insufficient to show that advertisement of federal direct taxes for 1816, as required by Act 1815, § 28, was made in a newspaper designated as one for the publication of United States laws.

83. INTERNAL REVENUE ⇐28—DIRECT TAX—TAX TITLES—DEEDS—RECITALS.

A recital in a deed to land sold for federal direct taxes that advertisement of the tax appeared in a named newspaper is no evidence of that fact.

84. STATUTES ⇐219—CONSTRUCTION BY ADMINISTRATIVE OFFICIALS.

A tax collector's construction of federal laws imposing direct taxes need not be deferred to by the courts, where there is no grave doubt as to the meaning of the law.

85. INTERNAL REVENUE ⇐28—FEDERAL DIRECT TAXES—ADVERTISEMENT OF TAX SALE.

Act March 5, 1816, c. 24, 3 Stat. 255, provided for direct federal taxes to be laid and apportioned according to act of 1813, and all of the provisions of Act Jan. 9, 1815, except so far as the same had been varied by subsequent acts. Sections 28 and 29 of the later act, relating to publication, were amended by Act March 3, 1815, which required publication of notice of tax sales to be made by the designated collectors at least once a week for eight weeks in every newspaper within the state in which the laws of the United States are by public authority published. *Held*, that notice of a tax sale on account of nonpayment of direct taxes for 1816 should be published in every newspaper in the state in which laws of the United States were by public authority published.

86. NEWSPAPERS ⇐1(4)—DESIGNATION OF OFFICIAL NEWSPAPER.

Evidence *held* insufficient to show that a newspaper, in which it was asserted sale for nonpayment of federal direct taxes had been advertised, was at the time of the advertisement a newspaper authorized to publish laws of the United States.

87. INTERNAL REVENUE ⇐28—FEDERAL DIRECT TAX—TAX TITLES—DEEDS—PRESUMPTION.

A recital in a deed to land sold for federal direct taxes that a newspaper in which it was stated advertisement of sale had been published was one authorized to publish laws of the United States raises no presumption to that effect.

88. NEWSPAPERS ⇐1(1)—DESIGNATION OF OFFICIAL NEWSPAPER.

Under Act March 5, 1816, levying federal direct taxes and providing for advertisement in accordance with earlier statutes imposing direct taxes in newspapers designated for the publication of United States laws, publication should be made in newspapers which at the time the advertisements were to be published were designated for the publication of laws of the United States.

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89. NEWSPAPERS ⊂=1(1)—EFFECT OF DESIGNATION.
In view of Const. art. 6, declaring that the Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made, shall be the supreme law of the land, Act March 3, 1815, § 3, providing that publication of notice of sales of land for nonpayment of federal direct taxes, etc., should be in every newspaper within the state in which the laws of the United States are by public authority published, requires publication of such notices be made only in the newspaper or newspapers designated to publish the federal laws.

90. NEWSPAPERS ⊂=1(1)—PUBLICATION OF ADVERTISEMENTS—CHARACTER OF NEWSPAPER.
In view of Act April 20, 1818, c. 80, 3 Stat. 439, and Act May 11, 1820, c. 92, 3 Stat. 576, relating to publication of United States laws, one relying on publication in one newspaper of the advertisement of a tax sale under Act March 5, 1816, imposing federal direct taxes, must show, not only that that paper was, at or before and after the time of publication, publishing orders, resolutions, and laws passed by Congress, but that it was the only newspaper in the state then so authorized.

91. INTERNAL REVENUE ⊂=28—FEDERAL DIRECT TAXES—PUBLICATION.
Publication of advertisement for sale of land for nonpayment of federal direct taxes imposed under Act March 5, 1816, which named one of the owners as "Robert," instead of "Richard," is insufficient, where the publication under the correct name "Richard" did not appear to have continued for the requisite number of times; the names not being idem sonans.

92. INTERNAL REVENUE ⊂=28—FEDERAL DIRECT TAXES—DEPOSIT OF LISTS WITH CLERKS OF DISTRICT COURTS.
One relying on a tax title to land sold for nonpayment of federal direct taxes must show that the collector complied with Act Jan. 9, 1815, § 30, requiring collectors designated by the Secretary of the Treasury to deposit with clerks of District Courts correct lists of the property sold, and where the records had been destroyed that fact must be proven affirmatively by other evidence.

93. EVIDENCE ⊂=186(1)—SECONDARY EVIDENCE—DESTRUCTION OF DOCUMENTS.
While satisfactory evidence of the loss or destruction of a document authorizes the receipt of secondary evidence of its contents, it does not establish the contents of the document.

94. INTERNAL REVENUE ⊂=28—FEDERAL DIRECT TAXES—STATUTES—DIRECTORY PROVISIONS.
Provisions of tax laws which are clearly intended for the benefit of the taxpayer are mandatory; hence Act Jan. 9, 1815, § 30, relating to collection of federal direct taxes, which requires collectors designated to deposit with clerks of District Courts correct lists of the property sold, is mandatory, and not directory, even though the lists were required to be filed after the tax sale.

95. INTERNAL REVENUE ⊂=28—FEDERAL DIRECT TAX—TAX DEEDS.
Where evidence extrinsic of the collector's deed showed what land sold for nonpayment of federal direct taxes was intended to be conveyed, an error in the Christian name of one of the owners against whom it was recited taxes had been assessed, should be treated as a clerical error, insufficient to invalidate the instrument.

96. INTERNAL REVENUE ⊂=25—FEDERAL DIRECT TAXES—ASSESSMENT.
Evidence *held* insufficient to show that federal direct taxes were assessed by the wrong collector.

97. INTERNAL REVENUE ⊂=28—FEDERAL DIRECT TAXES—ASSESSMENT.
Circumstantial evidence *held* sufficient to show that one executing a deed to land sold for federal direct taxes was the designated collector.

98. STATUTES ⇐38—PUBLICATION.
Under Act Va. Jan. 29, 1803 (2 Rev. Code 1819, p. 528), providing for forfeiture of lands for nonpayment of taxes, and requiring the auditor to publish the statute, forfeitures cannot be enforced where the statute was not published as directed.

99. TAXATION ⇐788(5)—SALES—BURDEN OF PROOF.
Where the burden of proving its validity rests on a party claiming under a tax forfeiture, a failure to affirmatively prove that the required notice was given is as fatal as would be evidence to the contrary.

100. STATUTES ⇐283(1)—PRESUMPTION—PUBLICATION.
Where there was no long, notorious, unbroken, and actual possession following an alleged forfeiture of lands under Act Va. Jan. 29, 1803, providing for nonpayment of taxes, there can be no presumption that the statute was published by the auditor as required.

101. TAXATION ⇐851—FORFEITURES—EXTRANEOUS EVIDENCE.
If extraneous evidence must be considered to identify land claimed to have been forfeited under Act Va. Feb. 9, 1814 (2 Rev. Code, 1819, p. 542), irregularities shown by such evidence should be considered, notwithstanding section 38, declaring that no irregularities, except such as appear on the face of the proceedings, may be relied upon to defeat the forfeiture.

102. TAXATION ⇐849—FORFEITURE—SUFFICIENCY OF ASSESSMENT.
Under Act Va. Feb. 9, 1814, providing for forfeiture of lands for nonpayment of taxes, it was not intended that land could be forfeited for nonpayment of taxes assessed on practically twice too great an acreage.

103. TAXATION ⇐338—ASSESSMENT—PERSONS TO WHOM LAND IS ASSESSED.
Land is properly assessed to persons in whom record title appears to be vested.

104. TAXATION ⇐849—ASSESSMENT—FORFEITURE.
A forfeiture for nonpayment of taxes cannot be enforced under Act Va. Feb. 9, 1814, where each record owner of one-half of the parcel was assessed on the whole, and the land was likewise assessed against the original patentees, for no one of those who might have been interested in the land could have obtained a redemption by payment of the tax for which he was justly liable.

105. TAXATION ⇐849—DELINQUENCY—EVIDENCE.
Where it appeared that many certificates have been issued by the auditor of public accounts as to the delinquency of taxes, based on check marks on old assessment lists, such check marks, while not very reliable, are admissible in evidence as tending to show that land was delinquent.

106. EVIDENCE ⇐341—TAX HISTORY OF LAND.
Where the tax history of land is deemed of importance, it should be shown by the attested or examined copies of entries in land books, lists of lands forfeited, etc.

107. TAXATION ⇐853—FORFEITED LANDS—PAYMENT OF TAX BY CLAIMANT.
Under Act Va. March 22, 1842 (Laws 1841–42, c. 13) § 3, declaring that all the right, title, and interest which shall be vested in the commonwealth in any lands west of the Alleghany Mountains by reason of the nonpayment of taxes heretofore due, or of the failure of the owner to cause the same to be entered on the books of the commissioner of the proper counties, and to have the same charged with taxes according to law, shall be and is absolutely transferred and vested in any person or persons other than those for whose default the same may have been forfeited, for so much as such person or persons may have just title to, held or derived from any grant of the commonwealth bearing date previous to January 1, 1843, who shall have discharged all taxes duly assessed against him or them, payment of taxes for the year 1841 by those claiming under the forfeited title does not transfer the commonwealth's title.

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108. TAXATION ⇐853—ASSESSMENT—REDEMPTION.
Until there has been a valid forfeiture of lands for nonpayment of taxes, no redemption or attempted redemption can possibly vest title in the party making the redemption.

109. TAXATION ⇐855—PATENT OF LANDS FORFEITED FOR TAXES—TRANSFER OF TITLE.
Where the commonwealth of Virginia issued a second patent to lands, title to which it was asserted had been forfeited, the commonwealth cannot thereafter, except for default of the second patentee or his successors, transfer title to another.

110. TAXATION ⇐855—TAX DEED—WARRANTY—CONSTRUCTION.
A warranty contained in a clerk's tax deed, pursuant to Code Va. § 666, is intended merely to prevent the clerk from asserting any title to the property, and does not have any binding effect on the state; the statute probably being based on the practice in chancery, which required commissioners to make deeds of special warranty.

111. EJECTMENT ⇐25(4)—OUTSTANDING TITLE—DEFENSES.
Unless an outstanding title be subsisting, valid, and enforceable it cannot be relied upon by a defendant in ejectment.

112. EJECTMENT ⇐9(2), 25(1)—ACTIONS—RECOVERY.
Where the plaintiff in ejectment fails to show that he has the true legal title to the land, he cannot recover.

113. APPEAL AND ERROR ⇐1061(1)—REVIEW—HARMLESS ERROR.
Where the court rendered judgment for defendant, the refusal to sustain defendant's demurrer to the evidence, if erroneous, was harmless.

114. EVIDENCE ⇐314(5)—HEARSAY—ADMISSIBILITY.
Testimony of a surveyor that a witness told him the place at which he located a corner was a point where the witness had seen corner trees standing is hearsay, and where the witness' testimony did not show that the trees stood at that point, the surveyor's testimony was not admissible to identify the place where he ended his line with the place where the trees had formerly stood.

115. ADVERSE POSSESSION ⇐101—"CONSTRUCTIVE POSSESSION."
One in possession of a small parcel of land, who obtained a patent to lands somewhat distant, and thereafter obtained patents to the intervening lands, so that he had one contiguous tract, has "constructive possession" of the whole, although the patents were obtained at different times, for the principle on which the doctrine of constructive possession of contiguous tracts is founded is that an actual possession by a colorable title holder of one of several tracts gives to the true title holder notice of an adverse claim to all of the tracts, and he must at his peril sue before the period of limitation runs.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Constructive Possession.]

116. ADVERSE POSSESSION ⇐45—RUNNING OF STATUTE—COMMENCEMENT.
Where constructive adverse possession of defendant's predecessor did not commence until 1862, limitations by reason of the stay law (Code Va. 1904, § 2919) did not begin to run until January 1, 1869.

117. TAXATION ⇐730—TAX TITLES—NATURE OF TITLES.
The title of a tax purchaser is a derivative one, and the tax purchaser is entitled only to such interest as he can show was vested in the owner at time of default.

118. STATUTES ⇐159—CONSTRUCTION—CONFLICT.
Statutes should be construed, if possible, so as to avoid conflicts.

119. ADVERSE POSSESSION ⇐19½, New, vol. 6 Key-No. Series—RUNNING OF STATUTES—COMMENCEMENT.
Actual possession of a tract of land creates a constructive possession of another tract which is the last of a chain or series of adjoining tracts.

Levy of taxes against senior title holder, followed by sale to the commonwealth and subsequent sale for taxes to a stranger, does not prevent junior title holder's constructive adversary possession of interlock from ripening and barring action by tax purchaser of the senior title.

120. COURTS ⟸352—FEDERAL COURTS—GENERAL OR SPECIAL FINDINGS.

Under Rev. St. § 649 (Comp. St. 1916, § 1587), the court where an action is tried without the jury has the discretion to find the facts, either generally or specially.

At Law. Ejectment by the Virginia & West Virginia Coal Company against Green Charles. Judgment for defendant.

On November 16, 1795, the commonwealth of Virginia granted to Richard Smyth and Henry Banks a tract of land, described as containing 200,000 acres, located then in Russell county, later in Tazewell county, and since 1858 in Buchanan county. On October 23, 1820, Wm. D. Taylor, "designated collector" of the federal direct tax of 1816 (3 Stats. at Large, 255, c. 24), sold this tract of land on account of nonpayment of said tax to Wm. Lamb, and on November 3, 1823, executed the following deed (Plaintiff's Exhibit 87):

"This indenture, made this third day of November, in the year of our Lord one thousand eight hundred and twenty-three, between William D. Taylor, collector designated by the Secretary of the Treasury for the state of Virginia, and collector of the direct taxes of the United States for the Eighteenth collection district of the state of Virginia, of the one part, and William Lamb, of the other part: Whereas, under and by virtue of the act of the Congress of the United States passed the 9th day of January, 1815, entitled 'An act to provide additional revenues for defraying the expenses of government and maintaining the public credit, by laying a direct tax upon the United States and to provide for the collection and assessing the same,' and the act passed the fifth day of March, eighteen hundred and sixteen, entitled 'An act to reduce the amount of direct tax upon the United States and the District of Columbia, for the year one thousand eight hundred and sixteen, and to repeal in part the act entitled "An act to provide additional revenue for defraying the expense of government, and maintaining the public credit by laying a direct tax upon the United States, and to provide for assessing and collecting the same,"' and also the act entitled 'An act to provide additional revenue for defraying the expense of the government, and maintaining the public credit by laying a direct tax upon the District of Columbia,' the tract of land hereinafter mentioned, lying and being in the county of Russell, in the First collection district of said state of Virginia, was duly assessed in the name of Robert Smith and Henry Banks as the owners or proprietors thereof, and by the said assessment and by virtue of the act secondly above mentioned the sum of fourteen dollars was imposed as a tax thereon for one year, to wit, the year one thousand eight hundred and sixteen; and whereas, the said proprietors or owners of the said tract of land were not resident of the said collection district in which the said land was situated, nor was the said land owned, occupied, or superintended by any person resident in the said collection district, nor were the said taxes paid to the collector of the said collection district within ninety days after the said collector had received the collection list from the principal assessor of the said district, nor within ninety days after the said collector had been required by the Secretary of the Treasury to advertise that the said taxes had become due; and whereas, in consequence of the said nonpayment of the said taxes, and in pursuance of the first recited act, and the twenty-eighth section thereof, the said collector of the said First collection district did transmit to the said William D. Taylor (the party of the first part to this conveyance and the collector designated by the Secretary of the Treasury, for the purpose of receiving such lists) lists of the property lying within the First collection district, not owned, occupied, or superintended by any person residing in the said First collection district, and the tax on which had not been paid within ninety days aforesaid, which lists comprised the said tract of land; and

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whereas, the said party of the first part (the collector designated as aforesaid) did cause due notification of the taxes due on the said land to be published once a week for eight weeks in succession in the Richmond Enquirer, the said newspaper being one in the state of Virginia, in which the laws of the United States were by public authority published, as provided by the said twenty-eighth section of the said first recited act, and the act amendatory thereof, passed the 3d day of March, 1815; and whereas, the said taxes on the said land remained unpaid for one year after the notification aforesaid, and the said party of the first part (the said designated collector), the said taxes having so remained unpaid for the term of one year, did, in pursuance of the twenty-ninth section of the said first recited act, and the said act amendatory thereof, passed the 3d of March, 1815, duly advertise once a week, for eight weeks in succession, the said land for sale for said taxes, and twenty per cent. thereon, as provided by the said first recited act, at the Eagle Hotel in the city of Richmond, Virginia, on the twenty-third day of October in the year one thousand eight hundred and twenty, which advertisement was published for the term and in the newspaper aforesaid, and in pursuance of the said advertisement so much of the said land was, at the time and place mentioned therein, offered at public sale as any purchaser would pay the taxes thereon and twenty per cent. added thereto for, and at the said sale the said William Lamb, the party of the second part to this conveyance, became the purchaser of two hundred thousand acres of the said land, he being the only bidder who would pay the said taxes, with the per cent. thereon, for the quantity so purchased of the said land; and whereas, since the said sale two years have elapsed, and the said land so sold as aforesaid has not been redeemed by any person, and by virtue of the provisions of the said first recited act the purchaser is now entitled to a deed for the same, from the said first party of the first part (the designated collector), conveying such title therein as the said act authorizes to be conveyed, or as the said party of the first part can, as the designated collector aforesaid (without any personal or individual responsibility whatever), convey, under the authority of the said first recited act: Now, this indenture witnesseth that the said William D. Taylor, collector of the Eighteenth collection district, in the state of Virginia, and the collector designated as aforesaid, by the Secretary of the Treasury, for and in the consideration of the premises, and for the sum of sixteen dollars and eighty cents, that being the amount of said taxes and twenty per cent. in addition thereto, to him in hand paid by the said William Lamb, before the ensealing and delivery of these presents, the receipt whereof from the said William Lamb he doth hereby acknowledge, has granted, bargained, and sold, and by these presents doth grant, bargain, and sell, unto the said William Lamb the said two hundred thousand acres of land in the county of Russell, and state of Virginia, being the land which was assessed in the name of Robert Smyth and Henry Banks, as aforesaid, and its appurtenances, and all the right, title, and interest that the said party of the first part is, under and by virtue of the said first recited act, authorized to convey in and to the same. To have and to hold the said two hundred thousand acres of land, in the county of Russell, and state of Virginia, and all and singular its appurtenances, to the said William Lamb, his heirs and assigns, forever, to the only use and behoof of the said William Lamb, his heirs and assigns, forever.

"In witness whereof the said party of the first part has hereunto set his hand and affixed his seal the day and year first above written.

"William D. Taylor. [Seal.]"

On August 30, 1833, the executors of Wm. Lamb conveyed the above-mentioned tract of land, as well as many other tracts and lots which had been purchased by Lamb at tax sales held by Taylor, collector, to Joseph Hagan and Sarah Purcell. On September 13, 1834, Joseph Hagan and Sarah Purcell conveyed to Geo. W. Hopkins 2,850 acres, a part of the 200,000-acre tract. On July 9, 1835, Hopkins reconveyed the 2,850 acres to Hagan and Purcell. Between 1834 and 1838 Sarah Purcell executed three powers of attorney authorizing sales of her interest in the 200,000-acre tract; but no sales appear to have

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been made. In 1835 Joseph Hagan instituted a suit against Sarah Purcell for a partition, inter alia, of the 200,000-acre tract, which was eventually granted. Some time prior to September 26, 1836, Joseph Hagan and Sarah Purcell were the plaintiffs in 9 caveat proceedings in the circuit superior court of Tazewell county, brought against as many proposing junior patentees of parts of the 200,000-acre tract. These suits were continued from time to time, and on April 23, 1844, they were dismissed, without trial, at the cost of the plaintiffs. On February 7, 1839, Sarah Purcell conveyed her part of the land to James Culbertson. In 1842 or 1843 Joseph Hagan and James Culbertson made, or at least attempted to make, a survey of the Smyth and Banks tract. While this was being done Culbertson made an agreement with one Edward Collins who was in adverse possession of a small part of the Culbertson tract to the effect that Collins, if Culbertson's title were subsequently held by the courts to be valid, should say that he had been holding possession for Culbertson and Hagan. This claim of possession, which continued until about 1855, is hereinafter discussed. As a result of a chancery suit between Joseph Hagan and James Culbertson, the latter's interest in the 200,000-acre tract was conveyed, on October 6, 1857, by Morison, commissioner, to Joseph Hagan. On April 4, 1871, Joseph Hagan conveyed the land to Patrick Hagan. From the recitals in a deed from Dennis, clerk, to Buchanan Company, to be mentioned later, it appears that some time prior to 1876 the 200,000-acre tract was transferred on the assessment list ("land book") from Patrick Hagan to Frederick Pearson. An offer by the plaintiff here to introduce in evidence (Exhibit 53) the record of a chancery suit, brought by Buchanan Company against Patrick Hagan and the nonresident heirs at law of Frederick Pearson, to establish the fact that Patrick Hagan had conveyed the land in 1874 to Pearson, which deed and the record thereof had been destroyed by fire, was overruled. In 1878 Frederick Pearson instituted in this court at Abingdon some 47 actions of ejectment against as many adverse claimants of parts of the 200,000-acre tract. None of these actions was ever brought to trial, although the evidence indicates that Pearson's attorneys made great efforts to find evidence sustaining the validity of the tax deed from Taylor to Lamb. In 1907 these actions were all dismissed. On November 3, 1883, Patrick Hagan, making no mention therein of a previous conveyance, conveyed the 200,000-acre tract to Frederick Pearson. The land was returned in the name of Pearson as delinquent for the taxes of 1876, as well as of subsequent years, to and including 1883. In 1886 the land was offered for sale because of these delinquencies and was bid in by the commonwealth. It was later conveyed to the Buchanan Company by Dennis, clerk. A part of the land was conveyed by the Buchanan Company to the plaintiff by deed of December 27, 1913, and the remainder by deed of April 2, 1914—both deeds having been made while the Virginia statute of March 13, 1912 (Acts 1912, p. 524), making ancient tax deeds prima facie evidence of the validity of the proceedings, was still in force.

No possession, except the claim of possession by Collins from 1842 to 1855, of any part of the 200,000-acre tract was had by or for any claimant under the Smyth and Banks patent. In 1906 the Buchanan Company employed one Raines as its agent. Raines lived on a small parcel of land, within the Smyth and Banks tract, belonging to his wife, apparently holding under a junior title, and acted as the agent of the company until 1910. On February 1, 1796, Richard Smyth, in his own behalf and as attorney in fact for Henry Banks (the deed reciting a power of attorney under date of December 2, 1795), conveyed the 200,000-acre tract to Abraham Moorehouse. The power of attorney was not proved. On February 2, 1796, Moorehouse conveyed a portion of the 200,000 acres, containing 102,313 and a fraction acres, to George Ralph. The effort of the defendant to show a subsisting and enforceable outstanding title was not successful. Payments of state and county taxes by the successive claimants under the Taylor tax deed were often partial and very irregular. The facts are too voluminous to justify detailed statement. During considerable periods no taxes were paid. At very irregular intervals some redemptions from delinquent taxes were made. Neither Pearson nor his heirs ever paid any taxes whatever.

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The defendant's chain of title, and the facts which raise some novel and interesting questions under the defense of adversary possession, will be hereafter set out. The location of the exterior lines of the Smyth and Banks patent were guessed at by several witnesses, who judged mainly from the location of the lands claimed by the numerous defendants in this and the other allied actions of ejectment brought in this court by this plaintiff. The patent, thus located, covers a very large part of Buchanan county, including the county seat, and contains apparently much more than 200,000 acres. Many of the defendants in these actions are the grandchildren of early settlers, who claimed partly under junior patents and largely under "court rights"—statutory judicial grants. From the evidence offered in behalf of the defendant it appears that during practically a century the land covered by the Smyth and Banks patent has been gradually settled by adverse claimants. Homes, schoolhouses, churches, and roads, many of them long antedating the memory of the oldest inhabitants, have been built. While the best informed of these adverse claimants probably knew, at least vaguely, of the existence of the claim under the Smyth and Banks patent, it has been seemingly for many years, and until recently, regarded as either abandoned or at least as invalid.

The third section of the Virginia act of March 22, 1842, hereinafter referred to, reads as follows:

"3. And be it further enacted, that all the right, title and interest, which shall be vested in the commonwealth in any lands or lots lying west of the Alleghany Mountains, by reason of the nonpayment of the taxes heretofore due thereon or which may become due on or before the first day of January next, or of the failure of the owner or owners thereof to cause the same to be entered on the books of the commissioner of the proper counties, and have the same charged with taxes according to law, by virtue of the provisions of the several acts of assembly heretofore enacted, in reference to delinquent and omitted lands, shall be and the same are hereby absolutely transferred to and vested in any person or persons (other than those for whose default the same may have been forfeited, their heirs or devisees), for so much as such person or persons may have just title or claim to, legal or equitable, claimed, held or derived from or under any grant of the commonwealth, bearing date previous to the first day of January eighteen hundred and forty-three, who shall have discharged all taxes, duly assessed and charged against him or them upon such lands, and all taxes that ought to have been assessed or charged thereon, from the time he, she or they acquired title thereto, whether legal or equitable: Provided, that nothing in this section contained, shall be construed to impair the right or title of any person or persons, who shall bona fide claim said land by title, legal or equitable, derived from the commonwealth, on which the taxes have been fully paid up according to law, but in all such cases the parties shall be left to the strength of their titles respectively." Acts 1841–42, p. 13; Hutchinson, Land Titles, pp. 92, 93.

The great length of the following opinion is due chiefly to an intent, fully shared in by counsel, to make of this, if possible, a test case.

S. B. Avis, of Charleston, W. Va., and Jeffries & Jeffries, of Norfolk, Va., for plaintiff.

E. M. Fulton, of Wise, Va., Wm. H. Werth, of Tazewell, Va., Chase & Daugherty, of Clintwood, Va., Greever, Gillespie & Devine, A. S. Higginbotham, Geo. W. St. Clair, and Geo. C. Peery, all of Tazewell, Va., C. C. Burns, of Lebanon, Va., J. H. Stinson, of Grundy, Va., Geo. E. Penn, of Abingdon, Va., and M. O. Litz, of Welch, W. Va., for defendant.

McDOWELL, District Judge (after stating the facts as above). This action of ejectment, which by agreement involves only one of several tracts of land claimed by the defendant, is a branch of an

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action brought by the plaintiff against Fairmount-Buchanan Company and some 1250 other defendants; and the main action is one of 17 similar actions of ejectment brought in this court at or about the same time by the same plaintiff against some hundred and seventy odd additional defendants. The trial of the case was by stipulation held before the court without a jury. Chiefly because of the short time allowed for the trial, by reason of terms of court elsewhere, the trial was conducted in a somewhat novel manner. In a very great majority of instances objections to the admission of testimony were, pro forma, overruled; but it was announced that I would, before final decision, review these rulings so far as they were of importance and correct such as appeared to be improper, with an exception saved to the losing side in each instance. The trial thus conducted so nearly occupied the entire time between the commencement of the trial and the beginning of the October term at Abingdon that it was shown that the method adopted was well chosen. The questions as to the admissibility of evidence raised and in effect taken under advisement during the course of the trial will be disposed of in this opinion in so far as seems necessary.

The boundaries of the tract of land in controversy in this particular trial are set out in a stipulation which has been filed and are also set out in Plaintiff's Exhibit 34. While a grant of land from the commonwealth to an individual may not be generally known as a patent, it is usually so styled in the Virginia Reports, and that term will be so used in this opinion. For the purpose of this trial alone it was stipulated that the Smyth and Banks patent covers the tract claimed by Green Charles in this particular controversy.

Plaintiff's Chain of Title.

The muniments of the plaintiff's title were in the main introduced in the reverse of the order in which the title accrued. A list of the chief documents in the chains of title, in the order of their dates, may aid in an understanding of the questions to be considered:

(1) Patent, November 16, 1795, from state of Virginia to Richard Smyth and Henry Banks.

(2) Tax deed, November 3, 1823, Taylor, collector, to Wm. Lamb.

(3) Will of Wm. Lamb, March 5, 1827.

(4) Deed, August 30, 1833, Lamb's executors to Joseph Hagan and Sarah Purcell.

(5) Deed, February 7, 1839, Sarah Purcell to James Culbertson.

(6) Record, 1856, Joseph Hagan v. James Culbertson.

(7) Deed, October 6, 1857, Morison, commissioner, to Joseph Hagan.

(8) Deed, April 4, 1871, Joseph Hagan to Patrick Hagan.

(9) Deed November 8, 1883, Patrick Hagan to Frederick Pearson.

(10) Tax deed, February 17, 1905, Dennis, clerk, to Buchanan Company.

(11) Deeds from Buchanan Company et al. to Virginia & West Virginia Coal Company.

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The Defendant's Chain of Title.

(1) Patent, May 1, 1861, state of Virginia to Silas Ratliff.
(2) Deed, December 8, 1896, Ratcliff's heirs to Margaret Justice.
(3) Deed, May 24, 1910, John W. and Margaret Justice to Green Charles.

At the trial the plaintiff offered the charter of the plaintiff company, the tax deed from Dennis, clerk, et al., to the Buchanan Company, a deed from the Buchanan Company to the plaintiff, another deed from the Buchanan Company to the plaintiff, and a deed from Martin Williams et al. to the plaintiff. No objection was made to the introduction of any of the foregoing exhibits.

Exhibit No. 6.

Copy of deed from P. Hagan et ux. to F. Pearson.

[1] (1) The first objection to the introduction of this copy is that the deed does not appear to have been sealed by the grantors. By section 2841, Code 1904, a scroll affixed by way of a seal by a natural person has the same force as a seal. The copy offered in evidence was written on a typewriting machine. The signature and scroll are shown as follows: "Patrick Hagan ()." I have no hesitation in ruling that this copy is prima facie evidence that the original instrument had a scroll used by way of seal after the name of Patrick Hagan, and that the deed book so shows.

[2] (2) The next objection is that the deed was not acknowledged before an officer authorized to take acknowledgments. This objection is based on the supposition that the statute of April 2, 1873 (Acts 1872–73, p. 382), which abolished the equity jurisdiction of the county courts, ipso facto destroyed the office of commissioner in chancery of the county courts. The acknowledgment in question was certified on November 8, 1883. By the act of June 17, 1870 (Acts 1869–70, p. 174), "commissioners in chancery of a court of record" were authorized to take and certify acknowledgments. This power has never been withdrawn (Code 1904, § 2501), and it appears that the power of the county courts (which were courts of record) to appoint commissioners in chancery was not withdrawn until the Code of 1887 (section 3319) took effect. In Code 1860, p. 720, c. 175, § 2, is the following:

"Each court may, from time to time, appoint commissioners in chancery, or for stating accounts, who shall be removable at its pleasure; there shall not be more than three such commissioners in office at the same time for the same court."

In Acts 1871–72, p. 466, is the same provision, in effect. In Code 1873, p. 1103, it is provided:

"Each court shall, from time to time, appoint commissioners in chancery, or for stating accounts, who shall be removable at pleasure. * * *"

This same language is used in the act of March 29, 1875, after the chancery jurisdiction had been taken from the county courts (Acts 1874–75, p. 366), and also in Act Jan. 3, 1876 (Acts 1875–76, p. 7),

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Act Dec. 29, 1877 (Acts 1877–78, p. 6), Act Jan. 14, 1879 (Acts 1878–79, p. 21), and Act March 6, 1886 (Acts 1885–86, p. 544). See, also, Act July 11, 1870 (Acts 1869–70, p. 442), which reads:

"The judge of each court having jurisdiction of the probate of wills and granting administration in the state, shall designate one of its commissioners in chancery, who shall be known as the commissioner of accounts. * * *"

This statute, so far as I have discovered, remained in force until the Code of 1887 was adopted. See section 2671, Code 1887.

[3] As the county court of Scott county had the power to appoint James B. Osborne a commissioner in chancery, and as such commissioner had power to take and certify acknowledgments of deeds in 1883, this objection was properly overruled, even without reference to the curative act of March 5, 1900 (Acts 1899–1900, p. 851). No evidence that Osborne was then a commissioner was necessary. Smith v. Chapman, 10 Grat. (Va.) 445, 452, 453. The doubt that gave rise to that statute was, it seems, not well founded. See, also, Acts 1901–02, p. 43; section 2501a, Code 1904.

[4] The original deed was recorded in Buchanan county in Deed Book 6, p. 147, on November 12, 1883. The copy offered in evidence was taken from Deed Book L, p. 418. This last record appears to have been made January 9, 1894, from the original deed. Under section 3339, Code 1904, there seems to be no ground on which to question the admissibility of the copy offered.

Exhibit No. 7.

[5] This is a copy of the same deed (Patrick Hagan et ux. to Frederick Pearson) above considered, taken from the deed book of Dickenson county. I am not advised of any authority for admitting this copy in evidence. It appears from the Dickenson county clerk's certificate of admission to record that the paper presented to him was not the original deed, but was a copy. The case does not come under the terms of either section 2506 or section 3339, Code 1904. Moreover, no evidence has been offered showing that any of the land conveyed lies in Dickenson county. There was no statement that this copy was offered for the purpose of showing that the mere act of having a copy of the deed recorded in Dickenson county was an act of ownership The ruling allowing this copy in evidence was erroneous.

Exhibit No. 8.

This exhibit was later withdrawn, and Exhibit 53 offered in lieu thereof.

Exhibit No. 9.

A Buchanan county copy of a certified copy of a deed from Joseph Hagan to Patrick Hagan.

[6] The paper offered is a certified copy taken from Buchanan County Deed Book L, which was made from an attested copy in 1894. By this paper it is shown that the original deed was recorded in Buchanan county in 1874, that a certified copy thereof was made in 1883 and that this copy was recorded in 1894. The testimony of W. L. Den-

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nis, the clerk and custodian of the Buchanan county deed books, is that the deed book in which the original deed was recorded (No. 2) is not in existence. I think that section 3339, Code 1904, makes the copy admissible. See, also, Taliaferro v. Pryor, 12 Grat. (Va.) 277, 283, 284; Effinger v. Hall, 81 Va. 94. The original deed was properly acknowledged and certified, and was clearly admissible to record. It is true that the attested copy of the deed made in 1883 is not offered, and that there is no evidence of its loss or destruction. But the statute gives to the record of that copy the same force and effect that the first record had. I read the last sentence in the statute as giving by implication as great authenticity to the officially certified copy taken from Deed Book L as a duly certified copy taken from Deed Book No. 2 would have had. Exhibit 9 was, in any event, properly admitted.

[7, 8] However, before it occurred to any one at the trial that the foregoing statute covered the point another very interesting question arose as to the admissibility of the evidence of J. L. Jeffries. Mr. Jeffries testified that he tried in 1903 or 1904 to find the original deed in the office of the clerk of the Buchanan county court, and that Jos. Hibbitts, then the clerk, had informed him that the original deed was destroyed by the fire which destroyed the Buchanan county courthouse in 1885. He also testified that Hibbitts has since then died, and that Patrick Hagan had told him that he did not have the original deed and that it had been burned in the clerk's office. All of this evidence was admitted over objection. I shall as briefly as may be discuss the question, as it recurred at later stages of the trial.

The statement of what Hibbitts had told the witness was admissible, even without the evidence of his subsequent death. Corbett v. Nutt, 18 Grat. (Va.) 625, 638, 639. As a matter of authority, all of the testimony in question was admissible. Corbett v. Nutt, supra; Beirne v. Rosser, 26 Grat. (Va.) 537, 543, 545; Minor v. Tillottson, 7 Pet. 99, 101, 8 L. Ed. 621; 2 Wigmore, Ev. 1196. See, also, De Lane v. Moore, 14 How. 253, 363, 364, 14 L. Ed. 409; Meehan v. Forsyth, 24 How. 175, 180, 16 L. Ed. 730. As a matter of reason, also, I think it true that the evidence was admissible and sufficient. In cases where the party proposing to offer secondary evidence of undoubted accuracy has no interest to hold back the original, and where there is no ground for suspicion that the original could be produced, if desired, the law does not require convincing evidence of the loss or destruction of the original document. Nothing more is required than evidence that an unsuccessful search for the original was made in good faith and with reasonable diligence. Colley v. Sheppard, 31 Grat. (72 Va.) 312, 321; 25 Am. & Eng. Encyc. (2d Ed.) 165, 166; 8 Encyc. Ev. 350, 351; 2 Wig. Ev. § 1194.

As direct evidence of the loss of the original deed the witness' statement of what Hibbitts and Hagan had said is clear hearsay. However, it was necessary to show that the unsuccessful search had been made in good faith and with diligence. For the purpose of showing this fact, the statements are information acted upon by the witness and are admissible. See 1 Greenleaf, Ev. (14th Ed.) § 101; 3 Wigmore, Ev. §§ 1789, 2314. From 8 Ency. Ev. 349, 350, 353, 354, and notes, 2 El-

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liott, Ev. § 1467, and notes, and 1 Greenleaf, Ev. (14th Ed.) § 558, p. 646, it may seem that there is much authority for the contrary view; but I doubt if such is the fact. In cases where the party proposing to introduce secondary evidence of the contents of an alleged lost document has an interest in holding back the original, or where there is doubt as to the accuracy of the secondary evidence, testimony such as we have under consideration may with perfect propriety be held admissible, but insufficient to justify the introduction of the secondary evidence. The circumstances of each case must be known before it can be said that any case is opposed to the ruling here made. I think the rulings made were correct.

Exhibit No. 10.

Certified copy from the Lee county deed book of the record of the original deed from Joseph Hagan to Patrick Hagan.

[9] Admitting this copy in evidence was, I think, error, although harmless error. There is nothing in the deed or in the evidence to indicate that any part of the land conveyed was in Lee county. The reason given for offering this copy without evidence that the clerk's office of Lee county was in the vicinity of the land, would, I think, be insufficient. The recordation of a deed at a place remote from the land conveyed would give no notoriety to the transfer of title among people interested in the land. The copy was not offered as evidence tending to show claim of ownership. I think this copy was improperly admitted.

Exhibits 11, 12, 13, and 14.

[10-12] These are two decrees of the Scott county circuit court in the cause of Joseph Hagan v. James Culbertson and another, a deed from Smith H. Morison, commissioner, to Joseph Hagan, taken from the Buchanan county deed book, and another copy of the same deed taken from the Scott county deed book.

I think the decrees were properly admitted, although only the decree of October 16, 1856, was strictly necessary. The purpose in offering the decrees was merely to show the authority of Morison, as commissioner, to pass Culbertson's title to Hagan. The first decree shows that James Culbertson was a defendant in a chancery suit, that he answered the bill, and that the decision was rendered on the merits, after consideration of the pleadings and depositions and a report of a commissioner. The decree directs Smith H. Morison, as commissioner, to convey to Joseph Hagan (if Culbertson does not himself do so by a given date) James Culbertson's interest in certain tracts of land. The first is described as James Culbertson's "interest in one hundred thousand acres of land lying in Tazewell county, Virginia, being the same land purchased by said James from Sarah Purcell." The Scott county tract is described more in detail. (It may be remarked in passing that the sufficiency of the description of the land in Tazewell county is made plain by Exhibit 15.) This court takes judicial notice of the fact that the circuit court of Scott county, Va., is, and was in 1856, a court of record and of general jurisdiction. Although all the

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details of the controversy between Hagan and Culbertson are not made clear by the decree, enough is shown to make it appear that the court had jurisdiction of the subject-matter. The circuit courts then, as now, were courts of the widest possible original jurisdiction in civil cases. It follows that there was no necessity of offering any more of the record than was offered. In Krebs v. Welch, 111 Va. 432, 435, 69 S. E. 346, 347, it is said:

"Whether or not a judgment or decree, without any other portion of the record, is competent and sufficient evidence, depends upon whether or not the judgment or decree so offered satisfactorily establishes the fact it is offered to prove."

See, also, White v. Clay, 7 Leigh (Va.) 68, 78, 82; Masters v. Varner, 5 Grat. (Va.) 168, 171, 50 Am. Dec. 114; Cales v. Miller, 8 Grat. (Va.) 6, 8, 12; Alderson v. Miller, 15 Grat. (Va.) 279, 285.

The decree in question authorized Morison to convey, if James Culbertson did not himself make the conveyance by January 16, 1857. Morison's deed, made October 6, 1857, recites:

"* * * And whereas, the said James Culbertson has not made said conveyance to said Hagan as said Morison is informed by said Hagan, * * *" etc.

I think this should be treated, especially after the lapse of time that has intervened, as a recital that Culbertson had not made the conveyance, and the remainder treated as surplusage. By statute this recital is prima facie true. Acts 1899–1900, pp. 1247–48; Code 1904, § 3333, a. The admissibility of the decree as constituting a link in plaintiff's title is not open to question. See authorities cited in the discussion of Exhibit 53, post. The evidence of the loss of the remainder of the record of Hagan v. Culbertson, while unnecessary, was not inadmissible.

[13, 14] Exhibit 13 is a copy of the deed by Morison, commissioner, to Hagan, taken from the Buchanan county deed book. It shows that the record was made from an attested copy of the deed taken from the Scott county deed book. Section 3339 does not seem to apply, and as evidence of the transfer of title it was inadmissible. However, this copy was admitted merely as tending to show an assertion of ownership, in that the copy was recorded. This expenditure was made in 1894. The inference that Pearson had the copy recorded is not an unreasonable one, as he alone had any legitimate interest to go to this expense, and it does, in some very slight measure, tend to show a belief of ownership of the land on his part. This exhibit is almost on the border line between tendency to prove an issue and too great remoteness, but was probably rightly admitted for the purpose for which it was admitted.

[15] Exhibit 14 is a copy taken from the deed book of Scott county. Part of the land conveyed by the deed is in that county, and hence the deed was properly recordable there. The objection to this copy is that the certificate of acknowledgment is, as alleged, made by the grantor. This objection was made under a misapprehension of the facts shown on the face of the exhibit. The deed was acknowledged

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(section 2500, Code 1904) in open court by S. H. Morison as commissioner, and the court ordered it to be recorded. I think it has always been the practice for the clerks of the county courts, where a deed was acknowledged in open court and ordered to be recorded, to indorse on the deed these facts. Assuming that S. H. Morison, clerk, is the same man that executed and acknowledged the deed as commissioner, I see no ground for holding that the deed was not properly admitted to record, or why a certified copy thereof is not admissible in evidence. The clerk of the county court was the right person to indorse on the deed the order of that court. I know of no rule which disqualified him to act merely because he was, in his capacity as commissioner in chancery of the circuit court, the grantor in the deed. He performed merely a ministerial duty in making the indorsement showing the action of the county court. The case is more nearly akin to Paul v. Baugh, 85 Va. 955, 961, 9 S. E. 329, than it is to Davis v. Beazley, 75 Va. 491. My conclusion is that these exhibits were properly admitted.

Exhibit 15.

Copy of deed from Sarah Purcell to James Culbertson.

[16] The only objection to this copy is founded on the assertion that the law in 1839 did not authorize an acknowledgment before two magistrates. 1 Rev. Code 1819, p. 363, § 7, fully authorized the certificate that was made. This statute seems to have remained in force until the Code of 1849 (volume 1, p. 512, § 3) went into effect. This exhibit was properly admitted.

Exhibit 16.

[17] This is a copy of the deed from Sarah Purcell to James Culbertson, taken from the Buchanan county deed book record, which was made in 1894 from an attested copy taken from the Tazewell county deed book in 1883. This paper is not made admissible by section 2506, Code 1904. When Buchanan county was in 1858 (Acts 1857–58, p. 108) formed out of parts of Tazewell and Russell counties, the original deed from Sarah Purcell to Culbertson became recordable in Buchanan county. If this original had become lost, on affidavit of such fact, an attested copy taken from the Tazewell county deed book became recordable. There was in this court no evidence offered of the loss of the original deed, and the certificate of admission to record made by the clerk of the Buchanan county court in 1894 does not show that the affidavit required by section 2506 was made. Granting that a clerk's certificate is conclusive of any fact certified (Taliaferro v. Pryor, 12 Grat. [Va.] 277, 284, 288), still the essential fact was not certified. Section 3339, Code, does not apply. If the original deed had prior to 1894 been recorded in Buchanan county, and the deed book subsequently destroyed, an attested copy made from that record could have been admitted to record. As this paper was not offered for the purpose of proving an act of ownership by Pearson, in having a copy of the deed recorded in Buchanan county, I do not see that this copy is admissible. It was improperly admitted.

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Exhibits 17 and 18.

Decrees of Russell county court in partition suit of Joseph Hagan v. Sarah Purcell.

[18] These decrees were offered merely as showing an act of ownership, and in order to explain the fact that for a time taxes were assessed in severalty against Sarah Purcell and Joseph Hagan. The fact that the entire record was not offered, even without reference to the evidence showing loss of the remainder of the record, is of no moment. See discussion of Exhibits 11 and 12. The Russell county court, in quarterly session, was a court of general jurisdiction. 1 Rev. Code 1819, p. 246, § 7. So far as I know, the statutory provision giving jurisdiction in partition to the court of the county where the land is (section 2562, Code 1904) was not enacted until 1849 (Code 1849, p. 526, § 1). The act of 1831 (Acts 1830–31, p. 99) relates only to cases where some of the owners are unknown. The lands were at the date of this proceeding in Tazewell and Scott counties, but the proceeding was by consent. The suit was not in rem, but at most quasi in rem. If any objection to the venue could have been made, it was waived. The court had general jurisdiction of equity cases and the defendant consented that the decree of October 6, 1835, be entered. 22 Ency. Pl. & Pr. 831; 40 Cyc. 41, 111. I think these decrees were properly admitted.

Exhibit 19.

A copy of deed of Wm. Lamb's executors to Hagan & Purcell.

[19] (1) The first objection to this deed is that the grantors did not add to their signatures anything to indicate that they signed as executors. The deed begins:

"This indenture made * * * between William P. Thompson and Bernard Hagan, * * * executors of the last will and testament of William Lamb, deceased, of the one part, and Joseph Hagan and Sarah Purcell, * * * of the other part."

It contains a recital that the sale of the land was in pursuance of the authority vested in the parties of the first part by the said will; also a recital that the court directed Bernard Hagan to unite with his coexecutor in conveying the title as it was vested in the said executors by the said will. The granting clause reads:

"That the said William P. Thompson and Bernard Hagan, executors as aforesaid, by these presents do grant * * * and convey," etc.

The warranty also is against all persons claiming under the grantors "as executors as aforesaid." The intention of the grantors in this deed is so manifest that I can think of no reason for holding that it is not the deed of the executors. It would have been more in accordance with modern practice had the word "Executor" been added to each signature, but such addition was, I think, unnecessary. The intent of the parties is the controlling principle in construing deeds, and I think this principle should apply in this case. In a digest note of the case of Kingsbury v. Wild, 3 N. H. 30, it is said:

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"An administrator's deed to land sold under an order of the probate court need not be signed by him as administrator, especially if the capacity in which he conveys appears in any other part of the deed." 22 Cent. Dig. 2180.

See, also, 16 Cent. Dig. 67; Heffernan v. Harvey, 41 W. Va. 766, 24 S. E. 592; Boggess v. Scott, 48 W. Va. 322, 37 S. E. 661.

This objection was properly overruled, in so far as this ground of objection is concerned.

[20] (2) The second objection is that the deed does not appear to have been properly acknowledged. The particulars of this objection are not given. No Virginia authority has been cited, and I have found none. I am unable to find the slightest flaw in the certificate, as it seems to conform entirely to 1 Rev. Code 1819, p. 363, § 7, unless it be that the certificate does not state that the grantors acknowledged the deed to be their act and deed as executors. But this, again, was unnecessary. The certificate follows verbatim the form given in the statute. The purpose of the acknowledgment and the official certificate thereof is to prevent fraud and mistake. Its essence is the admission by the person who executes the instrument to which the certificate is appended that such instrument is his act. To put into the mere certificate of acknowledgment, in addition to the full statement in the deed, a statement of the capacity in which the party acted in executing the instrument would seem to be as unnecessary as to insert therein a statement of the authority under which he acted. In 1 Corpus Juris, p. 848, § 191, it is said:

"*Acknowledgment by Agent or Attorney.* A certificate of acknowledgment by an agent or attorney must show that it was made by such agent or attorney in behalf of the principal; but no particular set of words is necessary, in the absence of express statutory requirement, to show that he made the acknowledgment in his representative and not his private capacity. If that fact can be gathered from a consideration of the certificate, in connection with the deed, it is enough."

While perhaps the amendment of sections 2500 and 2501 found in Acts 1895–96, p. 542, may not be retroactive, still, if not, I know of no good reason for holding it to be anything but declaratory of the pre-existing rule. This statute reads in part:

"Where any such writing purports to have been signed * * * in any representative capacity whatsoever, the certificate of acknowledgment * * * shall be sufficient, * * * without expressing that such acknowledgment was * * * in a representative capacity."

This objection was, I think, properly overruled, in so far as this point is concerned.

(3) The third objection (that the recitals in the deed concerning the will of Wm. Lamb are not competent evidence) need not be considered, as a copy of the will was subsequently introduced in evidence.

[21, 22] (4) The fourth objection is that it appears from the recitals in the deed that the devisees of Wm. Lamb were not before the court "when the decree, under which the executors professed to act, was rendered." In Lamb's will we find:

"It is my will * * * that all my just debts [be paid], * * * all of which debts, costs and expenses shall be paid out of moneys arising from the

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sale of any part of my real estate that my executors may deem most proper to be sold for the above purpose. * * *"

The expectation of the testator that some of his real estate would have to be sold in order to pay his debts, and his intent that the executors should select the lands to be sold, is beyond question. The will does not expressly give to the executors the power to either sell or convey the lands selected by them to be sold. I am inclined to believe that the will impliedly gives to the executors, acting jointly, power both to sell and to convey (40 Cyc. 1823); but, if not, there was in force during the entire period with which we are concerned a statute which reads as follows:

"52. The sale and conveyance of lands devised to be sold, shall be made by the executors, or such of them as shall undertake the execution of the will, if no other person be thereby appointed for that purpose, or if the person so appointed shall refuse to perform the trust, or die before he shall have completed it; but, if none of the executors named in such will shall qualify, or, after they have qualified, shall die before the sale and conveyance of such lands, then, in those cases, the sale and conveyance thereof shall be made by such person or persons to whom administration of the testator's estate, with the will annexed, shall be granted." 1 Code 1819, p. 388, § 52.

In part this statute was drawn from 21 Hen. VIII, c. 4, § 1, which is quoted in Mills v. Mills, 28 Grat. (Va.) 490. The first form of the statute (act of 1785) is found in 12 Henning's Stats. at Large, 150. The statute as it appears in the Code of 1819 was enacted in 1792, and remained unchanged, so far as I have discovered, until 1849. See Code 1849, p. 545; Code 1904, § 2663. If the will should not be construed as authorizing the executors to sell and convey, the statute of 1792 seems to me to apply to the case, and to give to the executors the power to sell and to convey any lands which, acting jointly, they selected for sale. The lands to be selected for sale by the two executors were "lands devised to be sold," and the will, as we are assuming, did not appoint any one to sell them or to convey them to the purchaser. The English statute covered only the case in which some or one of several executors refused to join in a sale. The Virginia statute of 1785, supra, was much broader, and the act of 1792 was still broader. The purpose of this legislation was to prevent the necessity of a resort to a court of equity, and to empower the executors (or, failing them, the administrator c. t. a.) to sell and convey when the testator had by his will shown an intent that his land be sold. See Mosby v. Mosby, 9 Grat. (Va.) 584, 585, 598.

It follows that, under either construction of the will, the executors, acting jointly, had full power both to sell and to convey, and it seems a necessary conclusion that a sale and conveyance made by the two executors divested any title that was, or may have been, vested in Lamb's devisees. If the devisees had the legal title, it was divested by the execution of the power of sale. Coles v. Jamerson, 112 Va. 311, 317, 71 S. E. 618, 50 L. R. A. (N. S.) 407. From the only evidence we have it appears that the sale was made by the two executors acting in concert. The deed recites:

"And whereas, the said parties of the first part * * * did on the first day of October, 1830, in pursuance of the power and authority vested in

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them as aforesaid, expose[d] to sale, * * * at which sale Joseph Hagan and Sarah Purcell became the purchasers. * * *"

Subsequently the deed was executed by both the executors. It is true that a suit in equity was instituted and a decree obtained before Bernard Hagan was willing to join in the execution of the deed; but I do not see that we are concerned as to the nature of that suit, or as to the parties thereto. It seems to me that, if Bernard Hagan had by any not unlawful means been induced to execute the deed, the delivery thereof vested the legal title in the grantees. No matter who were or were not parties, the decree of the court overcame Hagan's objections to executing the deed, and he did execute it. As the will, or the will and the statute, gave the executors the power to sell and convey, no suit against the devisees was necessary. The chief purpose of the statute was to prevent the necessity of such suit. Elys v. Wynne, 22 Grat. (Va.) 224, 230. Just why Bernard Hagan declined to execute the deed we do not know. Among the numerous surmises that may be made, one is that he merely doubted if the executors had the power to convey, and wanted the sanction of an order of court. To the suit that was brought, the devisees may possibly have been proper parties. They were not necessary parties, for neither the power to sell nor the power to convey was derived from the court's decree. These powers were derived from the will, or from the will and the statute. A deed voluntarily made after the sale by the two executors would undoubtedly have passed the title to the land. It follows (at least in the absence of evidence of fraud or duress) that the nature of the proceeding which overcame Hagan's objections to joining in the execution of the deed cannot affect the devolution of title to Joseph Hagan and Sarah Purcell.

(5) If the foregoing be sound, the fifth ground of objection—that the court had no jurisdiction—also fails.

[23] (6) The last objection is that the land conveyed is, so far as we are concerned, described as formerly belonging to Robert Smith and Henry Banks. The deed further describes the land as having been sold and conveyed to Wm. Lamb by William D. Taylor, collector, by deed dated November 3, 1823, and admitted to record in Russell county March 22, 1824. The intention on the part of the executors to convey the 200,000-acre tract which was conveyed by Taylor to Lamb is so manifest that no discussion seems necessary.

It follows that all the objections to the deed from Lamb's executors to Joseph Hagan and Sarah Purcell were properly overruled.

Exhibit 20.

A copy from the Buchanan county deed book of the deed from Lamb's executors to Hagan and Purcell.

This copy was offered merely "to keep the record straight." It is a copy of a record made from a copy taken from the Russell county deed book. I do not see that it falls under either section 2506 or section 3339. See discussion of Exhibit 16. It was unnecessary for the purpose of keeping the record straight, and the ruling admitting it must be reversed.

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Exhibits 21, 22, and 23.

[24, 25] The first is a deed of July 9, 1835, from Geo. A. Hopkins to Hagan and Purcell. As it does not relate to the Green Charles parcel, it would have no bearing on any question in this case, without the avowal that was made. Exhibit 22, next introduced, is a deed, dated September 30, 1834, from Joseph Hagan and Sarah Purcell, by Hagan, as attorney in fact, to Hopkins, for the same two parcels which Hopkins reconveyed by Exhibit 21. Exhibit 23 is a power of attorney from Sarah Purcell to Joseph Hagan. It was executed in November, 1834, and could not have authorized Hagan to make the deed to Hopkins of September 30, 1834. Moreover, it was acknowledged before one justice of the peace. So far as I know, this was not permissible until the Code of 1849 was adopted. Therefore the copy of this power was improperly admitted. It follows that Exhibit 22 did not pass Sarah Purcell's interest; but I think Exhibits 21 and 22 are admissible as evidence of an act of ownership by Joseph Hagan.

Exhibits 24, 25, and 26.

I think these powers of attorney were properly admitted as acts indicating claim of ownership on the part of Sarah Purcell, although the last one verges on the extreme limits of admissibility because of remoteness.

Exhibit 27.

The will of Wm. Lamb.

What has been said as to the deed from Lamb's executors covers the objections to this exhibit. I think it was properly admitted.

Exhibits 28 and 29.

[26] These are original tax receipts, showing the payment by or for Sarah Purcell on 100,000 acres of land in Tazewell county for the years 1840 and 1841. The partition between Joseph Hagan and Sarah Purcell was made in 1837. The conveyance from Sarah Purcell to Culbertson was not recorded in Tazewell county until 1848. For the years of 1840 and 1841 Sarah Purcell was liable for the taxes, and I know of no reason why these receipts are not admissible as evidence of acts of ownership.

Exhibits 30 and 31.

[27] These are also original receipts showing payment, in redemption, of the delinquent taxes on the 200,000-acre tract for the years 1865 to 1873, both inclusive. Being originals, much over 30 years of age, which came from the possession of Patrick Hagan, who made the payments in 1873, their authenticity is fully established. I think they were properly admitted.

Exhibit 32.

Patent to Richard Smyth and Henry Banks for 200,000 acres of land in Russell county, dated November 16, 1795. No objection was made to the introduction of this document.

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Exhibit 33.

[28] This is an extract from the Journal of the Executive Proceedings of the United States Senate, certified in accordance with section 895 R. S., 3 Fed. Stats. Anno. 34 (Comp. St. 1916, § 1508), showing that Wm. D. Taylor's nomination as collector of direct taxes for the Eighteenth collection district was on February 14, 1814, confirmed. I think this document was properly admitted. It is duly authenticated, and proves what it purports to show. It does not, of course, prove that Taylor was appointed "designated collector"; but this fact does not make the paper inadmissible.

Exhibit 34.

A copy of the deed from John W. Justice et ux. to Green Charles. This was introduced by the plaintiff merely to have in the record a description of the particular tract of land in controversy in this particular action. No objection was made.

Exhibit 35.

[29] This is a certificate of the auditor of public accounts. It was (section 3334, Code 1904) filed in due time, on August 21, 1915. The first day of the term at which it was offered commenced on September 14, 1915. However, the fact certified does not come within the provisions of section 3334, Code 1904. See discussion of Exhibit 37, post. It is not shown to be a certificate of the payment of taxes on either forfeited or delinquent lands. For all that we can learn from this certificate the taxes for 1835 may have been paid in 1835. Indeed, the source of the auditor's information (the land book) indicates that they were then paid. The fact sought to be proved would be admissible, if properly proved, as an act of ownership; but the statute does not authorize an ex parte certificate to be used in the circumstances here shown. The paper does not purport to be a copy of any paper on file in the office of the auditor of public accounts. I was in error in admitting this certificate, and the ruling made at the trial must be reversed.

Exhibit 36.

This is another auditor's certificate, and is open to the same objection as Exhibit 35. When this paper was offered, I thought that the quotation in the certificate might be of some importance to the plaintiff, and might possibly fall under the head of a copy of a document or paper in the auditor's office (section 3334); but it is not such. The part that is a copy is a mere excerpt, which would be meaningless, but for the facts certified as to where the quoted words are found. I was in error in admitting this exhibit, and the ruling must be reversed.

Exhibit 37.

This is also an auditor's certificate. Section 3334, Code 1904, under the head of what is admissible in evidence, reads in part as follows:

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"A copy of any record or paper * * * in the office of * * * either auditor. * * * And the certificate of the auditor of public accounts of the fact and time of the return of any real estate as delinquent, or of the sale thereof for taxes, shall be prima facie evidence of what is stated in such certificate. * * * The certificate of the auditor of public accounts of the payment or nonpayment, at any time, of taxes on forfeited or delinquent lands * * * shall, in any suit or proceeding in relation to such lands * * * be prima facie evidence of what is stated in such certificate, provided it be filed with the papers of said suit at least twenty days before the first day of the term at which it is to be offered in evidence. When the certificate purports to be signed by the said auditor, it may be admitted as evidence without proof of his signature."

The last two paragraphs and some parts of the first paragraph of this certificate are not admissible. I have marked with brackets on the transcript the parts that should not have been admitted.

Exhibit 38.

This is a certificate of the same character as Exhibit 37. I have inclosed in brackets the parts that I think are inadmissible, because not authorized by the statute.

Exhibit 39.

This certificate was properly admitted. It is an auditor's certificate "of the payment of taxes on delinquent land." Section 3334.

Exhibit 40.

This certificate was properly excluded. It does not come within the statute at all.

Exhibit 41.

[30] A duly certified copy of survey and plat for patent to Smyth and Banks. These are copies of records in the register's office. They are made admissible by section 3334, and have a tendency to show the county in which sundry deeds introduced by plaintiff should properly have been recorded. I think the exhibit was properly admitted.

Exhibit 42.

A deposition by D. M. Paterson. No specific objection was ever presented to this deposition.

Exhibit 43.

A deposition by C. H. Boardman. I adhere to the ruling made at the trial. The deposition shows acts of ownership on the part of the Buchanan Company.

Exhibits 44–52.

[31] I do not deem it necessary to review the rulings made at the trial as to the depositions of McChord, Talbert, and Hendricks, and as to Exhibits 49, 50, 51, and 52. They, in conjunction with other evidence, at least circumstantially prove that Wm. D. Taylor was the "designated collector," and that the papers directy relating to the tax sale to Lamb are not now to be found in Washington. Although some hearsay testimony was admitted, the error is harmless.

Exhibit 53.

Record of suit by Buchanan Company v. Patrick Hagan, Pearson's Heirs, et al.

[32] The plaintiff at an earlier stage of the trial offered merely the bill and the final decree in this suit (Exhibit 8) and then withdrew the offer. The suit in question was not brought under section 2361, Code 1904; it was not a statutory proceeding to perpetuate testimony (section 3369, Code), and it was not a suit under the ancient equity jurisdiction to perpetuate testimony (1 Story, Eq. Jurisp. [6th Ed.] § 1508 et seq.). It was instituted under the ancient equity jurisdiction, founded on accident, to establish a lost or destroyed title paper. The mere destruction of a deed would not give equity jurisdiction; but, where a party in possession of land has by accident lost the evidence of his title, there may be jurisdiction in equity to establish the former existence and contents of the lost document. 1 Story, Eq. Jurisp. (6th Ed.) § 84. The bill alleged that the Buchanan Company was in possession, and the court in its final decree decided that each allegation of the bill was true. In view of the conclusion reached later as to this exhibit, it may be conceded, without so deciding, that the court had jurisdiction of the subject-matter of the suit.

[33] The first objection I shall consider is based on the fact that the affidavit on which the order of publication was made is not in the record. The order of publication, however, reads in part:

"And affidavit having been made that Josephine Southwith Pearson * * * are nonresidents of the state of Virginia. * * *"

The final decree recites that the cause came on to be heard on "the order of publication duly published and executed." The statute (section 3230) does not in terms require that the affidavit be reduced to writing, nor do I know of any requirement, if it was reduced to writing, that it appear as part of the record. But, if there is any defect in this respect, the presumption in favor of the regularity of the proceeding covers the point. 8 Va. & West Va. Dig. 545, 546; Craig v. Sebrell, 9 Grat. (Va.) 131, 133; Wilcher v. Robertson, 78 Va. 602, 617; Howard v. Landsberg, 108 Va. 161, 165, 166, 60 S. E. 769; 23 Cyc. 1077.

[34-37] Whether or not the court gained jurisdiction of the persons of the nonresident defendants by publication depends on the nature of the suit. The suit in its nature is closely akin to the more familiar suits to quiet title. Notwithstanding Hart v. Samson, 110 U. S. 151, 155, 3 Sup. Ct. 586, 28 L. Ed. 101, I think the following authorities require that the suit be regarded as quasi in rem, and also a ruling that Pearson's heirs and the Butlers were before the court by publication: Clem v. Givens, 106 Va. 145, 55 S. E. 567; Arndt v. Griggs, 134 U. S. 316, 10 Sup. Ct. 557, 33 L. Ed. 918; Meyer v. Kuhn, 65 Fed. 705, 712, 13 C. C. A. 298; Tennant v. Fretts, 67 W. Va. 569, 68 S. E. 387, 29 L. R. A. (N. S.) 625, 140 Am. St. Rep. 979; 23 Cyc. 1412, note 79; 32 Cyc. 468; Hardy v. Beaty, 84 Tex. 562, 19 S. W. 778, 31 Am. St. Rep. 80. As the suit was not strictly in rem, the

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judgment is binding only on the parties. 23 Cyc. 1410, e; 24 Am. & Eng. Ency. (2d Ed.) 828. Consequently we have to consider the admissibility of the record as evidence against the defendant at bar as in ordinary cases. The general rule is that a judicial record is not admissible as evidence against a stranger. Payne v. Coles, 1 Munf. (Va.) 373, 394; Downer v. Morrison, 2 Grat. (Va.) 250, 256; 23 Cyc. 1280; 24 Am. & Eng. Ency. (2d Ed.) 190. There are some exceptions to the foregoing general rule, the most familiar of which is that a judicial record may be used in evidence against a stranger when it is a link in the chain of title of the party offering it. Lovell v. Arnold, 2 Munf. (Va.) 167, 172, 173, 174; Masters v. Varner, 5 Grat. (Va.) 168, 171, 50 Am. Dec. 114; Cales v. Miller, 8 Grat. (Va.) 6, 12; Smith v. Chapman, 10 Grat. (Va.) 445, 453, 465; Baylor v. Dejarnette, 13 Grat. (Va.) 152; 1 Greenleaf, Ev. (14th Ed.) § 539; 23 Cyc. 1287, 1288; 2 Black, Judgments (2d Ed.) § 607.

The reason for this exception is that the decree which directs a master in chancery to convey land itself constitutes his authority. His deed without authority is a nullity. This authority to execute the deed is as much a link in the chain of title as is the deed he subsequently makes. The decision of the court shown by the record here in question, however, does not itself constitute a link in the plaintiff's title. The chief purpose of the suit was to prove that Hagan had conveyed to Pearson in 1874, and hence that Pearson was properly chargeable with the taxes for 1876 and subsequent years. But the judgment of the court (in 1912) of course did not give authority to the tax officials to assess the land to Pearson in 1876 and subsequent years, nor to Dennis, clerk, to convey the land to Buchanan Company in 1905. The judgment simply ascertained and adjudicated that there had been authority to assess the land to Pearson in said years. This difference is of prime importance. A judgment of a court of competent jurisdiction, which itself constitutes a link in title, is evidence against strangers; but a judgment which is not of this class does not come within this exception to the general rule. Such judgment, however binding on the parties and privies, is, in the older sense of the term, merely res inter alios acta. See 2 Wigmore, Ev. § 1273 (2), p. 1552; 3 Wig. Ev. § 1060; Duncan v. Helms, 8 Grat. (Va.) 68; Bargamin v. Clarke, 20 Grat. (Va.) 544, 548, 549; Lynchurg Mills v. Rives, 112 Va. 137, 141, 70 S. E. 542.

[38] Nor can this matter be proven as against the defendant at bar on the theory that the record shows an admission against interest on the part of Pearson's heirs and the Butlers. All the authorities, so far as I have discovered, confine this exception to the general rule to cases in which a stranger to the record seeks to prove by such record that a party thereto made an admission. 2 Black, Judgments (2d Ed.) § 608; 2 Freeman, Judgments (4th Ed.) § 417a; 23 Cyc. 1288; 1 Greenleaf, Ev. (14th Ed.) § 527a. To allow a party (or a privy of a party) to use an admission by another party to the record against a stranger would make the danger of collusion too great. I think the exception that judicial records may be used as admissions cannot be extended to this case.

What has been said applies also to the fact shown by the record in question that Joseph and Patrick Hagan were residents of this state during all the time they were connected with the title. It falls under no exception to the general rule that I know of. The depositions in this record are not admissible as evidence against the defendant at bar. Even if they could otherwise be used, there is no competent evidence that Patrick Hagan is incompetent to testify. The other deponent is Mr. Jeffries, of counsel for the plaintiff. The only conclusion I can reach is that Exhibit 53 should not have been admitted for any purpose, and the ruling made at the trial must be reversed.

Exhibit 54.

[39] This is a partial record of the ejectment suit of Frederick Pearson v. Thos. J. Fuller, instituted in this court at Abingdon, Va., in 1878. I adhere to the ruling, made at the trial, admitting the paper as evidence of an assertion of ownership by Frederick Pearson in 1878.

Exhibits 55–63.

Depositions in Pearson v. Fuller.

[40] The defendant is not in privity with either Pearson or Fuller. The general rule prevailing in this state is that depositions taken in a former suit cannot be read as evidence in a subsequent suit, unless there be substantial identity both of parties and issues. Rowe v. Smith, 1 Call (Va.) 487, 489; Payne v. Coles, 1 Munf. (Va.) 373, 394; Sheppard v. Turpin, 3 Grat. (Va.) 373; Brown v. Johnson, 13 Grat. (Va.) 644, 649; Reed v. Gold, 102 Va. 37, 50, 45 S. E. 868. See, also, 1 Greenleaf, Ev. (14th Ed.) §§ 163, 164; 6 Ency. Pl. & Pr. 579; 7 Standard Procedure, 402; 2 Wigmore, Ev. § 1386; 1 Starkie, Ev. (7th Am. Ed.) 311 et seq. Whether or not this general rule should apply will be best considered by taking up the depositions in detail.

Exhibits 55 and 56.

[41] These are depositions of Samuel Culbertson. The deponent is dead, and his alleged tenant, Edward Collins, is dead. The possession sought to be proved by these depositions is probably to be classed as ancient. Culbertson was not cross-examined, but he was under oath. On the whole, I am of opinion that these two depositions were properly admitted. The subject is governed by the Virginia law (Clement v. Packer, 125 U. S. 309, 322, 8 Sup. Ct. 907, 31 L. Ed. 721), but I have found no decision quite in point. As a matter of general law the authorities are in conflict (2 Wigmore, Ev. p. 1941, note 9); but apparently, without attempting a full investigation, the weight of general authority supports the admissibility of Culbertson's depositions (16 Cyc. 1121; Bogardus v. Trinity Church, 4 Sandf. Ch. [N. Y.] 633, 724; Id., 7 N. Y. Ch. Repts. 1235, 1268; 1 Rice, Ev. p. 409). In Bank v. Albaugh, 188 U. S. 734, 737, 23 Sup. Ct. 450, 451 (47 L. Ed. 673), Mr. Justice Holmes used the following language:

"In these days, when the whole tendency of decisions and legislation is to enlarge the admissibility of hearsay, where hearsay must be admitted or a failure of justice occur, we are not inclined to narrow the lines."

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In Richards v. Elwell, 48 Pa. 361, 367, it is said:

"There is a time when the rules of evidence must be relaxed. We cannot summon witnesses from the grave, rake memory from its ashes, or give freshness and vigor to the dull and torpid brain."

It should be noted that I am here dealing only with the admissibility of these depositions. The effect to be given the testimony will be considered elsewhere in this opinion.

Exhibit 57.

This deposition by Enoch Young I hold for the same reason to be admissible as evidence tending, although slightly, to prove an ancient possession. There is some inadmissible testimony in these depositions, but the error in admitting it was harmless.

Exhibits 58 and 59.

These depositions I hold now to be inadmissible. Their tendency to prove possession is too slight to justify a departure from the usual rule. They may tend to prove claim by Joseph Hagan, but this has otherwise been abundantly proved by unobjectionable evidence, and does not fall within any recognized exception to the ordinary rule. My ruling in admitting these depositions was, I think now, erroneous, and must be reversed.

Exhibit 60.

A deposition by Wm. O. Yost. This also was improperly admitted.

Exhibit 61.

[42] A deposition taken in 1882 by M. F. Pleasants, then clerk of the United States Circuit Court for the Eastern District of Virginia. At the trial only so much of this deposition was admitted as showed what the witness said as to the destruction of the records of that court in 1865. But even in this concession I think now that I fell into error. This deposition is not a book of history, generally accepted as truthful and reliable. The mere fact of the loss of certain papers is desired to be proved. Neither the time nor the manner of their loss is here material. The deposition of the present custodian of these papers, taken for use in the case at bar, could equally well prove this fact, and the defendant at bar would have had an opportunity to cross-examine such witness. I know of no rule of evidence which makes this deposition admissible. It may be that this court should take judicial notice of the great conflagration in Richmond in 1865 following the evacuation of that city by General Lee's army, but I doubt if this would cover the particular fact sought to be proved by this deposition.

Exhibit 62.

This is a deposition by Jas. M. Taylor, a son of Wm. D. Taylor, taken to prove that the latter was a collector of United States direct taxes. The time when Wm. D. Taylor was in office was before the deponent was born. Whether or not the deposition would have been admissible in the case in which it was taken, had the action

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of Pearson v. Fuller come to trial, need not now be considered. I know of no reason for holding it admissible in the case at bar. My ruling admitting it was erroneous.

Exhibit 63.

A deposition by Conway Robinson. I think that this deposition was also improperly admitted. Even waiving all other objections, this deposition does not seem to me to have any sufficient tendency to prove that Wm. D. Taylor was the "designated collector." It may tend to show that Taylor was a collector, but nothing in the deposition indicates whether Taylor was a district collector merely, or a designated collector.

Exhibit 64.

A deposition by John Yates. This was also improperly admitted. Of exceptions to the rule against hearsay, see Queen v. Hepburn, 7 Cranch, 290, 296, 3 L. Ed. 348.

Ruling as to Testimony Reversed.

[43] I now reverse the ruling made at the trial to which the plaintiff excepted. The witness, as a foundation for the use of circumstantial evidence, had as I now think a right to state what he had been told at the Treasury Department concerning the supposed location of the original documents relating to sales made under the Direct Tax Act of 1816. This evidence shows the good faith of the witness in his search.

Exhibit 64.

[44] I adhere to the ruling made at the trial in admitting the Boyd map. It is almost a necessary inference either that Pearson had it made, or that some one authorized by him to try to sell the property had it made. It is evidence of an act of ownership.

Ruling as to Testimony Reversed.

[45, 46] At the trial I admitted, as evidence that Wm. D. Taylor was the "designated collector," an excerpt from the reporter's statement of facts in the report of Jesse v. Preston, 5 Grat. (Va.) 120, 121. As elsewhere appears, I hold that the circumstantial evidence is sufficient to show that Taylor was the designated collector, who should have advertised and sold lands of nonresidents under the act of 1816. It follows that in now reversing the ruling made at the trial I am committing harmless error, if error at all. Merely as a matter of accuracy, I must hold that this evidence should not have been admitted. The original deposition, if it could have been found, would not be admissible. If the court reporter had stated as a fact that Taylor was the designated collector, a question might have arisen as to evidence furnished by history.

Exhibits 65–85.

[47] I adhere to the rulings made admitting these photographic reproductions of parts of issues of the Richmond Enquirer, and generally to the rulings as to the oral testimony concerning the files of the ancient newspapers.

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Exhibit 86.

Also as to this exhibit, the qualification of Richard Jeffries as clerk of the District Court for the District of Virginia.

Exhibit 87.

The most interesting questions arising in this case relate to the admissibility and effect of Exhibit 87, the tax deed from Wm. D. Taylor, collector, to Wm. Lamb. The document is a certified copy taken from the Russell county deed book. I shall discuss the many questions which have been raised under sundry different heads, and shall not hereafter adhere to the order of introduction of the different exhibits.

Presumption of Validity of the Taylor Tax Deed.

[48] A. It is contended by counsel for plaintiff that the court should presume the prima facie validity of the tax deed made by Taylor to Lamb. This deed was not made as a result of a judicial proceeding, but was the act in pais of a mere tax collector. The general rule is that the party claiming under such a deed must affirmatively show that every prerequisite to the execution of the deed was complied with. Christy v. Minor, 4 Munf. (Va.) 431, 435; Nalle v. Fenwick, 4 Rand. (Va.) 585, 590, et seq.; Allen v. Smith, 1 Leigh (Va.) 231, 250, 251; Chapman v. Bennett, 2 Leigh (Va.) 329, 330, 331; Jesse v. Preston, 5 Grat. (Va.) 120, 129, 131; Masters v. Varner, 5 Grat. (Va.) 168, 171, 50 Am. Dec. 114; Wiley v. Givens, 6 Grat. (Va.) 277, 283, 284; Walton v. Hale, 9 Grat. (Va.) 194, 198; Flanagan v. Grimmet, 10 Grat. (Va.) 421; Boon v. Simmons, 88 Va. 259, 264, 13 S. E. 439; Reusens v. Lawson, 91 Va. 226, 236, 21 S. E. 347; Sulphur Mines Co. v. Thompson, 93 Va. 316, 317, 25 S. E. 232; Minor's Tax Titles, p. 123; Williams v. Peyton, 4 Wheat. 77, 80, 4 L. Ed. 518; Ronkendorff v. Taylor, 4 Pet. 349, 359, 7 L. Ed. 882; Marx v. Hanthorn, 148 U. S. 172, 180, 13 Sup. Ct. 508, 37 L. Ed. 410; 37 Cyc. 1452, 1454; 27 Am. & Eng. Ency. (2d Ed.) 974; note 17 Am. Dec. 505.

[49] The plaintiff's contention is based upon the antiquity of the tax deed, upon evidence of many acts indicative of claim of ownership other than possession of the land, and upon some evidence of possession of the land in behalf of claimants under the tax deed. In this respect reliance is placed on the depositions of James Culbertson (Exhibits 55–56) and of Enoch Young, taken to be used in the action of Pearson v. Fuller, and upon the testimony of Hiram Collins. However, this evidence does not seem to me to prove the kind of possession (if it proves possession at all) which would authorize presumptions of the validity of the Taylor deed. Young's testimony is almost entirely valueless. So far as appears, Looney may never have done anything except to agree to "hold possession for Hagan." But, if it be assumed that he did more, his tenancy was in all reasonable probability of the same character as that of Edward Collins, which will now be discussed more in detail. I think the clearest idea of the facts obtainable is found in the following from Culbertson's second deposition:

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"The said Collins was living in the survey according to our running. I requested him to hold possession for us, which he agreed to do. I told him he should have his home, and not be turned off, and that he should have the refusal of it, if the survey was established by the court."

This seems to mean that Culbertson found Collins in possession of a small tract of land inside of the 200,000-acre boundary, claiming it as his own, and the agreement was that Collins should, if the Hagan and Culbertson claim of title was subsequently held valid, say that he had been holding possession for Hagan and Culbertson. Collins is not alleged to have ever taken any actual possession outside of the small tract ("his home"), nor is it alleged that he in any way did any act, after this quasi tenancy commenced, which he would not have done, if the arrangement with Culbertson had not been made. Actual possession of land necessarily implies the doing of some physical acts. Collins' possession, as the quasi tenant of Hagan and Culbertson, seemingly was, and I think was intended to be, purely mental. There is no intimation that Collins agreed to make a public claim, on behalf of Hagan and Culbertson, of the large boundary, or that he was to prevent other adverse claimants from continuing to live thereon, or that he was (outside of his home place) to do anything. So far as I can make out, there is nothing to show but that this "possession" by Hagan and Culbertson (which lasted from 1842 or 1843 to not later than 1855) was a furtive, secret, nominal possession, which might well be regarded as a sham possession. Its nature was such that, instead of tending to fortify the claim under the Taylor deed, it has to my mind rather an opposite tendency. The long-continued possession under an ancient muniment of title, which creates a presumption of the validity of the document, is a bold, open, and notorious possession, such as attracts the attention of, and challenges attack by, all adversary claimants. It is not a secret understanding with an adverse claimant of a small part of the land, whereby the latter continues the identical possession he had previously had. In 2 Blackwell, Tax Titles, § 1118, it is said:

"The same principle was asserted by the Supreme Court of New Hampshire in the case of Waldron v. Tuttle, 3 N. H. 340; and in that case the rule is laid down, which is probably applicable to all cases where the doctrine of presumption is relied upon, that in order to justify its application the possession of the party claiming under the tax deed must be a long, open, notorious, and exclusive possession—such an one as will constitute, technically, an adverse possession."

[50] As to the effect of the lapse of time where the claimants under a tax deed have not had possession, it is said in 2 Blackwell, Tax Titles, § 1105:

"The longer the claimant under the tax deed remains out of possession, the less favor will he meet in the courts, and the less readily will they presume anything in his favor; for his neglect to assert his title argues a defect in it. If lapse of time were a basis for presumption in such case, all the claimant under a defective title would have to do would be to lie by till time and legal presumption should make his title good."

In 37 Cyc. 1453, 1454, it is said:

"As a general rule, and in the absence of a statute changing the common law in this respect, mere lapse of time will not of itself afford presumptive

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evidence of the regularity and validity of a tax sale, if the purchaser and those claiming under him have not had possession under the deed; that is, the antiquity of a tax deed, if no possession has been taken under it, affords no presumption in its favor, but, on the contrary, operates the more strongly against the holder."

To the same effect is Black, Tax Titles (2d Ed.) § 461. I know of no Virginia authority for taking a contrary position. The Virginia cases, cited ante, p. 119, seem to fully support the foregoing rule. In Reusens v. Lawson, 91 Va. 226, 235, 236, 21 S. E. 347, the clerk's tax deed was 58 years old at the time of the trial. In Sulphur Mines Co. v. Thompson, 93 Va. 293, 317, 25 S. E. 232, 237, it is said:

"The sale purports to have been made in 1813. The deed was made in 1830. This action was brought in 1890. No possession under it is shown. To hold that the recitals in that deed are prima facie evidence of the existence of the facts recited under these circumstances would violate every principle of law applicable to deeds executed under a naked power."

Counsel for plaintiff quote from 1 Greenleaf, Ev. (16th Ed.) § 20, to the effect that:

"Where an authority is given by law to executors, administrators, guardians, or other officers to make sales of lands, * * * and they are required to advertise, * * * the lapse of time [30 years, usually] raises a conclusive presumption that all the legal formalities of the sale were complied with."

The following from Black on Tax Titles, § 447, shows the inapplicability to the case at bar of the rule stated by Greenleaf:

"The rule applicable to sales by executors, guardians, and other officers, that the lapse of 30 years' time raises a conclusive presumption that all legal formalities of the sale were observed, does not apply to sales made in derogation of the common law, the proceedings for which were required to be evidenced by records and public documents, which are supposed to remain in the custody of the officers charged with their preservation. These must be proved, or their loss accounted for, and supplied by secondary evidence. If they cannot be found, or their loss accounted for, the presumption is, in the absence of evidence, that they never existed."

The plaintiff also relies upon Lasher v. McCreery, 66 Fed. 834, 836, and Cook v. Lasher, 73 Fed. 701, 19 C. C. A. 654. The tax sale in question in these cases was made in a proceeding in the circuit court of Tazewell county, Va., which had been instituted by the commissioner of delinquent lands. 73 Fed. 702, 19 C. C. A. 654. The proceeding was a judicial one. Smith v. Chapman, 10 Grat. (Va.) 445, 465; Hitchcox v. Rawson, 14 Grat. (Va.) 526, 534. Certainly these cases do not authorize the contention that the Circuit Court of Appeals for this circuit has departed from the usual rule.

I can find nothing in Ewing v. Burnet, 11 Pet. 41, 49, 52, 53, 9 L. Ed. 624, in Harris v. McGovern, 99 U. S. 161, 167, 25 L. Ed. 317, in Simmons v. Doran, 142 U. S. 417, 442, 12 Sup. Ct. 239, 35 L. Ed. 1063, or in Rich v. Braxton, 158 U. S. 375, 384, 15 Sup. Ct. 1006, 39 L. Ed. 1022, which in the least seems to me to support the idea that a long-standing claim to land, capable of occupation and use, will supply the place of a long-continued possession. See Dishazer v. Maitland, 12 Leigh, 525, 529, 532.

[51] Counsel for plaintiff contend that the mere execution of the Taylor deed and of those following it are evidences of possession. The English doctrine referred to in Wigmore, Ev. (volume 1, § 157; volume 3, § 2142), does not seem to be at all applicable to the situation before us. No one could rationally infer possession from the execution of the deed by Collector Taylor, or of the deed by Lamb's executors. Moreover, almost every fact that has been brought to light concerning the acts of Lamb, of Sarah Purcell and Joseph Hagan, of Culbertson, of Patrick Hagan, and of Pearson and his heirs, rebut any inference of possession on the part of any of them. The dismissal of the caveat proceedings by the plaintiffs, the dismissal of Pearson's actions of ejectment, the times and manner of paying such taxes as were paid by plaintiff's predecessors in title, and the testimony of many elderly witnesses for the defendant to the effect that they had never even heard of possession ever having been held for or by any one in plaintiff's chain of title, would seem to make it quite unreasonable to infer possession from the mere execution of the deeds in the plaintiff's chain of title. And it would be still more unreasonable to base a presumption of the validity of the Taylor deed on a possession inferred as above.

It is argued that there is no difference in principle between the presumption of the genuineness of an ancient original deed, and a presumption of the validity of an ancient tax deed, where there has not been possession in accordance with the deed in either case. I am unable to so hold. The genuineness of an original tax deed and the existence of the power to validly execute it are respectively dependent on such very different circumstances that I can see no reason for holding that a presumption in favor of the one has any close relation to a presumption in favor of the other. In Barley v. Byrd, 95 Va. 316, 319, 321, 28 S. E. 329, the authenticity of a very ancient and important document was fully conceded; but the court denied its validity as evidence of the transfer of title. Caruthers v. Eldridge, 12 Grat. (Va.) 670, 678, and Nowlin v. Burwell, 75 Va. 551, 553, relate to presumptions of the authenticity of ancient deeds, and not at all as to presumptions as to the validity of a deed executed by a tax collector.

In this connection counsel for plaintiff rely greatly on the unofficially reported case of Lennig v. White, 1 Va. Dec. 873 (date Dec. 22, 1894). If the entire soundness of that opinion be taken for granted, still the facts are so entirely unlike those in the case at bar that it cannot be fairly considered as in point. Nor in any event could any of the three last cases be followed, if in conflict with the later cases of Reusens v. Lawson, 91 Va. 226, 235, 236, 21 S. E. 347, and Sulphur Mines Co. v. Thompson, 93 Va. 293, 317, 25 S. E. 232.

[52] It is further contended that the defendant is making a "collateral attack" on the Taylor deed such as is forbidden by the law. This contention finds some seeming support in authorities discussing tax deeds made as the result of judicial proceedings, but only a seeming support. Of the quotation from 37 Cyc. 1378, counsel for defendant say:

"We have found in the Tazewell law library nearly all of the cases referred to in the notes to the above text in Cyc., and they are cases arising on tax

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sales made under judicial proceedings; the rule as to which will be found stated in 37 Cyc. 1315–1317, in Blackwell on Tax Titles (5th Ed.) § 351 et seq., and also in Black on Tax Titles (2d Ed.) § 177 et seq."

If this conclusion is not correct there is an irreconcilable discrepancy between different parts of the text of that work.

Counsel for plaintiff also rely upon certain Virginia decisions. In Robinett v. Preston, 4 Grat. 141, 146, the court was discussing a deed under which long possession had been held. See Jesse v. Preston, 5 Grat. (Va.) 120, 131; Walton v. Hale, 9 Grat. (Va.) 194, 198; Sulphur Mines Co. v. Thompson, 93 Va. 293, 317, 25 S. E. 232. In Hitchcox v. Rawson, 14 Grat. (Va.) 526, 534, the deed was made in the course of a judicial proceeding. If the very brief and unsatisfactory opinion in Machir v. Funk, 90 Va. 284, 289, 18 S. E. 197, may be supposed to support the plaintiff's contention, it is in conflict with many Virginia decisions, including the later case of Sulphur Mines Co. v. Thompson, supra. Bowe v. Richmond, 109 Va. 254, 64 S. E. 51, does not seem to me to support the contention of counsel for plaintiff in the least. We are here dealing with a collector's tax deed, upon which a plaintiff in ejectment relies, under which there has been no open and continuous possession of land entirely susceptible of possession. I think the following from Minor's Tax Titles, p. 123, is sounder than the statement in the brief of counsel for plaintiff:

"Independently of statute, the tax deed is of no effect whatever as evidence of the validity of the purchaser's title, or of the due and proper performance of all or any of the various steps prescribed by the law, whether they are required to be recited in the deed, or are in fact recited therein or not. The burden is still on the purchaser to show that all these preliminary steps have been complied with."

It should be added that describing the defendant's objections to the Taylor deed as a "collateral attack" is, I think, an erroneous use of this phrase. In ejectment, in the circumstances here, the defendant's plea of not guilty puts in issue the plaintiff's entire case. Richmond v. Jones, 111 Va. 214, 219, 68 S. E. 181. It should here be said that there is some hearsay in the evidence of Jno. A. Looney, a witness for the defendant, and perhaps some in that of Gillespie, Davis, Smith, Wolford, and Elswick. It seems unnecessary to go over it all in detail. The evidence for the plaintiff, without reference to anything that could be objectionable in the testimony for the defendant above mentioned, wholly fails in my judgment to show facts which would authorize a presumption of the validity of the Taylor deed. From what has been said it follows that, on common-law principles at least, the validity of that deed cannot be presumed.

Acts of 1912 and 1914.

[53] An act of the Virginia Legislature, approved March 13, 1912, reads as follows:

"Chap. 235.—An act to prescribe the effect as evidence to be given to deeds recorded prior to the year 1865.

"Approved March 13, 1912.

"1. Be it enacted by the General Assembly of Virginia, that in every action at law or suit in equity, in which it shall appear that a deed or other writing,

which constitutes a part of the chain of title to any lands has been made by an officer or other person, purporting to act under the provisions of any statute or decree, authorizing or providing for a sale or conveyance of real estate, and that said deed was duly recorded in the proper clerk's office prior to the year eighteen hundred and sixty-five, and that the record or evidence, or some parts thereof of the proceedings under or pursuant to which such sale, deed or other writing was made, has been lost or destroyed, or cannot be produced, the said deed or other writing, or a certified copy thereof, taken from said record, shall be prima facie evidence of the fact that all provisions and requirements of such statute or decree were duly complied with in the making of such sale, deed or other writing as well as the power or authority of such officer or other person to make and execute the same, and of the due execution thereof by him."

Acts 1912, p. 524.

This statute was repealed by the act of March 14, 1914. This act reads as follows:

"Chap. 100.—An act to repeal an act of the General Assembly of Virginia entitled 'An act to prescribe the effect as evidence to be given to deeds recorded prior to the year 1865. Approved March 13, 1912.' (S. B. 73.)

"Approved March 14, 1914.

"1. Be it enacted by the General Assembly of Virginia that an act entitled an act to prescribe the effect as evidence to be given to deeds recorded prior to the year eighteen hundred and sixty-five, approved March thirteenth, nineteen hundred and twelve, be and the same is hereby repealed."

Acts 1914, p. 186.

The plaintiff earnestly contends that by force of section 6, Code 1904, the act of 1914 should be so construed as to leave to the plaintiff a right to rely upon the act of 1912. Section 6 of the Code reads as follows:

"No new law shall be construed to repeal a former law, as to any offence committed against the former law, or as to any act done, any penalty, forfeiture, or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offence or act so committed or done, or any penalty, forfeiture, or punishment so incurred, or any right accrued, or claim arising before the new law takes effect; save only that the proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings; and if any penalty, forfeiture, or punishment be mitigated by any provision of the new law, such provision may, with the consent of the party affected, be applied to any judgment pronounced after the new law takes effect."

This section of the Code applies only when the repealing statute is open to construction; that is, when there is some ambiguity or doubt as to the intent of the lawmakers in enacting the repealing statute. As was said in Hamilton v. Rathbone, 175 U. S. 414, 421, 20 Sup. Ct. 155, 158 (44 L. Ed. 219):

"* * * The province of construction lies wholly within the domain of ambiguity."

In Lake County v. Rollins, 130 U. S. 662, 670, 671, 9 Sup. Ct. 651, 652 (32 L. Ed. 1060), it is said:

"Where a law is expressed in plain and unambiguous terms, * * * the Legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction."

In Great Northern R. Co. v. United States, 208 U. S. 452, 465, 28 Sup. Ct. 313, 52 L. Ed. 567, in regard to section 13, U. S. Rev. Stats. (Comp. St. 1916, § 14), it is said:

"As the section of the Revised Statutes in question has only the force of a statute, its provisions cannot justify a disregard of the will of Congress as manifested either expressly or by necessary implication in a subsequent enactment."

In 36 Cyc. 1231, it is said that general saving statutes are applicable, "unless such application is negatived by the express terms or clear implication of a particular repealing act." In Danville v. Pace, 25 Grat. (Va.) 1, 6, 18 Am. Rep. 663, in which this section (which was section 18, c. 16, Code 1860) was under consideration, it is said:

"In construing this section, it is necessary to consider also the preceding one, which provides that this rule of construction shall not be adopted, if it would be inconsistent with the manifest intention of the Legislature. In other words, the two sections taken together mean no more than that a new law shall not be construed to affect any right accrued under a former law, unless such is the manifest purpose of the Legislature."

The first question, therefore, is whether or not the act of 1914 is capable of more than one construction. The act of 1912 provided a new mode of procedure, was prospective in operation, and applied to all trials thereafter to be held. To wholly repeal this mode of procedure was to restore the common-law rule of evidence as to all cases thereafter to be tried. And this seems to me to be necessarily so, because the generality of the language employed conveys and admits of no other meaning.

Again, the act of 1912, assuming its constitutionality, is revolutionary and extreme. It is not improbable that the Legislature in enacting it intended only to validate deeds made by commissioners in chancery, prior to 1865, where the court order books and case files containing the decrees authorizing such deeds had been lost or destroyed. Many of the state court records were lost or destroyed during the Civil War. In many such cases it would be impossible to prove by direct evidence that there ever had been in existence any decree authorizing the deed. Hence the manifest intent was that mere inability to produce such decrees should throw the burden of proof on the party claiming against such deeds. The expression "or cannot be produced" was therefore intended as it was written, and cannot properly be read "lost or destroyed and [therefore] cannot be produced." Even as applicable solely to masters' deeds, because of the presumption of validity where there has been long possession under such deed, the policy of the statute was open to just criticism.

However, the language of the statute is such that it applies also to ancient tax deeds. It therefore introduced a rule of evidence which threw doubt upon the validity of probably thousands of titles theretofore considered as impregnable, and created fear of an unprecedented flood of litigation. When this surprising and very grave defect in the act of 1912 was, at its next session, called to the attention of the same Legislature which enacted it, the statute was repealed. Can we take the position that the intent shown by the repealing statute is not,

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at least by necessary implication, to wholly abolish the privilege given by the act of 1912 in all cases thereafter to be tried? With the limited library facilities at my command I have not been able to find any decision in which the facts are like the facts here. The old law in express terms applied to "every action at law or suit in equity." An absolute repeal, an unlimited annulment, of such law would seem therefore to be by necessary implication the exact equivalent of a statute reading, "In no action at law or suit in equity," etc.

[54] This conclusion is strengthened by the want of any sufficient reason for imputing a different intent to the Legislature in enacting the repealing statute. Is there any reason for an intent to save to those who may have purchased ancient tax titles to land during the existence of the act of 1912 the privilege conferred by that act? Certainly the rule of evidence created by the act of 1912 was impolitic and unwise. It was to protect the great number of citizens holding or claiming land adversely to ancient official deeds that the repealing statute was enacted. This purpose would have been very imperfectly realized, if there was also an intent to leave the act of 1912 in full force as to all who acquired claim of title during the existence of that statute.

And there is also want of reason for any intent to favor those who acquired claim of title under an ancient official deed while the act of 1912 was in force. I so say because no one has in any strict sense a right to a particular mode of procedure. The privilege unwisely and injudiciously conferred by the act of 1912 was completely within the control of the Legislature. Whoever bought a claim to land founded on an ancient official deed must be considered as having bought with full knowledge that the lawmakers might perceive the injustice of the act of 1912 and abolish the privilege before he could take advantage of it. He acquired no legal or moral right to such privilege so long as it remained wholly inchoate, and hence there was no reason for the existence of an intent in 1914 to exclude such persons from the operation of the repealing statute.

It is contended by counsel for the plaintiff that the Legislature in 1914 enacted the repealing statute, not only with full knowledge of section 6 of the Code, but with the expectation that the courts would construe the repeal by reading section 6 as a proviso thereto. If section 6 saves the benefit of the act of 1912 to those who acquired claims under ancient official deeds while that statute was in force, although their titles were still unadjudicated when the repeal took effect, it also saves the same benefit to those who acquired claims of title to land under such deeds prior to the enactment of the statute of 1912 and who still hold such unadjudicated claims of title. Every reason for holding that section 6 applies to the first class also leads to the same conclusion as to the second class. If the first class have a claim arising under the old law, so have the second class. If section 6 saves a wholly inchoate, executory "right" to a particular mode of judicial procedure to all of the first class, it necessarily saves this same "right" to the second class. If, therefore, the intent of the Legislature in enacting the repealing statute in 1914 was that section 6 would be read as a

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proviso to the repeal, and that it would save the benefit of the act of 1912 to all except those who might acquire title after the repeal went into effect, the repealing act was, while not entirely futile, intended to be futile in very large measure. Practically every possible claim of title founded on an official deed recorded prior to 1865 was, of course, in existence and owned by some one in 1914. To so repeal the act of 1912 that the repeal should apply only to those acquiring claims under these ancient deeds after the repeal was to accomplish in very small part the result that was desired by thousands of citizens. After the repeal went into effect, claims to land under ancient official deeds, the evidences of the validity of which could not be produced, and under which there had not been the long-continued possession or other facts necessary to create a common-law presumption of validity, would become practically unmarketable. Consequently the junior title holders, for whose benefit the repeal was enacted, were given no relief, except against a class of claimants who would, practically speaking, not come into existence for a long course of years. And where, as in the case at bar, a claim under an ancient official deed was acquired by a corporation having perpetual existence, the benefit of the act of 1912 was saved to a practically unending succession of new stockholders. I am therefore unable to concede that the Legislature in 1914 intended or expected that section 6 would be read as a proviso to the act of 1914.

Counsel for plaintiff rely strongly upon the following excerpt from Philips v. Commonwealth, 19 Grat. (Va.) 485, 524, relating to what is now section 6:

"It was designed to meet contingencies ensuing upon repeals, and superseded the necessity for future Legislatures undertaking to prescribe or limit the operation of repealing laws. After its adoption in the Code, it was thenceforth to be taken as a part and limitation of every repealing statute, as much so as if it had been therein re-enacted, unless, indeed, a contrary intent should appear from the statute itself. We are therefore bound to construe the operation of this repeal as governed by this prescribed rule of construction. It will be found in chapter 16, § 18, p. 115, under the head of 'Construction of Statutes.'"

I cannot possibly read this as holding that section 6 must be read as a proviso to every repealing statute. The last clause is expressly to the contrary, and without such saving the rule laid down would have been contrary to all authority and reason.

[55] Again, the mere fact, if it be a fact, that the language of section 6 is such that it could apply to the repealing statute here in question, is no sufficient reason for reading it as a proviso to the act of 1914. The intent of the Legislature of the year 1914 necessarily prevails over the intent of the earlier Legislatures which enacted and retained section 6. However, I am not satisfied that section 6 shows an intent that it should be applied to a case where the repealed statute provides only a mode of procedure, the right to which had not accrued at the time the repeal went into effect. I concede that section 6 is applicable to a statute repealing one creating a mode of procedure which has been partly executed when the new law goes into effect, as in Philips v. Commonwealth, supra, 19 Grat. (Va.) 485. In that

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case the prosecution had been commenced before the new law of procedure went into effect. The first examining trial was held prior to July 1, 1867. The defendant as well as the commonwealth had therefore, before the new law became effective, acquired a right to the old mode of proceeding. Philips' Case could be an authority against my reasoning only if the prosecution there had been commenced after the new law went into effect. Under the facts the right to the old procedure had accrued before the new law went into effect.

[56] However, I do not hold that section 6 saves only accrued rights. "Claims arising under the old law" must, I think, embrace inchoate rights. But that which is saved must be a claim to a right—although an inchoate right—and no one can be said to have an entirely inchoate right to a particular mode of procedure. A statute which provides a mere mode of procedure does not give any one a right, in the strict sense of the word, to that particular mode, unless he avails himself of it while the statute is in force. The only inchoate rights saved by section 6 are, I think, inchoate substantive rights. Reading section 6 as intended to save only accrued procedural rights, and both accrued and inchoate substantive rights, seems to give it the full operation intended and to be in accord with all of the Virginia decisions. I can see no reason for an intent, in enacting section 6, to save to any one some particular mode of proceeding, if inchoate and unaccrued at the time the Legislature substitutes therefor some other mode of judicial proceeding. The very reason for substituting another mode of proceeding is that the repealed mode has been found unfair or inexpedient. Where the repealed statute gave substantive rights, even inchoate rights, or gave mere procedural rights, which had accrued when the repealing statute takes effect, there is a probability of hardship resulting. Hence an intent that a repeal should not affect such rights. But no such reason exists where the repealed law affords an inchoate, unaccrued, unexecuted privilege to rely upon some particular mode of procedure. There is no hardship in substituting for an unfair or unwise mode of procedure another mode which is fairer and wiser. The only satisfactory conclusion I can reach is that the act of 1914 wholly abolished the act of 1912 in the case at bar.

Constitutionality of the Act of 1914.

[57] It is contended by the plaintiff that the act of 1914, if read as an absolute repeal of the act of 1912, is unconstitutional. I am unable to see that the statute impairs the obligation of any contract by or under which the plaintiff claims. Every contract, with one exception, in the plaintiff's chain of title, was made prior to 1912 and while the common-law rule of evidence was in force. The only possible exception is the contract between plaintiff and the Buchanan Company. The conveyances were made in 1913 and in April, 1914, before the act of 1914 went into effect. Section 53, Const. Va. Granting that the act of 1914 reduced the value of the Buchanan Company's title, the statute did not in any sense impair the obligation of the contract. In order that a state statute may impair the obligation of a contract, the statute must affect the validity, construction, discharge, or enforce-

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ment of the contract. It seems to me clear that the act of 1914 is absolutely without effect in any one of these particulars. See Curtis v. Whitney, 13 Wall. 68, 70, 71, 20 L. Ed. 513; Railroad Co. v. Maguire, 20 Wall. 46, 61, 22 L. Ed. 287; Ochiltree v. Railroad Co., 21 Wall. 249, 253, 22 L. Ed. 546; Edwards v. Kearzey, 96 U. S. 595, 607, 24 L. Ed. 793; Wolff v. New Orleans, 103 U. S. 358, 365, 26 L. Ed. 395; Insurance Co. v. Cushman, 108 U. S. 51, 65, 2 Sup. Ct. 236, 27 L. Ed. 648.

[58, 59] Does the act of 1914 deprive of property without due process of law? The authorities fully sustain the position that there is no want of due process of law in the enactment of a reasonable rule of evidence. In Railroad Co. v. Turnipseed, 219 U. S. 35, 43, 31 Sup. Ct. 136, 138 (55 L. Ed. 78, 32 L. R. A. [N. S.] 226, Ann. Cas. 1912A, 463), it is said:

"If a legislative provision, not unreasonable in itself, prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him."

The act of 1914 simply restored a common-law rule of evidence, which had come to be a rule because the highest court of this state, not to mention the highest courts of the nation and of the great majority of the other states, had for generations considered it fairer and more politic than any other rule. It is surely impossible to say that such a rule is an unreasonable one. On the other hand, the act of 1912 created an impolitic and unwise rule of evidence. Certainly the reasonableness of the act of 1912 is much more open to question than is that of the act of 1914. The following authorities seem to me to make it necessary to hold, and I do hold, that the act of 1914 is not unconstitutional. See Crawford v. Halsted, 20 Grat. (Va.) 211; Fong Yue Ting v. United States, 149 U. S. 698, 729, 13 Sup. Ct. 1016, 37 L. Ed. 905; Li Sing v. United States, 180 U. S. 486, 493, 21 Sup. Ct. 449, 45 L. Ed. 634; Ewell v. Daggs, 108 U. S. 143, 150, 151, 2 Sup. Ct. 408, 27 L. Ed. 682; Marx v. Hanthorn, 148 U. S. 172, 181, 13 Sup. Ct. 508, 37 L. Ed. 410; Hawkins v. Bleakly, 243 U. S. 210, 37 Sup. Ct. 255, 61 L. Ed. 678, Ann. Cas. 1917D, 637; Campbell v. Iron Co., 83 Fed. 643, 27 C. C. A. 646; 37 Cyc. 1459; 8 Cyc. 896, 925; Cooley, Const. Lim. (7th Ed.) 524, 525; Gage v. Caraher, 125 Ill. 447, 17 N. E. 777, 779; Burk v. Putnam, 113 Iowa, 232, 84 N. W. 1053, 86 Am. St. Rep. 372; People v. Cannon, 139 N. Y. 32, 34 N. E. 759, 36 Am. St. Rep. 668, 682–684; O'Bryan v. Allen, 108 Mo. 227, 18 S. W. 892, 32 Am. St. Rep. 595, 596; People v. Turner, 117 N. Y. 227, 22 N. E. 1022, 15 Am. St. Rep. 498, 501; Irwin v. Pierro, 44 Minn. 490, 47 N. W. 154. But, if there is even a doubt, it is the duty of the court to hold the statute to be valid. Dartmouth College v. Woodward, 4 Wheat. 518, 625, 4 L. Ed. 629; Ogden v. Saunders, 12 Wheat. 213, 270, 6 L. Ed. 606; Von Hoffman v. City, 4 Wall. 535, 549, 18 L. Ed. 403; Mayor v. Cooper, 6 Wall. 247, 251, 18 L. Ed. 851; Sinking Fund Cases, 99 U. S. 700, 718, 25 L. Ed. 496; Hooper v. California,

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155 U. S. 648, 657, 15 Sup. Ct. 207, 39 L. Ed. 297; Fairbank v. United States, 181 U. S. 283, 285, 21 Sup. Ct. 648, 45 L. Ed. 862.

Contention that Taylor Deed is Void on Its Face.

[60, 61] When a tax deed shows on its face affirmatively that some essential requirement of the law has been disregarded or disobeyed, the deed is void on its face. Moore v. Brown, 11 How. 414, 425, 13 L. Ed. 751; French v. Edwards, 13 Wall. 506, 509, 514, 515, 516, 20 L. Ed. 702. But, after as careful study of the question as my library facilities permit, I cannot hold that a mere failure to recite in a tax deed that every essential step in the procedure leading up to the delivery of the deed has been complied with is essential to the validity of the deed on its face. As a general rule it is not always necessary that a deed made in execution of a power should even refer on its face to the power. 31 Cyc. 1131. However, it may be assumed, for present purposes, that a stricter rule prevails in regard to tax deeds. I have found no Virginia decision which seems to me to throw light on this point. The statements found in the text books are rather unsatisfactory. 37 Cyc. 1434, 1436; 27 Am. & Eng. (2d Ed.) 968 et seq.; Blackwell, Tax Titles (5th Ed.) § 771 et seq.; Black, Tax Titles (2d Ed.) § 396 et seq. If it be the law that it is essential to the validity of a tax deed on its face that there be recited compliance with every essential step in the proceeding, the Taylor deed is, I think, void on its face because of its failure to recite (1) publication or posting of the local notice of taxes due, and (2) compliance with section 30 of the Act of 1815, if not for other reasons. But the most satisfactory conclusion I have been able to reach is that there are sufficient recitals in the deed. In French v. Edwards, 13 Wall. 506, 515–516 (20 L. Ed. 702) it is said:

"* * * If a sheriff should refer in his deed to an execution issued to him, and recite that in obedience to it, and the statute in such case provided, he had sold the property to the highest bidder, it would be presumed that he had done his duty in the premises, given proper advertisement, and made the sale at public auction in the proper manner."

In the Taylor deed there is a reference to the statutes, and it is recited that the land was assessed, that the taxes were not paid, that a sale was held, that the grantee became the purchaser, and had paid the purchase money. I think that it would be going too far to hold the deed void on its face because it fails to recite each step or even every essential step in the proceeding. This conclusion disposes of many of the objections to the deed on its face. I shall, however, consider separately some of these objections.

(1) Alleged Cessation of Lien of Taxes of 1816.

[62, 63] Counsel for defendant contend that by the terms of section 24 of the act of January 9, 1815 (3 Stat. 172, c. 21), kept in force by section 2 of the act of March 5, 1816 (3 Stat. 255, c. 24) the lien for the taxes for any year existed only for two years from the time the tax became due and payable. Contrary to my first belief, I am, after further study of the statutes, unable to hold that the first section of the

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act of April 26, 1816 (3 Stat. 302, c. 82) was intended to repeal the limitation found in section 19, Act July 22, 1813 (3 Stat. 30, c. 16), repeated in section 24, Act Jan. 9, 1815 (3 Stat. 172), and kept in force by section 2, Act March 5, 1816 (3 Stat. 255). And I have been unable to find any statute which extended the life of the lien for the taxes of 1816. The sale here was made October 23, 1820. However, merely from the face of the deed and the statutes it cannot be said that the lien had ceased to exist. Under the act of March 5, 1816, the provisions of the act of January 9, 1815, except as changed by later acts, are adopted. As I read section 4 of the act of January 9, 1815, as amended by section 1 of the act of March 3, 1815 (3 Stat. 231, c. 91), the assistant assessors were required to commence the making of the assessment lists of the tax of 1816 on April 1, 1816. By section 13 these lists were to be completed and put into the hands of the principal assessor within 60 days thereafter—June 1, 1816. Then (section 14) the principal assessor was to immediately advertise the fact that the lists were in his hands and subject to correction on complaint of taxpayers. Twenty-five days after the date of the publication is allowed for appeals to the principal assessor. By section 16, immediately after the 25 days have elapsed, each principal assessor was required to make out corrected lists and lay them before a board consisting of all the principal assessors. This board was to meet "at such time and place as the Secretary of the Treasury should appoint." The board was then (section 21), within 20 days after it convened, to equalize and apportion the taxes. After this had been done, each principal assessor was to make out lists of the taxes. These lists were to be furnished to the collectors within 35 days after the apportionment had been completed. It is unnecessary to further follow the details. The time which the Secretary of the Treasury fixed for the meeting of the board of assessors to act upon the taxes of 1816 does not appear (and I may say here, in order to show why this topic is not again considered, that it is not proven anywhere in the evidence), and consequently it is impossible to know when the tax of 1816 became due and payable. It may be that the convening of the board was so long deferred that the tax had not been due and payable for over two years when the sale was held.

(2) Alleged Insufficient Advertisement of Taxes Due.

[84] While I am satisfied that this notice had to be advertised at least once a week for eight weeks in succession in every newspaper in the state in which the laws of the United States were by public authority published (3 Stat. 175, 231, 255), I am unable to infer, merely from the recital in the deed, that the Richmond Enquirer had not been designated or that any other newspaper had been. 1 Stat. 724; 3 Stats. 439, 576, cc. 80, 92. The document offered in evidence is certified as a true copy from the deed book, and the latter presumptively contains a true copy of the original deed. I know of no more authority for inserting the words "of several" after the word "one" than for inserting the word "the" before the word "one," where the

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deed reads: "The said newspaper being one in the state of Virginia, in which," etc. While the deed shows that Collector Taylor understood the law to require that the advertisement need be published in only one newspaper which had been designated for the publication of the laws (although several may have been designated), it remains so far unknown to us that more than one had in fact been designated.

(3) Alleged Presumption that Taylor's Powers had Ceased.

[65] Because of the conditional provisions for retiring collectors of the direct taxes found in Act Dec. 23, 1817, c. 1, 3 Stat. 401, and Act April 20, 1818, c. 83, § 5, 3 Stat. 442, it is contended that a presumption arises that Taylor was no longer the designated collector at the time he made the deed to Lamb. I am unable to so hold. 16 Cyc. 1052, 3, 5; 22 Am. & Eng. Encyc. (2d Ed.) 1240.

(4) Absence of Taylor's Title in Signature and Acknowledgment.

[66, 67] It is contended that the deed is void because the grantor's official title is not annexed to his signature to the deed and does not appear in the certificate of acknowledgment. This subject has been discussed in treating the objections to the deed (Exhibit 19) from Lamb's executors to Hagan and Purcell. It is contended in behalf of the defendant that the rule of intention does not apply to a tax deed made by an administrative officer. No authority exactly in point has been cited and I have found none. The authorities holding that in some respects intendments and inferences are not to be made in aid of defective tax deeds do not seem to me to be quite pertinent to the point under consideration. As a matter of reason it seems to me that where a deed shows distinctly on its face, as this does many times, that it is the deed of a tax officer, the mere fact that his signature lacks his official title cannot be held to invalidate the deed. And the same is to be said as to the supposed defect in the certificate of acknowledgment. See Acts 1895–96, p. 542.

(5) Alleged Failure to Recite that Part of Land would Not Bring Taxes.

[68] The contention that the deed is void for failure to recite that a part of the land would not sell for a sum sufficient to pay the taxes seems to me to be answered by the language of the deed:

"And at said sale the said William Lamb * * * became the purchaser of two hundred thousand acres of the said land, he being the only bidder who would pay the said taxes, with the per cent. thereon, for the quantity so purchased of the said land."

While the phraseology is awkward, the recital seems to plainly mean that no one would bid the required amount for less than the entire tract of two hundred thousand acres. This recital clearly distinguishes the case at bar from French v. Edwards, 13 Wall. 506, 509, 514, 20 L. Ed. 702, and similar cases.

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(6) Contention that Only a Part of the Tract was Conveyed.

[69] This contention does not seem quite sound. The granting clause of the deed reads:

"* * * Doth grant unto the said William Lamb the said two hundred thousand acres of land in the county of Russell, and state of Virginia, being the land which was assessed in the name of Robert Smyth and Henry Banks, as aforesaid. * * *"

If anything passed by the deed, this language seems to me to cover the entire 200,000 acres.

(7) The Description of the Land.

[70, 71] The Taylor deed not only describes the 200,000 acres in Russell county, Va., as being the same that was assessed to Robert Smyth and Henry Banks, but also as being the same tract that was advertised for sale for delinquent taxes in the Richmond Enquirer. Although the assessment had not been introduced when the Taylor deed was offered, one cannot pronounce the deed void on its face for want of description without considering the advertisement of a sale of 200,000 acres of land in Russell county belonging to Robert Smith and Henry Banks, to be held at the Eagle Hotel, Richmond, Va., on October 23, 1820. The evidence as to this advertisement (which is recited in the deed to have appeared in eight successive issues of the Richmond Enquirer) shows that it read on its first appearance "Robert Smith and H. Banks," and in the next seven issues it read "Richard Smith and Henry Banks." The reference in the deed to the advertisement of sale, and the nature of the advertisement, seems to me to make it reasonably clear that the land sought to be conveyed is the 200,000-acre tract in Russell county which had at one time belonged to Richard Smyth and Henry Banks. While such an error may vitiate an assessment or a tax advertisement, it does not follow that the deed is thereby rendered invalid. In some states it seems that deeds made by officials are construed differently from those made by private grantors, but I have not found that such rule prevails in this state. In White v. Luning, 93 U. S. 514, 523 (23 L. Ed. 938), it is said:

"Obviously, therefore, there are no merits in this defense. It rests alone on the idea that sheriffs' deeds and ordinary deeds inter partes are subject to different rules of construction. In regard, however, to the description of the property conveyed, the rules are the same, whether the deed be made by a party in his own right, or by an officer of the court."

See, also, 2 Blackwell, Tax Tit. (5th Ed.) § 772; Farmers' Co. v. Eno (C. C.) 35 Fed. 89, 90; Cox v. Hart, 145 U. S. 376, 387, 389, 12 Sup. Ct. 962, 36 L. Ed. 741; Atkinson v. Cummins, 9 How. 479, 485, 486, 13 L. Ed. 223.

There are some circumstances in which a tax deed cannot be construed as would be a private deed. See, for instance, 2 Blackwell, § 769. But in the case here I see no very good reason for holding that the Taylor deed may not be read as conveying the tract we are concerned with.

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Validity of the Taylor Deed under the Evidence.

(1) No Evidence of an Assessment.

[72, 73] It is in this connection unnecessary to determine under what particular statute or statutes the assessment for the direct tax of 1816 should have been made. Whether the procedure was that provided by the act of January 9, 1815, and was partly under that statute and partly under the act of July 22, 1813, is utterly immaterial. The fact that is important is that no evidence has been adduced that the 200,000-acre tract ever was assessed. The recital in the Taylor deed to the effect that the land had been duly assessed is not evidence of such fact. The fact that the land was advertised for sale for the taxes of 1816 authorizes no more than an inference that the local collector may have reported the land as delinquent, but this does not prove that it was ever assessed, unless we indulge presumptions which we are not at liberty to indulge. It seems to me to follow that the Taylor deed is void for this reason.

(2) No Evidence of Notice of Assessment.

[74] By section 13 of the act of July 22, 1813 (3 Stat. 28, c. 16) each assistant assessor is required to make out two assessment lists—one of the land and other property of residents and the other of which "shall exhibit in alphabetical order the names of all persons residing out of the collection district, owners of property within the district, together with the value and assessment thereof, or the amount of the direct tax due thereon." The next section reads in part:

"That immediately after the valuations and enumerations shall have been completed as aforesaid, the principal assessor in each collection district shall, by advertisement in some public newspaper, if any such there be in such district, and by written notifications to be publicly posted up in at least four of the most public places in each assessment district, advertise all persons concerned of the place where the said lists, valuations, and enumerations may be seen and examined; and that during twenty-five days after the publication of the notification as aforesaid, appeals will be received and determined by him relative to any erroneous or excessive valuations or enumerations by the assessor."

See, to the same effect, sections 13 and 14 of act of January 9, 1815 (3 Stat. 169).

There is in this record no evidence that these provisions of the law were complied with, or that any attempt was made to comply with them. An assessment and notice and opportunity to contest an erroneous assessment are certainly highly important rights of a taxpayer. On this account also the Taylor deed must be held void.

(3) No Evidence of Local Advertisement of Taxes Due.

[75] By section 26 of the act of January 9, 1815 (3 Stat. 173), it was the duty of the local collector, within ten days after receiving the revised lists from the board of principal assessors, to advertise in one newspaper printed in his district, if any, and by notification to be posted in at least four public places in his collection district, that the tax

had become due and payable. Notwithstanding my first impression to the contrary, it seems that this provision applies to both the lists of resident and nonresident property owners. In respect to nonresidents there is provision (section 28) for an additional publication, by the designated collector, but nothing that dispenses with the local advertisement required by section 26. That this is the intent of section 26 is made quite clear by the proviso at the end of section 28 (3 Stat. 175):

"Provided, that such payment is made within one year after the day on which the collector of the district where such property lies, had notified that the tax had become due on the same."

There was no evidence that such advertisement was made. It follows that the deed is void on this account.

(4) Assessment (if Any) Not in Name of the Owners.

As this objection is purely theoretical, it seems unnecessary to discuss it. In connection with some other questions, however, the deed next to be mentioned is of some importance.

In order to show the invalidity of the tax deed the defendant offered in evidence (Exhibit 106) a certified copy from the Russell county deed book of a deed dated February 1, 1796 (and admitted to record in Russell county October 25, 1796), from Richard Smyth, acting in his own behalf and as attorney in fact for Henry Banks, conveying the entire 200,000-acre tract to one Moorehouse. It should here be said that no power of attorney from Banks to Smyth was ever produced. The plaintiff made several objections to the admission of this copy in evidence.

[76] As the deed of Richard Smyth in his own right, conveying an undivided half interest in the land, the first objection which seems to call for mention is the fact that the copy offered in evidence (and presumably the deed book also) does not contain any word, figure, or symbol to indicate that the certificate of acknowledgment was sealed. The acknowledgment was made, on February 6, 1796, before the mayor of Philadelphia. This was authorized by Act Dec. 13, 1792 (Code 1803, p. 160), as amended by Act Dec. 25, 1794 (Id. 327). See, also, Cales v. Miller, 8 Grat. (Va.) 6; Hassler v. King, 9 Grat. (Va.) 115. The certificate reads in part:

"In testimony whereof, I, the said mayor, have hereunto set my hand and caused the seal of mayoralty of the said city to be hereunto affixed. * * *"

I have little hesitation in holding that this objection was properly overruled. See Virginia Co. v. Keystone Co., 101 Va. 723, 45 S. E. 291; Howdashell v. Krenning, 103 Va. 30, 33, 48 S. E. 491; William James' Sons Co. v. Crouch, 72 W. Va. 794, 79 S. E. 815; 1 Cyc. 580; 34 Cyc. 615; 1 C. J. 839. Shanks v. Lancaster, 5 Grat. (Va.) 110, 112, 116, 50 Am. Dec. 108, seems to relate to an original deed offered in evidence. If so, the deed itself proved that the certificate had no seal on it, and that it had been improperly admitted to record. Therefore proof of its execution was necessary. In the case at bar there is a presumption that the seal of the mayor was affixed to the

original deed, which the clerk of the Russell county court simply failed to copy or indicate in making the copy on the deed book.

[77] It seems to be further contended that the copy of the deed to Moorehouse is not admissible as evidence of a conveyance of Smyth's half interest in the land, because not admitted to record within eight months after its date. In the deed (Exhibit 106) Smyth is stated to be "of the city of Richmond, in the commonwealth of Virginia." The statute, however, allowed two years after sealing and delivery for recordation, where the grantor did not "reside" in Virginia. Code 1803, pp. 327, 328. In Hassler v. King, 9 Grat. (Va.) 115, 119, it is said:

"The deed recites that the grantors were of the state of Virginia; but the acknowledgment by them before the mayor of New York, and his certificate thereof, afford sufficient evidence that, for the time being, the grantors dwelt in that city, and were, when they acknowledged the deed, nonresidents of Virginia, in the sense in which the terms were used in the act of 1785."

See, also, Cales v. Miller, 8 Grat. (Va.) 6, 12, 13.

[78, 79] It may be a fact that there was a duly executed and acknowledged power of attorney from Henry Banks to Richard Smyth in existence, which was admitted to record (in Wills and Inventories Book No. 1, since destroyed by fire) at the time the deed to Moorehouse was admitted. But such fact was not proved, and I cannot think that it ought to be presumed. Supervisors v. Railroad Co., 119 Va. 763, 770, 91 S. E. 124. There has, so far as the evidence discloses, never been any possession whatever by Moorehouse, or by any one claiming under him. Nor were there any other such acts of ownership as could justify a presumption that a valid power of attorney had been executed by Banks. The one fact which has made me hesitate on this point is that the evidence satisfies me that Banks never paid taxes on the land (or on any interest therein). Aside from the fact that Moorehouse and Ralph were equally delinquent, it is a matter of history that many owners of mountain land failed to pay taxes and allowed their lands to be forfeited, although they had not otherwise divested themselves of title. It would seem, therefore, that a mere failure to pay taxes is not a reliable indication of a previous voluntary divestiture of title.

[80] It is further contended that section 3333a, Code 1904, makes the deed to Moorehouse prima facie evidence of the authority of Smyth to convey Banks' interest. I think that, if the Legislature had intended this statute to apply to such cases as the one here, the expression "power," or "power of attorney," would have been used. If there is doubt as to the meaning of the statute, its title may be looked to. The title seems to me to show quite clearly that the case before us is not within the intent of the statute.

[81] To the mere fact that the court of Russell county admitted the deed to Moorehouse to record I cannot give weight. The deed was clearly entitled to record as the deed of Richard Smyth in his own right. The proceeding which resulted in the admission of a deed to record by order of court could be, and I believe nearly always was, ex parte, without notice to the grantors. From the many illus-

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trations thereof appearing in the Virginia Reports, I think we may say that it is a historical fact that the courts, in ordering deeds to be recorded, never undertook to judicially pass on the validity of such a deed as we have under consideration. See Dawson v. Thurston, 2 Hen. & M. (Va.) 132, 137. Moreover, I have found no statute which forbade the recordation of a deed made by one professing to act as an attorney in fact for another, even where no power of attorney was offered. And I believe that the deed was admissible to record. See Code 1803, p. 156 et seq.

There was also introduced in evidence a deed of February 2, 1796, from Moorehouse to one Ralph, conveying a part of the 200,000 acres in severalty, which was recorded October 25, 1796. It is, however, unnecessary at this juncture to discuss this deed, or to now further advert to Ralph as an owner, except to note (Exhibits 82 and 83) that George Ralph's 102.312½ acres of land in Russell county was advertised by Collector Taylor for sale for the same tax which was charged to Smith and Banks.

(5) No Evidence of Advertisement under Section 28 of Taxes Due.

[82] No attempt was made by the plaintiff to prove publication of the advertisement required by section 28 of the act of 1815 (3 Stat. 175) in any one of the newspapers which had been designated to publish the laws enacted by either the Fourteenth or Fifteenth Congresses, or at the first session of the Sixteenth Congress. In the list filed with the deposition of Joel Grayson the Richmond Enquirer nowhere appears. The period covered by these designations ran from December 4, 1815 (3 Stat. 251), to May 15, 1820 (Id. 607). The advertisement of taxes due had to be made after the passage of the act of 1816 and prior to October 23, 1819.

[83] I think I have said enough to show that the Taylor deed is void on this account. But, even if the position were taken that this advertisement could legally have been in the Richmond Enquirer and it alone, there is no evidence that it appeared even in that one newspaper even once. It is recited in the Taylor deed that this advertisement appeared in the Enquirer, but this recital does not prove the fact.

(6) The Advertisement of the Tax Sale.

[84, 85] The direct tax for the year 1816 was imposed by the act of March 5, 1816 (3 Stat. 255). That statute provides that a direct tax of $3,000,000 be laid and apportioned according to an act of 1813, "and all the provisions of the act" of January 9, 1815, "except so far as the same have been varied by subsequent acts, and excepting the first section of the said act, shall be held to apply to the assessment and collection of the direct tax * * * hereby laid. * * *" The act of January 9, 1815, by sections 28 and 29 (3 Stat. 175), required publication for 60 days in at least one of the newspapers published in the state. This statute was amended by two statutes of March 3, 1815 (3 Stat. 231 and 239, cc. 91 and 100), with the latter of which we are not now concerned. The first of these provided that the publications to be made by the designated collectors should be made "at

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least once a week, for eight weeks in succession, in every newspaper within the state, in which the laws of the United States are by public authority published."

The language of the act of 1816 means first that the provisions of the act of January 9, 1815, which had been changed by amendatory acts, were not to apply. But as this unnecessarily incomplete construction would leave this taxing act without any provision whatever for advertising the designated collector's notices of taxes due or the tax sales, it seems entirely clear that the necessary meaning was that the provisions of the amendatory acts which varied the requirements of the act of January 9, 1815, were to be followed. In order to hold that sections 28 and 29 of the act of January 9, 1815, were intended to apply to the delinquencies arising under the act of 1816, we must entirely ignore the clause "except so far as the same have been varied by subsequent acts."

Notwithstanding these clear provisions of the law, it is argued that, as Collector Taylor construed the law as requiring the advertisement of sale to be published in only one newspaper, his construction should be followed. My understanding of this rule of construction is that it does not apply unless there be grave doubt as to the meaning of the law. Houghton v. Payne, 194 U. S. 88, 99, 24 Sup. Ct. 590, 48 L. Ed. 888; United States v. Graham, 110 U. S. 219, 221, 3 Sup. Ct. 582, 28 L. Ed. 126; Manhattan Co. v. City, 74 Fed. 535, 543, 20 C. C. A. 642; 36 Cyc. 1141, 1142.

[86, 87] It is further a fact that there is no satisfactory evidence that the Richmond Enquirer was, at the period of the publication of the advertisement of sale (August 22 to October 10, 1820), a newspaper that had been authorized to publish the laws. In the issue of March 10, 1820 (see Exhibit 72) is a short act (admitting Maine to the Union), which may well have been copied from the National Intelligencer, or from one of the official papers, and published merely as a news item of public interest. The same may be said of the issue of May 30, 1820 (Exhibit 73). The recital in the Taylor deed creates no presumption that the Enquirer had been designated to publish the laws, and there was no sufficient evidence of such fact. Moreover, I am strongly inclined to believe the contrary. The publication of the laws of the first session of the Sixteenth Congress had been committed to the Palladium of Liberty, the Republican Compiler, and the Norfolk and Portsmouth Herald. This work was finished late in the month of June, 1820. The advertisement of sale was published from August 22 to October 10, 1820. The second session of the Sixteenth Congress did not convene until November 13, 1820 (3 Stat. 610). There was, therefore, no reason for the designation of any other newspaper prior to August 22, 1820. The total failure of the plaintiff to prove that the laws of the second session of the Sixteenth Congress were published in the Enquirer is strong evidence that the paper had not been designated at the time the advertisements of this tax sale were appearing.

[88] The contention by plaintiff to the effect that the publications required by the act of March 5, 1816 (3 Stat. 255), were to be

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made only in the newspaper or newspapers that had prior to March 5, 1816, been designated, rather than those that were designated under later statutes, seems to me to be unsound. The draftsman of the act of 1816 had in mind the provisions of the act of January 9, 1815, and of March 5, 1815. Not only is this a presumption of law (Sutherland, Stat. Construction, § 333), but the act so shows. In providing, by means of those statutes, for publications in cases of failure to pay the tax under the act of 1816, he necessarily threw his mind forward, for such publications would be made only two years or more after the date of the act of 1816. When a writer has his mind fixed on the future, and uses language that could apply either to the present or the future, the reasonable construction of such language is that it applies to the future—the time in the thoughts of the writer. Hence the act of 1816, in adopting the provisions of the act of March 5, 1815, should be read as referring to such newspapers as would be designated for publishing the laws by authority when the advertisements under the act of 1816 were due to be published. In 1816 it was as well known as it is now that newspapers sometimes cease to exist. As the law contemplated publications to be made two or more years after the passage of the act, it seems most improbable that the lawmakers intended that the publications should be made in newspapers which had been designated on or before March, 1816, rather than such as would be in existence and under designation at the time of the publications.

Moreover, the Richmond Enquirer was not designated to publish the laws enacted at the first session of the Fourteenth Congress, which commenced December 4, 1815, and ended April 30, 1816. 3 Stats. 251. Hence, even if the intent of the act of March 5, 1816, had been that the publications should be made in the newspapers that were in March 1816, under designation, there was no authority for publication in the Enquirer. The Virginia newspapers then under designation were the Press of Lynchburg, the Argus of Richmond, and the Constitution of Winchester.

[89] It is earnestly contended by counsel for the plaintiff that the expression "in every newspaper within the state, in which the laws of the United States are by public authority published," does not restrict tax publications to those newspapers in which the acts and resolutions of Congress were published. Article 6 of the federal Constitution reads, in part:

"This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, * * * shall be the supreme law of the land. * * *"

Here at least it is quite certain that the words "laws of the United States" are used as meaning acts and resolutions of Congress. In the act of March 2, 1799 (1 Stat. 724, c. 30) it is provided:

"That the Secretary of State shall, as soon as conveniently may be, after he shall receive any order, resolution or law passed by Congress, cause the same to be published at least in one of the public newspapers printed within each state; and whenever in any state, the aforesaid publication shall be found not sufficiently extensive for the promulgation thereof, the Secretary of State shall cause such orders, resolutions and laws to be published in a

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greater number of newspapers printed within such state, not exceeding three in any state."

The act of November 21, 1814 (3 Stat. 145, c. 6), reads as follows:

"That the Secretary for the Department of State be, and he is hereby authorized to cause the laws of the United States, passed, or to be passed, during the present or any future session of Congress, to be published in two of the public newspapers within each and every territory of the United States: Provided, in his opinion, it shall become necessary and expedient."

So far as I know, this was the law in force when the acts of 1815 and of 1816 were enacted. In view of the foregoing, it seems to me impossible to say that the language used in section 3 of the act of March 3, 1815 (3 Stat. 231), "at least once a week, for eight weeks in succession, in every newspaper within the state, in which the laws of the United States are by public authority published," does not clearly refer to the newspapers designated by the Secretary of State for the publication of the acts and resolutions of Congress.

[90] The advertisement of the tax sale was made from August 22 to October 10, 1820. Prior to that date two additional statutes had been enacted. See Act April 20, 1818 (3 Stat. 439), and Act May 11, 1820 (3 Stat. 576). The last repealed the former. The first section of the act of May 11, 1820, reads:

"That the Secretary of State shall, as soon as conveniently may be, after he shall receive any order, resolution, or law, passed by Congress, except such orders, resolutions, and laws, as are of a private nature, cause the same to be published in a number of public newspapers, not exceeding one in the District of Columbia, and in not more than three newspapers in each of the several states and territories of the United States. And he shall also cause to be published, in like manner, in the said newspapers, all public treaties entered into and ratified by the United States, except Indian treaties, which shall be published only in one newspaper, and that to be within the limits of the state, or territory, to which the subject-matter of such treaty shall belong."

In order to hold that publication for eight weeks in the Richmond Enquirer alone was a sufficient publication of the tax sale it would be necessary that the evidence show, not only that the Enquirer was at or before and after the period in question (August to October, 1820) publishing the "orders, resolutions and laws passed by Congress" by authority of the Secretary of State, but also that the Enquirer was the only newspaper in the state that was then so authorized and so doing. The evidence introduced by the plaintiff does not show either fact. The evidence introduced by the defendant goes far toward proving that the advertisement of sale could only have been validly published in the Palladium of Liberty, the Republican Compiler, and the Norfolk and Portsmouth Herald.

(7) Insufficiency of Advertisement in the Enquirer.

[91] I am satisfied that a perfectly correct advertisement of sale made for eight successive weeks in the Richmond Enquirer would not have been a compliance with a mandatory requirement of the law. I am further inclined to the opinion that, in order to make the tax collector's deed valid, the assessment, the local advertisement of assess-

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ment, the local advertisement of taxes due, the advertisement by the designated collector of taxes due, and the advertisement of the tax sale should have been in the names of Moorehouse and Ralph. But it is unnecessary to so decide. If it be assumed that these proceedings could have been in the names of Richard Smyth and Henry Banks, and if it be also assumed that an advertisement in such names for eight successive weeks in the Richmond Enquirer was sufficient, still the advertisement that was made was on its first weekly appearance in the names of "Robert Smith and H. Banks." And there is no evidence that there ever was an eighth advertisement in the names of Richard Smyth and Henry Banks. It is true that an eighth (corrected) advertisement may have appeared in a supplement, now lost, to the issue of the Enquirer of the 13th or 14th day of October, 1820. But the authorities which control here, already cited and quoted from, forbid that presumptions be made in favor of the validity of the Taylor deed, and the fact that the plaintiff is not now able to introduce evidence which proves its validity is simply the plaintiff's misfortune.

The statute required an advertisement for eight successive weeks. At the time this advertisement was appearing Richard Smyth was certainly not one of the owners of the land. Whether Moorehouse and Ralph (or their successors in interest) were the owners of all of the land, or only of Smyth's half interest, is at present immaterial. If they owned only a half interest (and if it be assumed that an advertisement in the names of the former owners was sufficient), they had a right to eight successive advertisements free from mistakes such as would have misled them. Robert Smith is not idem sonans with Richard Smyth. In requiring publications of delinquent taxes, and especially as to the property of nonresidents, the lawmakers must be supposed to have known, not only that owners of property may forget that they have not paid the taxes when due, but that the payment of taxes is frequently intrusted to an agent of the owner, who may be either forgetful or unfaithful. We should therefore assume it as possible that these nonresident owners may have sent the money to pay the direct tax of 1816 to their agents a year or more before this advertisement appeared. In such circumstances, it would seem that the advertisement was calculated to mislead. If Moorehouse, believing his taxes to have been paid, had actually seen the advertisement in the name of Robert Smith and H. Banks, as it appeared in the Enquirer of August 22, 1820, it seems to me that it could easily have been passed by as relating to land that he was not concerned with. Indeed, I am not sure that the true owner could have been expected, as his eye traveled down the column of owners' names in the advertisement, to read further than the word "Robert." The Virginia doctrine is expressed in Stevenson v. Henkle, 100 Va. at page 595, 42 S. E. 672. Amid the multiplicity of decisions of somewhat similar cases the opinion in Meyer v. Kuhn, 65 Fed. 705, 713, 13 C. C. A. 298 (C. C. A. 4th Circuit), is of great force. See, also, Marx v. Hanthorn, 148 U. S. 172, 184, 13 Sup. Ct. 508, 37 L. Ed. 410; Yellow Poplar Co. v. Thompson, 108 Va. 612, 619, 62 S. E. 358; 37 Cyc. 1005.

For this reason, also, I must hold that the Taylor deed is void.

(8) No Evidence of Compliance with Section 30 of Act of January 9, 1815.

[92, 93] This is an important provision of the law, intended for the benefit of the property owner. Assuming that, by force of some statute which I have not found, and to which no citation has been furnished, this list (if it ever existed) should have been removed to the clerk's office in Richmond; and assuming, if it ever existed, and if it ever reached there, that it was destroyed by the great fire of 1865, we still have no evidence that the statute was in fact complied with. Satisfactory evidence of the loss or destruction of a document authorizes the reception of secondary evidence of its contents, but does not supply want of evidence of the fact which needs be proved. Supervisors v. N. & W. R. Co., 119 Va. 763, 770, 91 S. E. 124. As I understand the law, the plaintiff here had to affirmatively prove (either by direct or circumstantial evidence) that the list in question was made in due time, and was also in due time filed in a certain place. We cannot make presumptions in favor of the Taylor deed. The inability of the plaintiff to prove compliance with the law in the respect in question may be due solely to the accidents incident to great lapse of time; but this is not the fault of the defendant. It remains a fact that the plaintiff has not proved the performance of an essential prerequisite to the validity of the Taylor deed. Minor, Tax Titles, 4; 1 Blackwell, Tax Titles (5th Ed.) §§ 641, 644; Flanagan v. Grimmet, 10 Grat. (Va.) 421, 426; Boon v. Simmons, 88 Va. 259, 265, 13 S. E. 439; Gage v. Bani, 141 U. S. 344, 351, 12 Sup. Ct. 22, 35 L. Ed. 776; De Forest v. Thompson (C. C.) 40 Fed. 375, 380; Braxton v. Rich (C. C.) 47 Fed. 178, 190; Cook v. Lasher (C. C. A. 4th Circuit) 73 Fed. 701, 707, 19 C. C. A. 654; Collier v. Goessling, 160 Fed. 604, 87 C. C. A. 506; Fay v. Crozer (C. C.) 156 Fed. 486, 489; Coulter v. Stafford, 56 Fed. 564, 6 C. C. A. 18.

In view of a contention made by plaintiff's counsel, attention should be called to the fact that there is an obvious typographical error in section 30 of the act of 1815. Where the act reads, "together with the names of the owners or presumed owners, *or* the purchasers, * * *" it should be read as "*of* the purchasers." This provision was manifestly copied from section 25 of the act of July 22, 1813 (3 Stat. p. 32).

[94] It should further be said that, while counsel for the plaintiff have succeeded in finding some decisions which may seem to sanction the theory that the provisions of section 30 of the act of 1815 may be regarded as directory, the rule which controls us here is that provisions of tax laws which are clearly intended for the benefit of the taxpayer are mandatory. In French v. Edwards, 13 Wall. 506, 511 (20 L. Ed. 702) it is said:

> "But when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory, but mandatory."

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In Marx v. Hanthorn, 148 U. S. 172, 180, 13 Sup. Ct. 508, 510 (37 L. Ed. 410), it is said:

"A statutory power, to be validly executed, must be executed according to the statutory directions. It is no doubt true that there may be provisions in tax laws that are made in the interest of the public, and which do not concern the taxpayer; and a failure to punctiliously observe them may furnish him with no just ground of complaint. But the well-established rule is, as above stated, that observance of every safeguard to the owner created by the statute is imperatively necessary."

See, also, Lyon v. Alley, 130 U. S. 177, 184, 185, 9 Sup. Ct. 480, 32 L. Ed. 899; Erhardt v. Schroeder, 155 U. S. 124, 129, 15 Sup. Ct. 45, 39 L. Ed. 94; Boon v. Simmons, 88 Va. 259, 264, 13 S. E. 439; Cooley, Taxation, p. 216 et seq.; 37 Cyc. 1281, 1479.

It is further insisted that the mere fact that the lists of sales were required to be filed after the tax sale forbids that this section be regarded as of importance. I am unable to see any force in this contention. 37 Cyc. 1281; Blackwell, Tax Tit. (2d Ed.) §§ 641, 644. The deed must be held void, also, on this account.

(9) Description of the Land Conveyed.

[95] While I hold that the advertisement of the tax sale in the names of Robert Smith and H. Banks was insufficient, it does not follow that the description in the deed is also insufficient. The evidence extrinsic of the deed shows that the land which was intended to be conveyed was in seven issues of the Richmond Enquirer advertised as 200,000 acres in Russell county, the property of Richard Smith and Henry Banks. The patent introduced granted 200,000 acres in Russell county to Richard Smyth and Henry Banks. The error in the deed, whereby the 200,000 acres in Russell county is described as having been assessed and sold as the land of Robert Smith and Henry Banks, should, I think, be treated as a mere clerical error, insufficient to invalidate the deed.

(10) Assessment by Improper Collector.

[96] I am not prepared to say that where a tract of land lies in two collection districts, and where the statute requires that the assessment be made by the collector of the district in which the land lies, it can properly be assessed by only one collector and in only one district. It may well be that the statute law we are dealing with required that, where a tract of land lies in two districts, each collector must assess the part of the land lying in his own district. However, there is under the evidence such uncertainty as to the location of the exterior lines of the Smyth and Banks tract that I do not feel quite justified in holding that this tract did in fact lie outside of the first collection district even in part. It was stipulated that the particular tract claimed by the defendant and involved in this action lies within the Smyth and Banks lines. And I am satisfied from the evidence that all of the Ratliff patents lie within the 200,000 acres. But the rather vague statements of the witnesses as to the location of the outside lines of the Smyth and Banks tract are too uncertain a foundation for the conclusion here urged by the defendant.

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(11) Authority of Taylor to Convey.

[97] It is contended by the defendant that there is no sufficient evidence of the appointment of Wm. D. Taylor as "designated collector." I think the circumstantial evidence is sufficient to authorize a ruling that this fact has been sufficiently shown. Ronkendorff v. Taylor, 4 Pet. 349, 359, 7 L. Ed. 882.

(12) Claim that Land was Not Subject to Federal Tax in 1816.

(A) Act of 1803.

[98] It is contended that the 200,000-acre tract here in question was validly forfeited to the state of Virginia by force of the Virginia act of January 29, 1803 (2 Code 1819, p. 528), was not redeemed, if ever, until after 1816, and hence was not subject to the federal direct tax of 1816. The second section of the act of 1803, which ipso facto causes a forfeiture under certain conditions, required that the auditor publish the statute in the "gazette of the printer of this commonwealth, and in some newspaper published at the seat of the general government." It is true that the purpose in requiring publication of the statute may have been in part for the benefit of the state. But, when we recall that under the first section of the act many landowners might lose valuable land because of an unintentional failure to pay taxes amounting to only a small fraction of the value of the land, it seems to me necessary to hold that the publication of the statute was at least in part intended for the benefit of the landowners. It is also true that there is in the statute no express provision to the effect that the publication should be a condition precedent to the validity of forfeitures occurring by force of the statute. However, it is clear that the lawmakers intended that the publication should be made, and we have no warrant for assuming an intent that forfeitures should occur, although the publication was not made.

[99] No essential difference in principle has occurred to me between the notice in advance of a sale for taxes, required by practically every state, and the notice intended by the second section of the act of 1803. It seems to be universally held that a failure to give the notice of a tax sale invalidates the sale. And where the burden of proving its validity rests on the party claiming under the sale a failure to affirmatively prove that the notice was given is as fatal as would be evidence to the contrary effect.

[100] Whether or not the defendant is entitled to the benefit of a presumption that the auditor complied with the second section of the act of 1803 is a question which has been given careful consideration. It is the general rule that presumptions are not indulged in favor of a party claiming the benefit of a forfeiture. Moreover, there has never been any notorious, long, unbroken, actual possession of the tract specifically in controversy in this particular suit, and the evidence of other acts of ownership by Silas Ratliff and his successors in title does not seem to me at all sufficient to warrant a presumption in favor of a forfeiture. In Marx v. Hanthorn, 148 U. S. 172, 180, 13 Sup. Ct. 508, 510 (37 L. Ed. 410), it is said:

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"A statutory power, to be validly executed, must be executed according to the statutory directions. It is no doubt true that there may be provisions in tax laws that are made in the interest of the public, and which do not concern the taxpayer; and a failure to punctiliously observe them may furnish him with no just ground of complaint. But the well-established rule is, as above stated, that observance of every safeguard to the owner created by the statute is imperatively necessary. So, too, it is the rule, when not modified by statute, that the burthen of proof is on the holder of a tax deed to maintain his title by affirmatively showing that the provisions of the law have been complied with."

In Wilson v. Bell, 7 Leigh (Va.) 22, 24, it is said:

"It is therefore the well-settled law that he who claims under a forfeiture must show that the law has been exactly complied with."

(B) Act of 1814.

[101-104] It is further contended on behalf of the defendant that, if there was no valid prior forfeiture, the 200,000-acre tract was forfeited in 1815, under the act of February 9, 1814 (2 Code 1819, p. 542). Under section 38 (page 551) of this statute no irregularities, except such as appear on the face of "the proceedings," may be relied upon to defeat the forfeiture. As this provision attempts to make the proceedings conclusive evidence of the regularity of the listing and assessment and of other necessary prerequisites to a valid taxation, it is probably void. See Marx v. Hanthorn, 148 U. S. 172, 182, 183, 13 Sup. Ct. 508, 37 L. Ed. 410; Minor, Tax Titles, p. 132.

However, it is not necessary to so hold. Admitting that the only document now in existence which may be regarded as "the proceedings" is the list or return of forfeitures in 1815, I am unable from it alone to identify any one of the 200,000-acre tracts therein mentioned as being the tract we are concerned with. The entry in the names of Richard Smyth and Henry Banks of 200,000 acres raises, of course, the nicest question. It is not an impossibility that the same Richard Smyth and Henry Banks with whom we are concerned obtained title to a tract of 200,000 acres of land in Russell county, other than the tract we are concerned with. But if we go to evidence outside of the forfeiture list in order to identify the lands on the list, we must, if the other evidence shows that grave irregularities are shown by the list, make use of such other evidence. If, by the extraneous evidence we identify any one entry of a 200,000-acre tract shown on Exhibit No. 1 with the second deposition of C. Lee Moore (the forfeiture list), we must also learn that every entry of 200,000 acres on that exhibit relates to the tract we are concerned with. This list (not to mention other errors) shows 200,000 acres returned as forfeited in the name of Moorehouse, and 200,000 acres as forfeited in the name of Ralph. In order to identify these two tracts with the land we are concerned with, we must consider evidence which, while it shows that the land returned as forfeited is the Smyth and Banks 200,000-acre tract we have been dealing with, also shows that neither Moorehouse nor Ralph was ever properly assessable with taxes on 200,000 acres. The same day that the deed from Smyth to Moorehouse (Exhibit 106)

was admitted to record, the deed from Moorehouse to Ralph (Exhibit 107) was admitted to record. Moorehouse was never assessable on more than 97,686 acres, and Ralph was never assessable on more than 102,313 acres. The lawmakers never intended that Moorehouse's land or Ralph's land could be forfeited for nonpayment of taxes assessed on practically twice too great an acreage.

Nor can any sound argument be based on the theory that no real injustice was done them. If my construction of the act of 1814 (sections 23, 24, and 48) be correct, the amounts charged in the list of forfeited lands against Moorehouse and against Ralph respectively are considerably too great. It is true that in making this computation I have as to Moorehouse reduced the taxes for 1797 and 1798 by one-half, and have not guessed at, but have omitted, any taxes for 1799, 1800, 1802, and 1808, as the land books do not show the taxes for these years. A party seeking to support a forfeiture cannot ask the court to guess at unknown assessments. But, even if the taxes for the omitted years were assumed to be the same as in the years nearest thereto, still the total would be too large. In the case of Ralph I charge only the tax on 102,313 acres for 1797, charge a third of the assessment for 1798, and omit taxes for 1799, 1800, 1802, and 1808. But here, again, if the proper amounts be guessed at for the omitted years, the total is still considerably more than was just. The totals found in the forfeiture list are explicable only on the theory that Moorehouse was charged on 200,000 acres for 1797 and 1798, and that Ralph was charged on 302,313 acres for the same years.

And the case against a valid forfeiture in the name of either Moorehouse or of Ralph is stronger than has been stated. The same 200,000-acre tract was returned (in two entries) as forfeited in the names of Smith and Banks. Under section 37 of the act (2 Code 1819, p. 551) a forfeiture in the name of a grantor is made binding on the grantee. From the land books we learn that from 1804 until after 1815 the entire tract was assessed to Moorehouse and Ralph and also to Smith and Banks. As I read the statute, neither Moorehouse nor Ralph could have redeemed, and secured thereby a marketable title, except by paying, in addition to the sums charged to himself, the sums charged to Smith and Banks.

Let us now consider the validity of the attempted forfeiture in respect to Henry Banks' possible rights. To identify the tract that was returned as forfeited in the names of Smith and Banks and of Richard Smith and Henry Banks we must consider extraneous evidence, including the land books. And if we solve in favor of the defendant the doubt as to the identity of the 200,000-acre tract, appearing on the land book in the names of Smith and Banks for the first time in 1804, we are by force of the same evidence led to know that the land could not properly have been assessed in the names of Smith and Banks. For the year 1804 (and for each year thereafter until after 1815), as has been said, every acre of the entire tract was assessed to either Moorehouse or Ralph, and properly. Lohrs v. Miller, 12 Grat. (Va.) 452, 456. This is itself a sufficient reason for holding that the returns of forfeiture in the names "Smith & Banks" and "Richard Smith and Henry

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Banks" are invalid. A claim of forfeiture based on an entirely erroneous assessment cannot be sustained.

Moreover, Banks, had he so wished, could not have redeemed, except by paying taxes which, so far as the evidence shows, were in excess of what should have been assessed. The statute allowed redemption only "by the payment of the taxes and damages for which the land was sold." It may possibly be doubtful if this language authorized a redemption of an undivided half interest in a tract of land by payment of half of the taxes and damages for which the entire tract was sold. But, if we solve this doubt in favor of the defendant, it still remains a fact that Banks could not have so redeemed his half interest in the land as to secure a marketable title, except by paying half of all the charges made in the list of forfeitures against both Moorehouse and Ralph (not to consider those made against Smith and Banks). This is so because the land was properly assessed to Moorehouse and Ralph. See Lohrs v. Miller, supra, 12 Grat. (Va.) 452, 456. The charges made against Moorehouse and Ralph, as has been shown, are considerably too great.

The conclusion necessarily reached is that no valid forfeiture of the land in question prior to 1816 has been shown.

Check Marks on Land Books.

[105] Objections by the plaintiff to the testimony of C. Lee Moore, the auditor of public accounts, concerning certain check marks on old land books (assessment lists) in his office, which are said to indicate delinquency, raise a question which may be of great interest in some subsequent trial. I adhere to the rulings made at the trial. It may be that a check mark alone is not sufficient evidence of delinquency. Such a mark could so easily and innocently be made by any one examining a title that the evidence, standing by itself, is not very reliable. But as a circumstance tending to show delinquency it seems to me that the evidence is admissible. It appears that many certificates have been issued from the auditor's office stating that the records of the office show that certain land was returned delinquent, and that they have been based merely on these check marks. Section 3334, Code 1904, makes a certificate by the auditor of the fact of the return of any real estate as delinquent admissible and prima facie true. It would be unreasonable to hold inadmissible the facts on which such a certificate is based, while compelled to admit as prima facie true the certificate itself.

Auditor's Records.

[106] A very large part of the first deposition of C. Lee Moore is unintelligible, without an extravagant consumption of time. If another of these cases is to be tried, and if the tax history of the land in question is deemed of importance by either side, the contents of the land books, lists of lands forfeited, lists of lands sold and bought by the commonwealth, etc., should be presented by examined or attested copies (or extract copies) of the different sheets.

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Claim of Title in Plaintiff under Act of 1842.

[107] The contention that the commonwealth's title by forfeiture, if any, was vested in Joseph Hagan and Sarah Purcell, or in James Culbertson, by force of the third section of the act of March 22, 1842 (Acts 1841–42, p. 13), does not justify more than the briefest discussion. I am satisfied that the interpretation put on the statute by counsel for plaintiff is utterly unsound. The expressions found in the opinions in Wild v. Serpell, 10 Grat. (Va.) 405, at pages 409 and 412, and in Atkins v. Lewis, 14 Grat. (Va.) 30, at page 36, are dicta; but the construction therein put upon the statute was unavoidable. See Hutchinson, Land Titles, pp. 28–110, especially pages 36, 37, 49, 62, 63, 71, 85–87. It is true that the section of the statute in question is badly phrased. But the highly ingenious interpretation put on it by counsel for the plaintiff will not withstand examination. If their construction be correct, the Legislature intended, for instance, the following result: If a tract of land had been granted to A. in 1800, and if he, never having paid any taxes, had on January 1, 1841, conveyed the land to B., the latter would gain the commonwealth's title on March 22, 1842, if he had paid merely the taxes for the year 1841. In such case B. would have "discharged all taxes duly assessed and charged against him * * * and all taxes that ought to have been assessed or charged * * * from the time he * * * acquired title thereto. * * *" It should be added that the entire argument under this head ignores the fact that the Taylor deed is void.

Redemptions Claimed by Plaintiff.

[108] As has been shown, there was no forfeiture under either the act of 1803 or of 1814. I do not find that counsel for either side have specified any time or any other particular statute under which a forfeiture may have occurred. I am not justified in giving to this case the time that would be necessary to make an independent investigation as to each one of the numerous statutes enacted after 1814. As of course, until it appears that there had previously been a valid forfeiture, no redemption, or attempted redemption, could possibly vest any title in the party making the redemption, or in any one else.

Warranty in the Deed from Dennis, Clerk (Exhibit 2).

[109] If the commonwealth acquired title to the land in question under the act of 1835, it is certain that the patent issued to Ratliff in 1861 (Exhibit 114) vested in him every vestige of title that was then in the commonwealth. That the commonwealth could thereafter, except for the default of Ratliff or his successors in title, pass the title to the land in controversy to some one else, is too unreasonable to call for discussion.

[110] However, the meaning of the Legislature in providing (in section 666, Code 1904) that the clerk's tax deed shall be with covenants of special warranty has interested me. It has been the practice in the chancery courts of this state, since an early day in the history

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of the courts, in directing that commissioners in chancery execute deeds, to order that the commissioner shall make a deed of special warranty. Certainly it was never the intention that such warranty should bind the court, and the only reason for the practice that has occurred to me is that this requirement has some tendency to prevent the commissioner from illegally making conveyance to some one other than the person entitled to the deed, and thereafter also making conveyance according to the court's decree. And the analogy between the tax deed to be made by the clerk and the conveyances so frequently made by commissioners in chancery may have suggested the insertion in section 666 of the sentence in question. But in no event can the warranty be considered as one made in behalf of the commonwealth. It is no more binding on the state than is the special warranty in a deed made by a commissioner in chancery binding on the court by whose authority he makes the deed. Again, the entire course of legislation on the subject of delinquent lands negatives a theory that the state intended to warrant the title conveyed by the clerk of court under section 666.

As no objections to the Dennis deed have ever been filed by the defendant, I assume that it passed such title to the land in controversy as was vested in Pearson. But it cannot be held to have any greater effect.

Title Outstanding in Third Persons.

[111] The true, senior, legal paper title to the land in controversy is, if not in the defendant, outstanding in the heirs, or other successors in title, of Moorehouse, Ralph, and Banks. The entire failure of any one claiming under any of the three to take possession, or to do any sufficient act of ownership to indicate that that title is valid, subsisting, and enforceable, is a sufficient reason for saying that in this particular case the defendant cannot rely upon the defense of outstanding title. It follows that a discussion of the admissibility and effect of the deed from the heirs of Lewis Pascault to Wante (Exhibit 141), or of the curious Derrick deed (Exhibit 176) would be of academic interest only.

Plaintiff's Title.

[112] Having found the Taylor deed to be a nullity, the plaintiff has not the legal title to the land in controversy. As has been said, the Dennis deed passed only such title as was in Pearson, and that was not the true legal title. Without regard to the question of title outstanding in third persons, or to the possession of the defendant and his predecessors, the judgment of the court must be for the defendant. And, such being the conclusion reached, it may seem quite unnecessary to go further. But to make this, as far as may be possible, a test case, it seems advisable to consider at least the defendant's paper title and the defense of adversary possession.

Defendant's Paper Title.

The patent issued to Silas Ratliff in 1861 could have vested in him the true legal title to the tract now in controversy, if theretofore there

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had been a valid forfeiture of the title under the Smyth and Banks patent. The defendant's claim of forfeitures under the acts of 1803 and 1814 have been discussed and rejected. Counsel for defendant have not pointed out any other specific statute under which a forfeiture may have occurred, nor has mention been made by them of the time when any such forfeiture may have occurred. The time already given to this case has been so great, and the demands from many other litigants are so pressing, that I do not feel justified in pursuing this theory in this case. If, in some other of these allied cases, counsel will specify some date and some particular statute under which a forfeiture is claimed, I will examine the question as thoroughly as I can.

Defendant's Motion for Judgment.

[113] The theory of this motion, made first at the conclusion of the testimony in chief for plaintiff, and renewed at the close of the testimony, is that an exception to the action of the court in overruling it would bring the facts before the appellate court for review. See Insurance Co. v. Folsom, 18 Wall. 237, 249, 21 L. Ed. 827. It is not within my province to express an opinion on this question. It may be that this motion could properly have been granted. However, no harm is done either party (in view of the conclusion I have reached on the whole case) by overruling it. I take this course, as it seems much more likely to result in making this a test case than would a judgment based on the theory of a demurrer to the evidence.

Exhibit 123.

This is a copy, taken from the Buchanan county deed book, of a deed from Martin Gibson to Silas Ratliff. The Buchanan county record was made from a copy taken from the Tazewell county deed book. I do not think section 3339 authorizes the use of the copy that was offered. However, counsel for plaintiff did not make this objection at the trial. Had the objection been then made and sustained, the defendant could have obtained and offered a copy from the Tazewell county record. This document was offered on Tuesday, September 28, 1915. The reception of evidence continued until the afternoon of October 1, 1915; and, as the objection would have been highly technical, I would have given the defendant more time, if needed, to obtain a copy from Tazewell county. Hence no change of the ruling admitting the copy that was introduced can now fairly be made.

Ruling as to Testimony Reversed.

[114] At the trial the surveyor, Stone, was permitted to state, concerning the place at which he located a corner, that Fred Ratliff had thereafter told him that said place is the point where he (Ratliff) had seen the corner trees standing. As evidence of the fact that the corner trees had formerly stood at that place this testimony is hearsay. It was admitted under the belief that, when reached, Fred Ratliff's deposition would show what place he had pointed out to Stone. In such event I think the statement would have been admissible as identifying the place where Stone ended his line with the place where the trees

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had formerly stood. However, Fred Ratliff's deposition does not clearly meet the requirements. The ruling made on page 1424, vol. 2, of transcript of evidence, must be reversed.

Adversary Possession.

[115] The defendant, inter alia, relied upon the defense of adversary possession. Using the expression "actual possession" as meaning a visible possession, resulting from a series of physical acts, which have noticeably changed the land from its state of nature, and the expression "constructive possession" as meaning an invisible, unreal possession, which must always be connected with, and founded upon, a partial actual possession, the facts as to the possession were as follows: The defendant's predecessor in title, Ratliff, acquired color of title long prior to the Civil War to two small adjoining tracts of land, which were in large part taken into and kept in unbroken, notorious, actual possession from about 1852 until 1896. The two tracts are over a mile from the land in controversy, which was never in actual possession. Ratliff obtained a grant from the commonwealth of the tract in controversy May 1, 1861. This tract adjoins another tract granted by the commonwealth to Ratliff August 1, 1862, which in turn adjoins a tract granted by the commonwealth to Ratliff in 1861, which adjoins and impinges upon the two tracts which Ratliff had in actual possession. There has never been any actual possession of the tract in controversy, or of either of the two tracts which serve to connect the tract in controversy with the two tracts which were kept in actual possession. The doctrine of constructive possession of contiguous tracts, claimed under color of title, is laid down in Overton v. Davisson, 1 Grat. (Va.) 211, at pages 213, 216, 224, 42 Am. Dec. 544. In Va. Co. v. Fields, 94 Va. 102, at pages 106, 107, and bottom of page 115, 26 S. E. 426, it is affirmed, as it also is in Roller v. Armentrout, 118 Va. 173, 177, 86 S. E. 906. In Hot Springs Co. v. Sterrett, 108 Va. 710, at pages 712 and 713, 62 S. E. 797, and in Harman v. Ratliff, 93 Va. 249, 255, 24 S. E. 1023, it is recognized. See, also, Sharp v. Shenandoah Co., 100 Va. 27, at pages 34–36, 40 S. E. 103; Merryman v. Hoover, 107 Va. 485, 492, 502, 59 S. E. 483; Garrett v. Ramsey, 26 W. Va. 345, 370; State v. Harman, 57 W. Va. 447, 50 S. E. 828, 835; Simmons Co. v. Doran, 142 U. S. 417, 443, 12 Sup. Ct. 239, 35 L. Ed. 1063; Braxton v. Rich (C. C.) 47 Fed. 178, 180; Rich v. Braxton, 158 U. S. 375, 384, 15 Sup. Ct. 1006, 39 L. Ed. 1022; Hutchinson, Land Titles, § 416.

Harman v. Ratliff, 93 Va. 249, 255, 256, supra, 24 S. E. 1023, without close attention to the facts, might be misleading. At pages 250, 251, are set out the titles claimed by Silas Ratliff in that case. They do not include his home tract. The key to the opinion—a fact which should have been stated in the report—is that Silas Ratliff's home tract was outside of the Harman & Bender patent. The record, sent me by the clerk at Wytheville, rather clearly indicates that only the 14 acres, the 465 acres, and the 1,080 acres impinged on plaintiff's boundary. Both Judge Coulling and Mr. Finney, of counsel in that case, have written me that Silas Ratliff's home tract was outside of

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the Harman tract. In the brief for the plaintiff in error, signed by the late Judge John H. Fulton, it is said:

"The defendant [Ratliff] owned a tract that adjoined the plaintiff on the east called the 640-acre tract. This does not include any of the land in controversy. It is called the home tract (presumably). He lived upon it."

There is nothing to the contrary in the opposing brief. In the case at bar the junior claimant, Ratliff, before the Civil War took actual possession of a part of the tract conveyed to him by Gibson, as well as of the 15-acre tract. The Gibson tract lies, as do the other tracts to be mentioned, wholly within the Smyth & Banks patent. The 15-acre patent to Ratliff (whose name is also spelled Ratcliff) was issued in 1854. In 1861 Ratliff got a patent for the 595 acres which adjoins the 15 acres and the Gibson tract. In 1861 he also obtained a patent for the 673 acres (the land in controversy), which did not then adjoin any of Ratliff's other tracts. In 1862 (August 1st) Ratliff obtained the 163-acre patent, which adjoins the 673 acres and the 595 acres, and then the land in controversy became a part of a chain of contiguous tracts. If any one in plaintiff's chain of title ever had any actual possession of any part of the 200,000-acre tract, such possession had been abandoned long prior to 1862, and was never afterwards resumed. The doctrine here relied upon by the defendant does not greatly commend itself to my mind, but I am unable to satisfactorily distinguish the case at bar from Overton v. Davisson, supra. In that case Davisson's actual possession (which was commenced before the emanation of either grant and was confined to a part of a tract of 400 acres, granted to Davisson on January 3, 1787) was held to extend Davisson's constructive possession over another adjoining tract of 800 acres granted to him on January 23, 1787. If a constructive possession can arise after an interval of 20 days, it may also arise after an interval of one or of several years. There is no time at which a line of demarcation can be drawn. Hence, although the interval of time is longer here than in Overton v. Davisson, the principle there laid down seems necessarily to apply here, unless it be because the land in controversy does not immediately adjoin either of the two tracts of which Ratliff had a partial actual possession.

In this respect this case differs from Overton v. Davisson. But I am unable to see any sufficient reason for limiting the doctrine to an immediately adjoining tract. The principle on which the doctrine is founded is that an actual possession within the interlock by a colorable title holder gives to the true title holder notice of an adverse claim, and he must at his peril sue before the period of limitation runs. It can make no difference to the senior that the junior's colorable titles were acquired at different times. All contiguous tracts constitute one parcel, so far as the senior title holder is concerned. After August 1, 1862, Ratliff was in the actual possession of a part of what was in effect one large boundary, shown by the exterior lines on the trial map. In Overton v. Davisson, 1 Grat. (Va.) 216, 229 (42 Am. Dec. 544), it is said:

"And, moreover, that upon the question of adversary possession, it is immaterial whether the land in controversy, be embraced by one or several coter-

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minous grants of the older patentee, or one or several coterminous grants of the younger patentee; in either case the lands granted to the same person by several patents must be regarded as forming one entire tract."

[116] As has been shown, Ratliff's constructive possession of the tract in controversy commenced on August 1, 1862 (the date when the land in controversy became one of the several adjoining tracts); but at that time the stay law was in force. Section 2919, Code 1904; 4 Minor's Insts. 624. It was not until January 1, 1869, that Ratliff's possession could start the running of the statute of limitation. The 10 years of adverse possession necessary to bar the senior title holder could not have run until January 1, 1879.

[117-119] In 1876 Pearson failed to pay the taxes assessed against him on the 200,000-acre tract. It is contended in behalf of the plaintiff that the statute of limitations ceased to run on January 1, 1876, and did not commence to run again until the tax deed was made by Dennis, clerk, to the Buchanan Company. This contention is founded on section 661, Code 1904:

"*Sec. 661. When Deed Made—What Title is Invested in Grantee—How Defeated—When Title of Remainderman Not Divested by Sale.*—When the purchaser of any real estate sold as aforesaid or sold in pursuance of section six hundred and sixty-six, his heirs or assigns, has obtained a deed therefor, and the same has been duly admitted to record in the county or corporation in which such real estate lies, the right or title to such real estate shall stand vested in the grantee in such deed as it was vested in the party assessed with the taxes or levies on account whereof the sale was made, at the commencement of the year for which said taxes or levies were assessed, or, in any person claiming under such party," etc.

I concede that from the date of the purchase by the commonwealth (October 12, 1886) until the deed was made to the Buchanan Company the possession of Ratliff and his successors did not count. Smith v. Chapman, 10 Grat. (Va.) 445, 464. The exact question here presented does not seem to have ever been decided by the Virginia Court of Appeals. In Thomas v. Jones, 94 Va. 756, 759, 27 S. E. 813, 815 (where it was contended that the purchaser of the tax title took subject to a vendor's lien in favor of the delinquent's grantor), the court said:

"The provision in section 661 of the Code, that 'the right or title to such estate shall stand vested in the grantee in such deed as it was vested in the party assessed with the taxes or levies on account whereof the sale was made,' refers to the character of the title that shall be vested in the grantee in such deed, whether it be a fee simple or otherwise. It has no reference to liens, and does not mean, as contended, that the purchaser takes the land subject to the liens resting thereon at the time the taxes are assessed."

In Stevenson v. Henkle, 100 Va. 591, 598, 42 S. E. 672 (where it was contended that a deed of trust made by the landowner prior to the assessment of taxes for which the land was subsequently sold was paramount to the tax lien), the language used in Thomas v. Jones, supra, is again used. While the question is not entirely free from difficulty, I believe that the language of the statute means no more than that the grantee in the tax deed shall have the estate that was vested in the delinquent former owner. Without going further back than the tax statutes collected in the Code of 1819, it will be advisable

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to note the genesis of the language used in the statute in force when the land was conveyed to the Buchanan Company. In the act of January 7, 1788 (2 Code 1819, p. 512), it is provided that the sheriff's deed "shall be effectual for passing to the purchaser all the estate and interest which the debtor had and might lawfully part with in the lands." In another act of the same date (Id. p. 515), in providing for redemption after purchase by the tax commissioner for the public, it is provided that the person who was originally chargeable with the land tax "may discharge the same, and be entitled to all the estate he held in such land, in as full and ample a manner as if the said sale had never been made." In the act of November 30, 1792 (Id. 522), the deed "shall be effectual for passing to the purchaser all the estate and interest which the debtor had, and might lawfully part with. * * *" In the act of February 14, 1811 (Id. p. 536), is the following:

"* * * No forfeiture of any lands occasioned by the failure of any tenant for life to pay the taxes due thereon shall operate on any other estate except that of such tenant for life, unless such estate be found to be insufficient to pay the arrears of taxes due thereon."

In the act of February 9, 1814 (Id. 551), it is provided:

"37. The sales made as aforesaid, and the titles vested in the literary fund as aforesaid, shall give to the purchaser, or to the literary fund, as the case may be, only such estate and such right, as, at the time when such land or lot was returned delinquent, was vested in the person in whose name it was returned, his heir, devisee, or other person claiming by, through or under him; save only, that all use, trust and equity of redemption, shall be extinguished by such sale or vesting in the literary fund."

In the act of March 10, 1832 (Acts 1831–32, p. 64), it is provided:

"20. All sales of lands and lots, made in pursuance of this act, and not redeemed within the period aforesaid, shall be good and effectual in law, for passing such estate only as shall be vested in the persons charged with the taxes, for the nonpayment whereof such sale shall be made."

In so far as we are now concerned, the language of the present statute is identical with that in 1 Code 1849, p. 204, Code 1860, p. 221, Code 1873, p. 385, and Code 1887, § 661 (Code 1904, § 661). Throughout this long course of legislation it seems rather clear that the intent has always been that a tax purchaser should obtain such estate in the land as the delinquent had, rather than to provide a shield against adversary possession held by a stranger to the delinquent taxpayer.

Again, if the intent was that a delinquency, followed by a sale and deed to a tax purchaser, should stop the running of the statute of limitations at the date of the delinquency, the language chosen is ill adapted to express such intent. While adversary possession of real estate may defeat the right or title of a delinquent taxpayer, it is not a part of such right or title. If the intent was to shield the tax purchaser against an adversary possession which had not ripened at the commencement of the year of the delinquency, the Legislature would have said that the purchaser should have the title of the delinquent owner, with every right of action which he had on the first day of the year of the first delinquency. It is true that on January 1, 1876, Pearson

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had an unbarred right of action against Ratliff, which his successors in interest, if my conclusion is sound, have not. But the words "right or title" in the statute mean here the paper title which Pearson had on that date, and this has been passed on to the plaintiff.

Again, Pearson could have sued Ratliff in ejectment, free from the defense of adversary possession, at any time from January 1, 1876, until January 1, 1879. I can think of no very good reason for assuming a legislative intent to give to a purchaser who stands in Pearson's shoes an exemption from Pearson's negligence, or to visit punishment on a stranger who was not to blame for Pearson's delinquency. It is true that it would make tax titles more salable if the statute means what plaintiff's counsel contend that it means. But such legislation would operate most harshly on actual settlers, and would be inherently unjust, in that it would make an innocent stranger in adverse possession (and presumably, also, taxed on the land he claims) suffer for the delinquency of the senior title holder. Neither an intent to discourage actual settlement of the thinly inhabited mountain sections of this state, nor an intent to visit punishment for one man's sins on another, can well be derived from the language of the statute. 1 Fed. Stats. Ann. lv.

Another reason for rejecting the construction advocated by plaintiff's counsel—and one of very considerable force—is found in this fact: In none of the very numerous cases reported in this state, in which plaintiffs have relied upon tax titles, has this contention, so far as I have discovered, ever been made. I have said that the plaintiff here stands in the shoes of Pearson. Under statutes such as those of this state the title of the tax purchaser is a derivative title. McDonald v. Hannah (C. C.) 51 Fed. 73, 74; McDonald v. Hannah, 59 Fed. 977, 980, 8 C. C. A. 426. See Blackwell, Tax Titles (1st Ed.) §§ 232, 233, p. 548:

"Where the law requires the land to be listed in the name of the owner of the fee, or of any other interest in the estate, provides for a personal demand of the tax, and, in case of default, authorizes the seizure of the body or goods of the delinquent in satisfaction of the tax, and in terms, or upon a fair construction of the law, permits a sale of the land only when all other remedies have been exhausted, then the sale and conveyance by the officer passes only the interest of him in whose name it was listed, upon whom the demand was made, who had notice of the proceedings, and who alone can be regarded as legally delinquent. In such cases the title is a derivative one, and the tax purchaser can recover in ejectment only such interest as he may prove to have been vested in the defaulter at the time of the assessment."

If the contention of the plaintiff be upheld, we must construe section 661 as being in conflict with section 2915—the statute of limitation:

"No person shall * * * bring an action to recover any land lying west of the Alleghany mountains but within ten years next after the time at which the right * * * to bring such action shall have first accrued to himself or to some person through whom he claims."

But, if section 661 be construed as the defendant contends, this conflict is avoided, and this fact affords a reason of some weight for adopting the construction of section 661 above chosen. 36 Cyc. p. 1146; 26 Am. & Encyc. 616–618; Black, Interp. Law (1st Ed.) pp.

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17, 60–61; 1 Fed. Stats. Ann. xciii, 31b; Sutherland, Stat. Constr. (1st Ed.) § 288.

Counsel for plaintiff build up a somewhat plausible argument on the decisions holding that the state's lien for taxes is a paramount lien. It is true that Pearson could not have incumbered the land by any lien, even to the suffering of a judgment lien, either before or after the 1st of January, 1876, which would not have been subordinate to the tax lien, and which would not have been extinguished by the tax sale. It is also true that a sale or devise of the land by Pearson, or a transmission of his title by descent, after the said date, could not affect the validity of the tax sale. But it does not follow that the ripening of Ratliff's title by adversary possession is also nullified by the tax sale. The difference is that all such lienors, vendees, devisees, or heirs acquire their rights through and under Pearson, Ratliff acquired his right in opposition to Pearson. Any one who acquired a lien on the land from Pearson's predecessors in title, and any one who acquired a lien on or the ownership of the land from or under Pearson, are his privies in title. Ratliff is a stranger to the Pearson title.

Counsel ask what would have been the result if the tax sale had been held on January 2, 1879. I think the answer is that the state would in such event have offered a wholly worthless tax title for sale. It is perfectly true that, if the Pearson title was in 1876 a valid title, by assessing him with the taxes for that year the state acquired a valid and valuable lien on the land. But there is certainly no Virginia decision, so far as I know, which holds that delay in foreclosing this lien, accompanied by the ripeninng of an adverse possession of the land by a stranger to the taxpayer, may not make the lien valueless. And I can see no reason why the result should be otherwise. If the position I take be sound, it is entirely true that a well-advised proposing tax purchaser would not buy at a tax sale, where an adverse title had ripened before the tax sale is held, or will ripen so soon after the tax sale that suit cannot be instituted before the adverse title ripens. And it follows that the tax lien is, or may be, in such case valueless. But such should in reason and justice be the result. The law does not provide that a purchaser at a tax sale shall get every one's title to the land sold, but only the title of the person assessed and of those claiming in privity with him. It does not provide for a forfeiture of the rights of strangers, also claiming the land, because the adverse claimant should be, and in practically all cases is, also assessed with taxes levied on the same land. This conclusion finds some support in Reusens v. Lawson, 91 Va. 226, 244, 21 S. E. 347; 1 Cyc. 1018; 2 Corp. Jur. 108; Jordan v. Higgins, 63 Tex. 150; Sellers v. Simpson, 53 Tex. Civ. App. 205, 115 S. W. 888. See, contra, Monroe v. Morris, 7 Ohio, 262, pt. 1.

If the defendant's title to the land in controversy had been lost by failure to pay the taxes assessed against him or his predecessors in title, the plaintiff would assuredly have introduced evidence of such fact. As there was no such evidence, it seems a reasonable conclusion that Ratliff and his successors have always paid the taxes on the land in controversy. If so, it would be difficult to conceive of greater injustice than that the defendant should lose the land claimed by him,

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not because Pearson has a better title to it, but because Pearson failed to pay the taxes assessed against Pearson on the same land. It follows that the statute of limitations affords in itself a sufficient reason for rendering judgment for the defendant.

Facts to be Found Generally.

[120] Section 649, Rev. Stats. (4 Fed. Stats. Ann. 393 and 450 et seq. [Comp. St. 1916, § 1587]), gives the court discretion as to finding the facts either generally or specially. Insurance Co. v. Folsom, 18 Wall. 237, 249, 21 L. Ed. 827. Contrary to my original intention, I must abandon all thought of preparing and entering special findings of the facts. The time at my disposal does not admit of such course. Moreover, neither side has asked for a special finding.

Prayers for Instructions.

Since writing almost all of the foregoing opinion I have received from counsel prayers for instructions. Some of those submitted by plaintiff's counsel and many of those submitted by counsel for the defendant state the law, as I understand it, with perfect accuracy. I wanted these prayers filed, in order that any error in my conclusions should be certainly preserved for the action of the upper court. It will best subserve this purpose that I reject all of the prayers, and in lieu thereof insert in the final order in this case a very brief statement of the conclusions of law which have been adopted by the court.

It will appear in the final order that exceptions are reserved by each party because of the rejection of its instructions, as well as exceptions to such of the conclusions of law as are adverse to either party.

THE ANNIE LORD.

THE FLORA L. OLIVER.

(District Court, D. Massachusetts. December 29, 1917.)

No. 1457.

1. SALVAGE ⊂=17—RIGHT TO COMPENSATION—SUCCESS OF EFFORTS.
 It is not necessary, in order to establish a right to salvage, that the claimant should actually complete the work of saving the property at risk; but it is sufficient if he endeavor to do so, and his efforts have a causal relation to the eventual preservation of it.

2. SALVAGE ⊂=14—RIGHT TO COMPENSATION—SAVING HUMAN LIFE.
 An outbound fishing vessel, which rescued the crew of a water-logged lumber schooner, who were in danger of freezing, and after trying unsuccessfully to tow the schooner returned to port and notified a revenue cutter, which brought in the derelict, *held* entitled to salvage, and her crew to a share in the award for saving human life, under Comp. St. 1916, § 7992.

In Admiralty. Suit for salvage by Antonio M. Brown, master of the fishing schooner Flora L. Oliver, against the schooner Annie Lord. Decree for libelant.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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J. M. Marshall, of Gloucester, Mass., for libelant.

Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for claimant.

MORTON, District Judge. This salvage case was heard in open court on December 18, 1917. At the conclusion of the arguments I gave judgment orally, and said that I would put on file a formal memorandum of decision sufficient for the purposes of appeal.

The Annie Lord was a three-masted schooner. She sailed with a cargo of lumber from Windsor, N. S., for Fall River, Mass., about January 20, 1916. On or about February 19th following, she was knocked down by a squall and filled with water. She became water-logged and unmanageable. The crew were driven on deck. In this condition she was found next day by the Flora L. Oliver in the early afternoon. The weather was severe, very cold, with a high wind and rough sea. The crew of the Lord had suffered considerably from exposure and were in a precarious situation; several of them were already frost-bitten, and it is doubtful whether they would have survived the coming night without serious loss or injury. At the request of the master of the Annie Lord, the Oliver took off the crew. All, including the master, went to bed at once. Most of them stayed below until the Oliver reached port, and none did any work. Those who were frost-bitten received such care and treatment as was possible under the circumstances.

The Annie Lord, at the time of the rescue, was about 16 miles east-southeast of Thacher's Island Light. The wind was strong from the west. Capt. Brown of the Oliver decided to try to tow the Lord into Boston. Five men from the Oliver accordingly went aboard the Lord put more sail on her, and endeavored to shape her course as well as they could. On account of her water-logged condition, and perhaps for other reasons, she did not mind her helm; but her course could be more or less altered by the trim of her sails. The work was so exposing and the weather so severe that the Oliver's men found it impossible to stay long at a time on the Lord and were frequently changed; but I do not gather that at the beginning of the tow the conditions were such as to involve any considerable danger to men accustomed to the sea.

During the night the wind drew to the north and increased. The cold became more intense, and the sea reached a point described by Capt. Merriam, of the Lord, as "very rough." The tow lines parted several times and were repaired. Finally, about 1:30 a. m., they again broke. There were no further lines available, the weather was extremely bad, and the frost-bitten men of the Lord's crew were apparently in need of medical attention. The master of the Oliver decided to give over the attempt to tow the Lord into port. At this time the vessels had reached a point about five or six miles to the northeast of Minot's Ledge Light. It was a bad situation for the Lord if the wind should draw more to the northeast. Capt. Brown accordingly gave instructions to have the course of the Lord changed; she was headed straight off shore, and her sails were trimmed so as to give

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her an easterly course. A signal lantern was hung in the Lord's rigging to warn other vessels, and two or three torches were lighted and placed on her decks for the same purpose, and to assist in identifying and locating her.

The Oliver then, not without difficulty, and perhaps some danger, took off her men from the Lord and bore away for Gloucester, where she arrived early the following forenoon. She was so badly iced up that it was impossible to work her sails, and she had to be towed into port. One of her crew testified that, in 40-odd years at sea, it was the worst night within his experience. This is perhaps somewhat of an exaggeration, but I think there can be no doubt that it was a very severe time. Having arrived at Gloucester, most of the Lord's men were sent to the hospital, where, however, they did not stay long; and Capt. Merriam, at the suggestion of Capt. Brown, went to the telephone, called up the custom house, and arranged to have the United States revenue cutter Gresham, then in the port of Boston, notified to go out and pick up the Annie Lord. Capt. Brown testified that he was unable to do this himself because of the condition of his own vessel, which required his attention, and that it took his crew all that day and part of the next to get the ice off her, so that she was fit to go to sea. The Gresham, as a result of this notification, went out and found the Annie Lord near Peaked Hill Bars, off Cape Cod, took her in tow, and brought her into Boston, arriving here on the following day. After the Lord was left by the Oliver, she lost two of her masts and most of her deck cargo.

The Flora L. Oliver is a two-masted fishing schooner, about 105 feet long, and about 115 tons gross. At the time when she fell in with the Lord she was outward bound on a cod and halibut trip off the Nova Scotia coast, intended to last about three weeks. She carried a crew of 17, besides the master. As a result of her salvage efforts, she destroyed gear worth about $130, and lost about five days' time. Her value is not stated. The gross earnings of the Oliver on the trip which was interrupted by the salvage were about $1,000 a week. The parties agree that the value of the Lord was $1,500 on the vessel and $4,000 on the cargo, a total of $5,500. As to the foregoing facts there is not much controversy between the parties.

The real questions are whether the Oliver is entitled to any salvage, and, if so, to what amount. The respondent contends that the efforts of the Oliver, however praiseworthy, were unsuccessful, and did not in fact result in the saving of any property, and that therefore no salvage can be awarded.

[1, 2] It is not necessary, in order to establish a claim to salvage, that the salvor should actually complete the work of saving the property at risk. It is sufficient if he endeavor to do so, and his efforts have a causal relation to the eventual preservation of it. In The Strathnevis (D. C.) 76 Fed. 855, 862, the salving steamer was unable to get the imperiled vessel into port and was forced to leave her 60 miles off shore; but it was held that her services in towing the disabled vessel nearly 500 miles and bringing her nearer port, and in the way of passing vessels, were sufficient to entitle her to salvage. See, too, The

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Flottbek, 118 Fed. 954, 55 C. C. A. 448. In Adams v. Island City, 1 Clif. 210, Fed. Cas. No. 55 (in this district), the salving schooner endeavored to tow the wreck into port, but was unable to do so, and abandoned the attempt, leaving the wreck anchored several miles off shore and in a dangerous position. The schooner, on arriving in port, gave notice of the location and dangerous situation of the wreck, and help was sent to it. It was held that the schooner was entitled to salvage. In The Samuel Hubbard (District Court, Massachusetts), 229 Fed. 843, where a fishing schooner put men on an unmanageable derelict, and then went on to port and sent out a tug, which towed the derelict in, it was held that the schooner was entitled to salvage amounting to $1,675, on a total valuation of property saved amounting to $5,300. Putting men on the derelict did not assist in the actual salvage.

In the present case, as things turned out, the work done in towing the Lord from the position off Thacher's Island to that off Minot's Light neither helped nor hindered in the final result. The cause of the Annie Lord's being saved was the message brought into port by the Oliver and communicated to the Gresham. In order to do this, the Oliver temporarily abandoned the voyage that she was on and returned to port. It is true that Capt. Brown of the Oliver did not, in testifying, state distinctly and categorically that this reason was in his mind, but from various things that were testified to I have no doubt that it was. What was done at the time when the Oliver left the Lord indicates pretty clearly that Capt. Brown then expected to send after her. The fact that Capt. Merriam, instead of Capt. Brown, under agreement between the two, did the actual telephoning, seems to me not to diminish the rights which the Oliver would otherwise have. I do not regard Capt. Brown's assent as in any degree a waiver of the Oliver's claim to salvage.

Upon all the evidence, I find that the services of the Flora L. Oliver and her crew were the proximate cause of assistance being sent to the Annie Lord and of her being saved from what otherwise would have been total loss; and I am of opinion that the Oliver has established her claim to salvage. Under the statute (U. S. Comp. St. 1916, § 7992) the saving of human life entitles its salvors to a fair share in the award, and it is perhaps necessary to make a finding on the question whether the action of the Oliver saved life. The crew of the Lord were in no danger of death by drowning, unless by being washed overboard; but they were admittedly in great danger of death from exposure. They were all in serious condition when rescued. On their own vessel they were without shelter or warm food, and exposed to intense cold and a rough sea. Whether they would have lived until another vessel than the Oliver picked them up is mere speculation. The Oliver certainly rescued them from a position of great and imminent peril. It seems to me that her action saved human life within the meaning of the statute.

As to the amount of salvage: It is well settled that the amount of salvage should be sufficient to obtain again the same service, if conditions should repeat. The Lord was an abandoned vessel: and the

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public benefit from saving what might otherwise become a dangerous floating derelict in frequented paths of commerce is entitled to recognition. The saving of life and the temporary abandonment of her voyage by the salving vessel are to be taken into account, as well as the enterprise, courage, and skill displayed by the salvors. As the Gresham, being in the United States revenue service, is not entitled to salvage, apparently the award to the Oliver will be the only salvage charge against the Annie Lord and her cargo. Upon all the facts, I find that the Oliver is entitled to salvage in the sum of $1,600. I am not asked to apportion it.

Decree accordingly, with costs.

OCMULGEE RIVER LUMBER CO. v. OCMULGEE VALLEY RY. CO.

(District Court, S. D. Georgia, W. D. July 17, 1917.)

1. CORPORATIONS ⟸383—MODE OF ACTING.
 A corporation can act only in a corporate capacity.

2. ESTOPPEL ⟸90(1)—"ACQUIESCENCE."
 "Acquiescence" imports active consent, and is not to be inferred from acts which are doubtful or ambiguous, and consequently, where a corporation consistently protested against the appropriation of its property, acquiescence cannot be inferred.

 [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Acquiescence.]

3. RAILROADS ⟸178—ENFORCEMENT OF CLAIM AGAINST SPECIFIC PROPERTY.
 Where rails and other railroad property belonging to a lumber company were appropriated by a railroad company without the consent of the lumber company, and some of the property was incorporated in the railroad, a suit by the lumber company to recover its property cannot be defeated on the ground that such property was devoted to a public use, and the lumber company is entitled to a decree for its value, and, in event of nonpayment, to remove the property.

In Equity. Bill by the Ocmulgee River Lumber Company against the Ocmulgee Valley Railway Company. Decree for complainant.

Hardeman, Jones, Park & Johnston, of Macon, Ga., for plaintiff.

W. S. Mann, of McRae, Ga., and Hall & Grice, of Macon, Ga., for defendant.

SPEER, District Judge. The pleadings and the evidence in this case disclose the fact that the Ocmulgee Valley Railway Company has constructed a short railway, which purports to extend from Lumber City to a point in the pine woods some miles short of Jacksonville, Telfair county, Ga. Jacksonville was once the courthouse town of the county, but for this purpose has long been abandoned. It might be termed a river town, but for the fact that it is something more than a mile from a landing on the Ocmulgee.

The Ocmulgee Valley Railroad is not a prosperous artery of commerce. During last year it spent nothing for its upkeep, paid its officers no salaries, and charged off nothing for depreciation. It remit-

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ted the duty of paying its state and county taxes to the plaintiff. For the rails it uses it has never paid a dollar. This is also true of all its rolling stock and other railway material. Depots, platforms, terminals, and other such attributes of the railway are wholly nonexistent. Its president testified that he did not believe it possible that it would ever pay its operating expenses. He did not think it could be sold. Indeed, he doubted if it could be given away to any one under obligation to continue its operation. He was equally skeptical as to the possibility of bonding the property. The condition of the road and the roadbed is not less calamitous. Generally, its supports are rotten, and in at least one place crossing a stream or other depression, the stringers having rotted away, the passing train is upheld only by the rail.

[1-3] This railroad, it is alleged, has appropriated the rolling stock, steel rails and other railway material of the plaintiff, it is insisted, to the value of $100,000. This bill in equity is brought to obtain a decree directing the restoration of this railway material to the true owner; this, it is insisted, is the Ocmulgee Lumber Company. The bill charges, and the answer admits, that this material was the property of the plaintiff. It had been engaged in the manufacture of pine lumber at Lumber City. Its mills having been destroyed by fire, the plaintiff was left with this material. The bill charges, and the answer admits, that neither the defendant nor any one has paid anything to the plaintiff for this property. It is, however, insisted that the plaintiff's effort to secure redress must be denied, because its property has been dedicated to a public use, in which use it is also alleged the plaintiff has acquiesced. The plaintiff and the defendant, both corporations, could only act in a corporate capacity. It is not pretended that any such corporate action authorized a sale.

It is moreover, plainly apparent from the oral, and particularly from the documentary, evidence that there was no sale of any sort by anybody of the steel rails and other railway material of the Ocmulgee Lumber Company. It is true that there were certain negotiations looking to such sale. The minutes of the defendant company exhibit a resolution authorizing the purchase of this property from C. F. Smith, trustee, for $94,500, if the authority for such purchase should be given by the Georgia Railroad Commission, but no authority was given by the Commission, nor was any application made to the Commission for such authority. For whom C. F. Smith was trustee is gravely in doubt. At one time he testified that he was trustee for his wife; at another, that he was trustee for certain unnamed and unknown promoters of the railway; and at another time, that he was trustee for his sons, and perhaps other relatives, who were to share, to use his expression, in the "cutting of the melon."

Counsel for the defendant, while contending that Smith bought the property, declare they do not know whether it was for himself as trustee, or for himself as president of the Ocmulgee Valley Railway Company. There is, however, not the slightest dispute as to the fact that no purchase money was ever paid or secured. In truth, for a long time C. F. Smith was president of the plaintiff company, and the letters offered in evidence from those interested in that company are

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filled with appeals to him to protect them, the company, and Smith himself, from the loss which would result from the improper disposition of this railway material, which was plainly its most valuable asset.

Smith claimed that his purchase was in July, 1915, and for $30,000; yet in August, 1916, he makes a written offer to buy the property, and tenders for it $50,000 of the railroad company's bonds. Time and again, as appears from the correspondence, Smith, sometimes as an officer for the plaintiff, sometimes as an officer for the defendant, was repeatedly notified by those acting for the plaintiff that this rail must not be moved from the premises of the plaintiff. As often he replies that the rail had not been moved, would not be, and that the plaintiff's rights in it should be conserved. All the while Smith was one of the largest stockholders of the plaintiff, the Ocmulgee Lumber Company, a director—most of the time, the president.

Nor does the evidence show such acquiescence on the part of the plaintiff company for the use of its railway material by the defendant as will preclude the former from now insisting on its rights. Acquiescence imports active consent, and is not to be inferred from acts which are doubtful or ambiguous. A fortiori will it not be inferred from the written protest against such use—from an unbroken refusal of compliance? It appears from the evidence that A. L. Taylor, who was the agent for the plaintiff, visited Georgia in the fall of 1915. He then discovered that the plaintiff's rail was being used in the defendant's road. He at once notified the defendant's agents, and, indeed, the public, of his intention to remove the rail. Since that time, and until this suit was filed, the plaintiff has continually insisted that, unless arrangements to purchase its rail were effected, it would be taken up and removed. Even where the railroad has unjustifiably seized the right of way, although the owner may primarily be denied ejectment, yet the courts preserve his right to payment. And said Mr. Associate Justice Cobb in the leading case of Charleston & Western Carolina Railroad Company v. Hughes, 105 Ga. 1, 30 S. E. 972, 70 Am. St. Rep. 17:

"When the amount to be paid to the petitioners is thus ascertained, a decree should be entered, allowing the railway company a reasonable time in which to pay the amount thus found, and upon payment of same the title to the property to vest in the railway company. Upon a failure to pay the same within the time limited, the right of the company to acquire the property should be decreed to be lost, and the writ of possession should issue to enforce the judgment in the ejectment already rendered in the case."

This case was extensively quoted by the Supreme Court of the United States in New York v. Pine, 185 U. S. 93, 22 Sup. Ct. 592, 46 L. Ed. 820, and a strongly analogous conclusion was reached. Since this ruling is applicable in the adjustment of such a controversy, as to property so indispensable as its roadbed, for how much greater reason should it be held applicable to property movable in its nature, like the rails, rolling stock, and other railway material here involved. Particular rails and particular equipment are not, like the right of way, absolutely essential to railway operation. Other material of this sort may be bought in open market. That the railway company is unable to buy

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other material cannot affect the right of the owner to that which the railway has seized and not paid for.

There is, moreover, high authority to the effect that to place rails unpaid for in a railway track does not in a proper case preclude their removal. Hunt v. Bay State Iron Company, 97 Mass. 279. Besides, it appears here that a large portion of the rail for which the suit is brought has not been laid in the defendant's track; that it is still piled up at one of its sidings, and there is but little of the motive power of the plaintiff in the possession of the defendant, which is now in use. It is perhaps fortunate that a decree authorizing the recovery of the values the plaintiffs have in this property, or the property itself, on account of the short and incompleted nature of the projected railroad, will afflict the minimum of loss and inconvenience on the public.

It is, moreover, true that the court may well mistrust the apparent solicitude for the public interest which the defendant with such vehemence asserts. Usually public interests are not well conserved at the instance of those who seize, appropriate, and do not pay for the property of others; and the state, which is the appropriate guardian of the public, is not a party here.

Our conclusion is that the averments of the bill are fully supported by the facts and that the relief sought should be granted. A decree may be taken, referring this cause to the standing master, with direction to him to ascertain and report the rails, rolling stock, and other railway material of the plaintiff appropriated by the defendant, and that he shall also ascertain and report its market value at the time of this hearing. The decree will further provide that when the report of the master shall be filed, and the values found by him approved, in accordance with the practice in equity, the defendant shall be allowed 60 days in which to make payment to the plaintiff, and, in case of failure or refusal of payment of the amount thus found to be due, that the plaintiffs shall be empowered to remove the rails and other railway material, and sell the same conformably to law for the settlement of the amount thus found to be due by virtue of this decree.

In re RAWLINS MERCANTILE CO.

NICHOLSON v. DEAVER.

(District Court, S. D. Georgia, W. D. June 10, 1918.)

(Syllabus by the Court.)

1. BANKRUPTCY ⊂=314(1)—BANKRUPT'S RESIDENCE PROPERTY—CLAIM IN INTERVENTION—ESTOPPEL.

Where an intervener, apprised of the facts, without any claim of ownership in his own right, has permitted the bankrupt to hold exclusive possession, and use real property as his home, claim it always as such, return it for taxes in his own name, pay the taxes, pledge it, make substantial improvements thereon, claim it in judicial proceedings, without any protest by intervener, he cannot, after the expiration of more than 20 years, contravene the lien of the trustee in behalf of creditors, for some

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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of whose debts, with the knowledge of the intervener, the property was distinctly pledged, and for all impliedly pledged, in that the credit accorded him may have been in view of such apparent ownership.

2. EVIDENCE ⊂⊃183(15)—TRANSFER OF TITLE—SECONDARY EVIDENCE.
Where a deed is not produced, and the evidence does not disclose a thorough search for it, the testimony of the grantor, "I don't know whether it was a security deed or a warranty deed; I don't know anything about it, except there must have been a deed, because I remember that I did borrow about $500 (from the reputed grantee)—is not sufficient to admit secondary evidence, nor was the evidence quoted sufficient to convey title.

3. ADVERSE POSSESSION ⊂⊃60(1)—PERMISSIVE POSSESSION.
Permissive possession of real estate, if relied upon to avoid the effect of proof of adverse possession for more than 20 years, must be expressly permissive.

4. ADVERSE POSSESSION ⊂⊃85(1)—CHARACTER OF POSSESSION—PRESUMPTION.
Under the law of Georgia, where one, by occupation, cultivation, and the like, is shown to be notoriously in possession of land, his possession is presumed to be adverse, until the contrary is shown.

5. ADVERSE POSSESSION ⊂⊃63(2)—ASSUMPTION OF TITLE BY GRANTOR—NOTICE TO GRANTEE.
The grantee of land is obliged to take notice, when brought to his attention, of such subsequent conduct on part of the grantor as would amount to an assumption of title in the latter's behalf.

6. ESTOPPEL ⊂⊃72—CONFIDENCE—LOSSES BETWEEN TWO INNOCENT PARTIES.
Of two innocent parties, he whose confidence and conduct enables a wrongdoer to act to the injury of one or the other must bear the burden of the resulting loss.

7. ESTOPPEL ⊂⊃72—CONDUCT—EQUITY.
A person who puts it in the power of another to deceive creditors and raise money from them must take the consequences. He cannot afterwards rely on a particular or a different equity.

In Bankruptcy. In the matter of the Rawlins Mercantile Company, bankrupt. B. S. Deaver, trustee, obtained an order from the referee for the sale of the residence of J. C. Rawlins, and from an order of the referee, sustaining the claim of J S. Nicholson in intervention, the trustee petitions for a review. Findings of referee reversed.

Hardeman, Jones, Park & Johnston, of Macon, Ga. (Orville A. Park, of Macon, Ga., of counsel), for trustee.

Charles Akerman, of Macon, Ga., for intervening claimant.

SPEER, District Judge. The questions here must be determined in view of the facts following:

In 1877, J. C. Rawlins, for many years the clerk of the superior court of Dodge county, bought a town lot, one-fourth of an acre, in Eastman. On this lot has been the home of Rawlins for 41 years. There he has lived, and reared nine children of his first wife and nine of his second. With so many to meet his enemies at the gate, it is perhaps not surprising that his possession has been peaceful and undisturbed. It has been also continuous and exclusive. Unlike most of the patriarchs, Mr. Rawlins has been less successful in the amassment of worldly goods than in the multiplication of offspring.

A singularly unfortunate venture was the Rawlins Mercantile Com-

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pany, a partnership composed of himself and his brother, or possibly his nephew. Involuntary proceedings in bankruptcy soon ensued; but a jury, after hearing the evidence, pronounced the company solvent. In all the years since its purchase, the home place of Rawlins at Eastman had largely increased in value. It now appeared to be a principal asset of J. C. Rawlins. He testified that it was his, and was worth some $4,000 or $5,000. This asset seemed essential to the solvency which the jury had ascertained to exist.

It was not long, however, before the Rawlins Mercantile Company was again in the throes of bankruptcy, and this time by its own voluntary petition. With this last proceeding Rawlins filed his schedule, and therein declared anew the house and lot in Eastman to be his property. This now appeared to be under the lien of a mortgage, which was given to secure some $3,800 due a local bank, the Citizens' Bank of Eastman, which is a party here. This mortgage covered other land besides the home place. The trustee, believing that there was an equity in the realty pledged, over and above the amount of the debt it secured, and being in possession by virtue of the possession of the bankrupt, obtained from the referee an order for its sale. Now, for the first time, it appeared that there was an outstanding claim of title to the home of the bankrupt. This was brought to the attention of the referee by the intervention of Nicholson, who is the son-in-law and neighbor of Rawlins. The referee sustained the claim, and the trustee brought his petition for review. The question then is: Shall the claim of Nicholson prevail, or shall the creditors, secured and unsecured, be accorded the right to have this property sold and appropriated toward the payment of the several claims?

[1] First, as to the question of title, it is not disputed that Rawlins bought the lot and held under a deed from Sapp; that from 1877 until 1918 there has been no change in Rawlins' actual possession. There is no written evidence conveying the title from Rawlins to Nicholson or to any one. The referee finds that Rawlins has been in possession since his purchase, that the possession was exclusive, that he claimed it as his own, that he paid taxes on it, that he improved it, and that he mortgaged it. It does not appear that, in all the years intervening between the date of the original purchase and this voluntary proceeding in bankruptcy, Rawlins and Nicholson exchanged or uttered a word with regard to Rawlins' possession. Indeed, Nicholson testified that he never said a word to Rawlins about it. It is true that some 26 years ago, while he was financially embarrassed, Rawlins returned for taxes his home place and other property as the agent for Nicholson; but uniformly since then Rawlins returned the lot in controversy as his own, and every year paid the taxes himself.

Early in this period Rawlins determined to enlarge his boundary. He purchased 1¾ acres adjoining him. He made other purchases contiguous to his home place, until he had acquired a considerable body of land in the suburbs of Eastman. He, however, continued to live on the home lot. Besides, Rawlins built a new house on this lot. He testified that it is worth $2,000 now. On the former trial, when the issue was insolvency, he thought it was worth $4,000. He had built

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the house with borrowed money. He mortgaged the lot as security for the loan. Nicholson testified that he knew Rawlins had executed this mortgage. This debt Rawlins paid. Nicholson testified that he helped him build the house. He did not, however, assert any title or claim to it. Indeed, so well was it understood in the community that Rawlins' ownership of his home was unquestioned that the local bank of Eastman loaned him $3,800 and took a mortgage on the home place to secure it. When the bankruptcy proceeding was filed, the cashier said to Nicholson: "Do you want to take up our claim, so as to protect the old man?" Nicholson replied: "It looks pretty hard for him to lose his home. I will see you about taking up his debt." Still, however, he makes no sort of claim to the title. Nicholson was the neighbor and intimate of his father-in-law. The community in which they lived was not a very large town. It is probable that Nicholson must have known that Rawlins, on the trial of the first bankruptcy case, testified that the property was his. Indeed, that fact seems necessary to the solvency which the jury ascertained. Nor is this all. When Rawlins' final proceeding in bankruptcy was filed by himself, he scheduled this property as his own; but, when the trustee proceeds to sell it to pay his creditors, it is discovered to be the property of his son-in-law.

The right of the trustee depends upon the fact that Rawlins had title and that he was not shown to have conveyed it; but, even had there been such conveyance, the facts show that he held it adversely and in his own right for more than 20 years, that this was done without any sort of protest or claim by the intervener for all of that period, and that the latter, having permitted Rawlins to use the property as his own, pay taxes on it, pledge it, improve it, and claim it in judicial proceedings and otherwise, without any protest from him, cannot now be heard to contravene the lien of the trustee in behalf of the creditors, for some of whose debts, with the knowledge of the intervener, this property was distinctly pledged, and for all impliedly pledged, in that the credit accorded him may have been in view of such apparent ownership.

[2] The finding of the learned referee upholding the claim of the intervener is based upon a deed from L. M. Peacock, administrator, and Florence T. Rozar, administratrix, of John J. Rozar, deceased, to J. S. Nicholson, dated January 7, 1890. The consideration was $345.45. It conveyed to Nicholson a lot of land No. 207, in the Nineteenth district of Dodge county; also the "town lot, with dwelling thereon, in the town of Eastman, known as the place where he, the said J. C. Rawlins, lives." The deed was written by J. C. Rawlins, who was then clerk of the superior court of Dodge county. It was recorded, but it is, perhaps, not without significance that it was nowhere referred to in the index kept by the clerk. This deed recites that, in the year 1886, John J. Rozar executed to J. C. Rawlins a bond, conditioned that upon the payment of $500 Rozar should make to Rawlins a deed to the lot. Before this was done, Rozar died, and L. M. Peacock and Florence T. Rozar were appointed his administrators. Then a petition was filed in the ordinary's court by J. S. Nicholson as transferee

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of the bond. This was to require the administrators of Rozar to make him a deed to the land, and at the regular term of the court in January, 1890, an order was entered directing the administrators to make a deed to Nicholson; the purchase price, it states, having been paid. A certified copy of the above proceedings in the ordinary's court was offered in connection with the Nicholson deed. No deed from Rawlins to Rozar is produced. The referee uses this language:

"There is some evidence as to the search for it among the effects of Rozar. The bond for title is not produced."

The referee adds:

"There is, therefore, a break in Nicholson's chain of title, which must be fatal to his case, unless the fact that such conveyance existed is shown by the evidence."

Indeed, counsel for the trustee objected to this evidence, and the oral testimony of Rawlins, as incompetent to show title. No witness, other than Rawlins, makes reference, however remote, to the deed from him to Rozar. Of this deed, Rawlins testified:

"I don't know whether it was a security deed or a warranty deed. I don't know anything about it, except there must have been a deed, because I remember that I did borrow about $500 from Rozar."

The referee found that the deed was made. Even if we omit consideration of the long possession and the many acts of ownership of Rawlins, with Nicholson's knowledge, this proof is scarcely sufficient to show the legal title in Nicholson. Title to land in Georgia is conveyed by deed. The search for the supposititious deed from Rawlins to Rozar was most perfunctory. It was wholly insufficient, under the rule, to admit secondary proof of its execution, and the proof, when admitted, was insufficient. Rawlins testified that there must be a deed, because he borrowed $500 from Rozar. This seems a non sequitur. Many loans are made without such security. Nor is the bond for title, the alleged transfer of which to Nicholson is the basis of his claim, produced in evidence. The proof of the search for this was also insufficient to admit oral evidence of its existence. The conclusion of the court, however, has been reached in view of considerations believed to be more important. These are that, whatever his title, Nicholson never, in the slightest manner, disturbed the possession which Rawlins held under his deed from Sapp. This was made in 1877. That possession was open, notorious, uninterrupted, adverse to all the world, and exercised by Rawlins under the claim that the title was rightfully his own. This, under the law of Georgia, would seem to leave the legal title in him.

[3] The learned referee found that Rawlins' possession was not adverse, because it was permissive by Nicholson, and that such permissive possession could not be the foundation of a prescriptive title. He cites Code of Georgia, § 4164, which provides:

"Possession, to be the foundation of a prescription, must be in the right of the possessor and not of another, must not have originated in fraud, must be public, continuous, exclusive, uninterrupted and peaceable, and be accompanied by a claim of right. Permissive possession cannot be the foundation of a prescription until an adverse claim and actual notice to the other party."

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A case in apparent support of the referee's conclusion on this point is Jay v. Whelchel, 78 Ga. 786, 3 S. E. 906. There it is held:

"That possession, remaining with the grantor and never surrendered, is held under the grantee, and is not adverse to his title, and neither prescription nor the statute of limitations is available as a defense to an action of ejectment founded on the deed."

Here, however, there is no deed from Rawlins to Nicholson. It is true that Rawlins drew the deed from the administrators of Rozar to Nicholson, and was a witness to it. This may be susceptible of the inference that he recognized Nicholson's title. Since, at the time, he was heavily embarrassed, and since Nicholson, his son-in-law, as he himself testifies, never said a word to him for more than 26 years about the property, or his continued possession, so far as the rights of the creditors are involved, it may be susceptible of an inference less favorable.

[4] The referee cites other cases. Spalding v. Grigg, 4 Ga. 75; Ford v. Holmes, 61 Ga. 419; Doris v. Story, 122 Ga. 611, 50 S. E. 348. It will be observed, however, that in each of these cases the person in possession, claiming to hold adversely, took possession under an express contract to the effect that the possession was permissive. But here Rawlins' possession was not taken from Nicholson, or recognized by either Nicholson or Rawlins as being permissive. Such open and notorious possession, without a break, as that held by Rawlins, is presumed by the law of Georgia to be adverse possession:

"When a person is shown to be notoriously in possession of land by occupancy, cultivation, and the like, his possession is presumed to be adverse until the contrary is shown." Hammond & Hinson v. Crosby, 68 Ga. 767.

[5] Nor does the actual notice of adverse possession, essential to the foundation of a prescriptive title as required by the Code of Georgia, supra, import written or even verbal notice. Even had Rawlins made his deed to Nicholson, Nicholson would be held obliged to take notice of such subsequent conduct on the part of Rawlins as would amount to an assumption of title in his own behalf. Proof of such conduct abounds throughout the record.

"The relation of grantor may be denied, by retaining actual possession and exercising acts of control and dominion over the property, consistent only with a claim of exclusive ownership and of adverse right, and hostile to the title of the grantee." Knight v. Knight, 178 Ill. 558, 53 N. E. 308; Harn v. Smith, 79 Tex. 310, 15 S. W. 240, 242, 23 Am. St. Rep. 340; Murray v. Hoyle, 92 Ala. 559, 9 South. 368.

[6, 7] When, therefore, Nicholson became apprised that his father-in-law invariably claimed the property as his own, mortgaged it to secure the cost, and erected thereon a new and much larger house, returned it as his own for taxes, included it as his own property in his bankruptcy schedules, and gave a mortgage on it to the local bank for a considerable amount, it was ample notice to him of Rawlins' adverse claim, which, as to others, demanded the assertion of his right. If Nicholson had acquired the legal title, if the possession of Rawlins was only permissive, and Rawlins' prescriptive title had not ripened in his own behalf, the conduct of Nicholson, for so many years in per-

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mitting such possession and use of the property by Rawlins as would lead the public to believe that the lot was the property of the latter, would now estop him from maintaining his long secret title against those creditors who had impliedly trusted Rawlins because of his reputed ownership, and more especially those creditors who, with Nicholson's knowledge and without his objection, had taken distinct liens upon the property to secure loans his father-in-law had contracted. This would be true, even if Nicholson was entirely innocent of any improper motive. He may indeed, have indulged the generous and innocent purpose to protect his father-in-law in his home; but the creditors, who trusted Rawlins because of his reputed ownership of this property, were also innocent. True, these conditions must be applied. The settled rule of equity is:

"Of two innocent parties, he whose confidence enables the wrongdoer to act must bear the burden of the resulting loss."

This is an ancient doctrine. It is announced by Lord Holt in Hern v. Nichols, 1 Salkeld, 289:

"For, seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts trust and confidence in the deceiver should be a loser than a stranger."

See, also, Butler v. United States, 21 Wall. 275, 22 L. Ed. 614; Pompton v. Cooper Union, 101 U. S. 204, 25 L. Ed. 803; People's Bank v. National Bank, 101 U. S. 183, 25 L. Ed. 907. There the general principle is announced:

"Where one of two innocent parties must suffer by the wrongful act of a third, he who gave the power to do the wrong must bear the burden of the consequences."

The rule is stated with much pertinence by Lord Romilly, Master of the Rolls, in Briggs v. Jones, Law Rep. 10 Eq. 92, 98:

"A person who puts it in the power of another to deceive and raise money must take the consequences. He cannot afterwards rely on a particular or a different equity."

This is a doctrine of equity, but a bankruptcy court is a court of equity. Whatever may have been Nicholson's motives, his acquiescence for so many years in Rawlins' claim of ownership will result in loss either to the creditors or to himself. It is the opinion of the court that, under the circumstances, he should bear the loss.

For these reasons, it is concluded that the findings of the referee should be reversed; and it will be so ordered.

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TOMLINSON v. IOWA STATE TRAVELING MEN'S ASS'N.

(District Court, W. D. Missouri. February 9, 1918.)

1. INSURANCE ⊂⊃627(2)—SERVICE OF PROCESS—"DOING BUSINESS" IN STATE.
An incorporated Iowa insurance association, which maintained no regular agents in Missouri, although it issued certificates of membership to Missouri residents, *held* not to be doing business in that state, so that service could be made on the superintendent of the Missouri insurance department under Rev. St. Mo. 1909, § 7042.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Doing Business.]

2. INSURANCE ⊂⊃627(1)—SERVICE OF PROCESS—AGENTS—FOREIGN COMPANY.
Though the by-laws of an incorporated traveling men's association obligated every member to use his influence further in the interest of the association, members who voluntarily induced others to join are not agents, and do not represent the association to the extent that service of summons on them would be binding on it.

3. INSURANCE ⊂⊃627(2)—SERVICE OF PROCESS—JURISDICTION.
Where the insurance contract between an incorporated association and a member was not a Missouri contract, and the association was not doing business in that state, service on the superintendent of the Missouri insurance department in accordance with the local statutes cannot, on the theory of convenience to the members, be deemed to give jurisdiction over the association.

At Law. Action by Madora G. Tomlinson against the Iowa State Traveling Men's Association, a corporation. On motion to quash service. Motion sustained.

J. Roy Smith and Albert Reeves, both of Kansas City, Mo., for plaintiff.

Frank Hagerman, Henry L. Jost, S. R. Freet, and Clyde Taylor, all of Kansas City, Mo., and Sullivan & Sullivan, of Des Moines, Iowa, for defendant.

VAN VALKENBURGH, J. The service in this case was made upon the superintendent of the insurance department of the state of Missouri under and by virtue of section 7042, R. S. Mo. 1909. The grounds urged in support of the motion are: First, that defendant was not doing business in the state of Missouri, in the sense necessary to warrant service through the state superintendent of insurance; and, second, that, even if it be conceded that the defendant company was doing business within this state in such legal sense, nevertheless the contract sued on was not consummated in this state, but in the state of Iowa; that it was therefore not a Missouri contract, and the constructive assent of the company to the terms prescribed by the local statute for service of process will not be implied as to business not transacted in this state. Both parties have filed affidavits in support of their contentions on this motion.

[1, 2] I am of opinion that the defendant is not doing business in this state in any substantial sense. If it is, then in practically all cases where policies of insurance are issued by foreign companies to citizens of Missouri they can and must be held to be doing business here. It

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is, of course, conceivable that the business may be conducted entirely by correspondence without the intervention of personal suggestion; but that is rarely the case.

The defendant is located at Des Moines, Iowa. Its by-laws provide that all applications for membership shall be presented to the board of directors, who meet only in Des Moines, and no person shall be considered as a member, nor shall the association be liable, in any manner, to any person as a member therein, until the said directors have accepted his application and a certificate of membership has been issued to him. The consummation of the contract is accomplished by the successive acts of acceptance and the issuance of the certificate. The contract of insurance is therefore completed in the state of Iowa, and the affidavits of the president and of the secretary and treasurer of defendant positively and affirmatively state that such was the procedure in the instant case. The affidavits of plaintiff do not satisfactorily meet defendant's proofs in support of the motion. The nearest approach to a positive allegation on this point is contained in the affidavit of the plaintiff, who says that:

"To the best of her knowledge and belief said policy in suit was made, executed, and delivered to the said John C. Tomlinson in the city of St. Louis, Mo."

Such an averment savors of hearsay, tenders a mere conclusion, and evades the responsibility of positive statement, by falling back upon the best secondary substitute of knowledge and belief. Such an allegation cannot stand against direct testimony dealing with concrete facts from which a conclusion necessarily and legally follows, and this allegation of the plaintiff is the only allegation which deals with the execution and delivery of the policy in suit. It is true that the affidavit further deals with notices of assessments, receipts for dues, and the adjustment of a prior accident conducted by mail, and matters of that nature. Such acts would be ineffective to evidence the doing of business in this state in the sense involved, and their recital goes far to indicate plaintiff's conception of a proper basis for the knowledge and belief which she alleges. The same general criticism may be made of the other affidavits filed by the plaintiff in opposition to the motion. None of them deals with the policy in suit. They do bring out, however, the main ground upon which it is contended that the defendant is doing business in this state, and is therefore subject to the notice by summons served upon the insurance department.

The by-laws contain the following altogether general provision:

"Every member of this association shall use his influence in furthering the interest of the same."

As is stated in the affidavit of the president, from time to time circular letters are written to the several members of the association urging them, in the spirit of this by-law, to acquaint their brother traveling men with the virtues of said association and the advantages of membership therein; but the defendant has no paid agents, servants, officers, nor representatives to secure members or solicit applications for membership. The services of the members in this regard, if ren-

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dered, are purely voluntary and without consideration, neither are their activities directed toward any particular locality; nor do they contemplate the confines of any state. It will be noted that the defendant is a traveling men's association. Traveling men meet in all parts of the country. A member of the association from Maine may meet a Missouri commercial traveler in the state of Washington, and there suggest to him the attractions of a certificate in this Iowa company. The fact that the same sort of transaction may have taken place in Missouri between citizens of Missouri, or between a citizen of Iowa and a citizen of Missouri, does not alter the case. The by-law itself, when passed, probably did not contemplate the circulars to which reference has been made, and certainly neither by-law nor circular has in view any particular locality in which the member shall use his influence in furthering the interest of the association. These so-called agents of the defendant, who are relied upon as localizing its business in Missouri, represent the defendant in no such sense as would authorize and validate the service of summons upon them in such manner as to bind the company. Higham v. Iowa State Travelers' Ass'n (C. C.) 183 Fed. 845. In resolving the questions of fact presented by the affidavits, necessarily the court cannot put out of mind the business methods of the defendant of which it has acquired judicial cognizance. I conclude, therefore, that the defendant is not doing business in this state in any substantial legal sense, and that the certificate sued upon is an Iowa, and not a Missouri, contract.

[3] As the contract in question was not a Missouri contract, the case falls directly within the doctrine announced by the Supreme Court in Old Wayne Mutual Life Ass'n v. McDonough, 204 U. S. 8, 27 Sup. Ct. 236, 51 L. Ed. 345. The ruling in this case is in no wise affected by that of the Supreme Court in Commercial Mutual Accident Co. v. Davis, 213 U. S. 245, 29 Sup. Ct. 445, 53 L. Ed. 782. In the latter case it does not appear where the contract was made, and the questions under consideration differ widely from those at bar. The opinion discloses no purpose to modify the principle announced in the Old Wayne Case.

Nor is the situation changed because, in the latter case, it was necessarily admitted, by the court procedure adopted, that the policy was an Indiana contract, sought to be enforced in Pennsylvania. Here it is established by the proofs that this is an Iowa contract, upon which recovery is sought in Missouri. In the Old Wayne Case both the assured and the beneficiaries were citizens and residents of Pennsylvania, in which state the original action was instituted, as here both insured and beneficiary are residents of Missouri. In both cases the contract was made without the state with equal effectiveness. It follows equally that jurisdiction cannot be acquired in the manner attempted.

It is true that it is less convenient, and probably more expensive, for the plaintiff to prosecute her action in Iowa, where valid service can readily be procured; nevertheless this is one of the incidents of doing business with a foreign insurance company of the character of this defendant, which does business almost, if not quite, exclusively

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with commercial travelers who live in widely separated localities. It may be doubted whether the burden imposed upon the entire membership of such an association, depending, as it does, entirely upon moderate assessments for the payment of losses, as a result of being compelled to defend presumably in every state of the Union, would not outweigh the physical and financial inconvenience of the individual beneficiary. However this may be, the law must be administered as it is found to apply, and the plaintiff is not left without her remedy, but may pursue it, if valid and subsisting, in the proper jurisdiction.

The motion to quash is sustained.

THE TRINIDAD.

(District Court, E. D. New York. May 13, 1918.)

1. WHARVES ⊂=17—WHARFAGE—DAMAGES—MARKET VALUE.
 Like demurrage, wharfage can be fixed at a market rate, which represents the amount of damage, loss of profits, etc.
2. WHARVES ⊂=19—WHARFAGE—DAMAGES—EVIDENCE.
 If proof be given of a market rate of wharfage, no further proof on question of damages is necessary, and such charge is properly allowed.
3. SHIPPING ⊂=76—REPAIR OF VESSELS—DEDUCTIONS.
 Where libelant, which had repaired a vessel, consented to a deduction on the condition of prompt payment, and the owner failed to comply with the condition, being unable to dispose of the vessel, so as to obtain funds to pay for the repairs, it lost any legal right to claim the deduction or allowance.
4. WHARVES ⊂=18—WHARFAGE—LIEN.
 Where the owner of a vessel failed to pay for repairs at their completion, the vessel meanwhile remaining in the dock of libelant, which made the repairs, the vessel is liable for wharfage, and libelant is entitled to a lien thereon.
5. WHARVES ⊂=17—WHARFAGE—AMOUNT.
 On libel by a dock company, which repaired a vessel, *held* that, under the circumstances, it was entitled to wharfage at the rate of $45 a day during the period when the vessel was retained, because of the owner's failure to pay for the repairs.

In Admiralty. Libel by the Tietjen & Lang Dry Dock Company against the steamer Trinidad, her engines, etc., claimed by Alfred Webber Duckett. Decree for libelant.

Crowell & Rouse, of New York City (J. Dexter Crowell, of New York City, of counsel), for libelant.

Peale & McLaughlin, of New York City (Francis X. Carmody, of New York City, of counsel), for claimant.

CHATFIELD, District Judge. The libelant did work totaling $122,940.81, which included a large amount of work extra to that required by the original specifications. This work was completed and payment demanded on or about the 26th day of February, 1917. The steamer Trinidad, on which the work had been done, was then in the

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Tietjen & Lang Dry Docks in Jersey City, and apparently question was immediately raised as to items totaling $1,096, which the owner of the steamer claimed had been included in the charge, although the work which they represented had been omitted by its direction. Prompt payment of the bill was demanded, and there is evidence that a charge of $100 wharfage per day was threatened if there was delay in payment. The president of the Tietjen & Lang Company, after some discussion, offered to allow the $1,096 above referred to as a deduction, if payment was made at once. The bill was not paid until the 29th day of March, the vessel at that time changing ownership. The delay in the purchase of the vessel seems to have corresponded to the delay in paying the bill, and at the time of payment two questions were left open, which came up for adjustment. One was the amount of wharfage claimed by Tietjen & Lang, and the other the old item of $1,096, which the owners of the steamship thought should still be allowed. The Tietjen & Lang people have never claimed interest upon the amount of their bill, nor any damages occasioned by their loss of the space occupied by the Trinidad, during this time. Instead of so doing, they have withdrawn the deduction, which was conditioned upon prompt payment, and have fixed the berth charge at a reduced amount of $75 per day, which according to the testimony of one witness was the minimum market rate at that time for a berth of this size.

[1] Like demurrage, wharfage can be fixed at a market rate which represents the amount of damages, loss of profits, etc. If proof be given of such a market rate, then no further proof would be necessary on the question of damage, and such a charge is properly allowed.

[2-5] Evidence was put in as to the charge fixed by the laws of New York (section 859, N. Y. Charter [Laws 1901, c. 466]) for public docks, which would not exceed, for a vessel of this size, $32 a day, and evidence has been given that a berth for purely storage purposes could be found at a considerably less price, even for $5 a day, where no protection was afforded to the vessel by the person furnishing the berth.

The libelant claims also $441.24 for other repairs made by direction of the new owner during the week subsequent to the payment of the original bills. Objection has been made to this charge on the ground that this work had been omitted, but had nevertheless been charged for in the original bill. The evidence shows clearly that no such double charge has been made, that the items were further extras ordered by the new owner, and the proof is satisfactory that the charge is reasonable in amount. But it is of some importance to note that the dry dock was willing to let the boat stay in the berth for the period of a week, while they were making repairs for which they received but $441.24, and this throws some light upon the propriety of their charging the full market rate of $75 a day during the preceding month. The president of the Tietjen & Lang Company has testified that he was not able to find a berth at the time, where he could place the boat; but his efforts to do so did not go so far as to put the matter in the hands of an agent, or to anchor the vessel in the harbor at the

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risk of the owner, if he did not agree to the amount which he threatened to charge.

It is evident that the owner of the vessel was still negotiating for the sale of the boat, in order to pay the repairs out of the proceeds, and that so far as it was concerned it lost any legal right to claim the reduction or allowance of $1,096. The vessel was liable for wharfage, and for this a lien admittedly accrued. The Easton, 95 U. S. 68, 24 L. Ed. 373. The purchaser ordered the new work, amounting to $441.21, and the amount seems to be correct. It is apparent that the items of allowance and wharfage were particularly appropriate for negotiation or arbitration, but that it is difficult to find a legal basis for the wharfage charge, which should be allowed when the parties have failed to agree among themselves as to a fair amount. The notice given was that $100 a day would be charged; the amount insisted on is $75 a day, and this is the rate which might be proper at a wharf where the space was being let out for profit.

Consideration must also be given to the amount fixed by the charter of the city of New York for similar services, where the charge is a matter of statute rather than private agreement. If the delay had been short, the charge would undoubtedly have been disregarded. When a small amount of business was tendered by the new owner, the wharfage charge was immediately dropped.

The situation is analogous to that in the case of The Easton, 239 Fed. 859, 152 C. C. A. 643, decided by the Circuit Court of Appeals of this circuit, in which an item of demurrage was fixed by a commissioner at $40 a day; the testimony of the experts being, on the one hand, $45, and, on the other, various amounts under $40. In the District Court the $45 price was taken as correct, because supported by the evidence; but the Court of Appeals determined that the finding of the commissioner of a rate part way between the two extremes was "well supported by the evidence."

There is much reason in the present case for holding that such a solution would be fair. Probably the $75 a day rate would not have been insisted on, if it had been fixed by prior agreement. On the other hand, space at the rate of $32 could not be obtained, and such storage as could be had at $5 a day, or anchorage in the river, would not have been consented to by either party. As a fair mean between the $5 rate, the $32 rate, and the $75 rate, and having in mind the amount of the subsequent bill for the period during which no wharfage at all was charged, the libelant will be allowed wharfage at the rate of $45 a day for 31 days; that is, from February 27th to March 29th, inclusive.

Decree may be entered for $441.24 and $1,495, with costs and interest on $441.24.

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COHANSEY GLASS MFG. CO. v. FIRST NAT. BANK OF PHILADELPHIA.

(Circuit Court of Appeals, Third Circuit. June 20, 1918.)

No. 2350.

1. PLEDGES ⊂=36—ACTION AGAINST PLEDGEE—JURY QUESTION.
Evidence *held* to warrant the submission to the jury of the question whether a corporation, through its president, had assented to the private sale of collateral held by a bank.

2. APPEAL AND ERROR ⊂=1056(5)—EXCLUSION OF EVIDENCE—HARMLESS ERROR.
Exclusion of evidence in an action tried to a jury *held* not prejudicial error.

In Error to the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Action at law by the Cohansey Glass Manufacturing Company against the First National Bank of Philadelphia. Judgment for defendant, and plaintiff brings error. Affirmed.

John Kent Kane and Hampton L. Carson, both of Philadelphia, Pa., for plaintiff in error.

Joseph S. Clark and Owen J. Roberts, both of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. In 1909 the Cohansey Company owed the bank four notes, aggregating about $50,000. With the notes were deposited as collateral security certain shares of stock in the American Window Glass Machine Company. The notes, which were in simple form and did not contain the customary provisions of collateral notes, were not renewed, but remained in default for a number of years. Early in 1915 the stock advanced in value, leading to some discussion between the bank and the company, and in May Mr. Law, the president of the bank, wrote to Mr. Milliken, the president of the company, and suggested that the bank should sell the stock through a broker in Pittsburgh, where the principal market was to be found. In response to this letter, Mr. Milliken verbally informed the bank that the stock might be sold at the bank's pleasure, but expressed the hope that the sale might be deferred, as the stock would probably go higher and the company might profit by the rise. The bank verbally rejoined that the stock would be sold when the price increased sufficiently to pay the debt. The stock was sold privately, and, while the sales were going on, Mr. Milliken discussed with the vice president of the bank the amount of the sales and the prices obtained, making no claim that the company was entitled to notice of the sales; none having in fact been given. The sales were made in September, and enough was realized to pay the debt, with a surplus of $727.08. The bank paid the surplus and returned the notes, with a statement of account, which was afterwards changed in form in accordance with the company's request. In January, 1916, the company tendered the debt and interest and demanded the stock; but the bank refused, as-

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serting that the company had agreed to the sale. Thereupon the company sued for conversion, claiming as damages the highest market value after the sale. The defenses were: (1) The company's previous agreement to the method of sale; and (2) ratification with full knowledge. At the trial, the court overruled the second defense, but submitted the first, with instructions that are not now complained of. The jury found for the bank.

[1] In order to understand the argument for reversal, the course of the trial should be given in some detail. After putting in evidence the notes and the pledge of the stock, the company offered Mr. Law's letter of May 22, 1915, to Mr. Milliken:

"You have doubtless noticed that the American Window Glass Machine Co. preferred shares were quoted yesterday at 85. 97 for the preferrd and 20 for the common would pay the debt of the Cohansey Glass Co. to this bank, principal and interest.

"As we stated to you yesterday, we are very anxious not to overstay the market. If the preferred should advance to 97, it seems to us that we should realize, giving you first an opportunity to buy the stock for the company and pay the debt to us, before offering it outside. If you are not in a position to buy the stock, would it not be well for us to place an order to sell at the above figures with some reputable Pittsburgh broker, you writing us a letter consenting to the above course?"

—and followed it by a letter of September 28 from the assistant cashier after the sale:

"In accordance with our advices of May 22, 1915, we have taken advantage of the present rising market to liquidate the collateral to the Cohansey Glass Co. notes held by this bank. The preferred was sold at an overage of approximately 94½, and the common around 22, and after paying the notes in full, with interest, there is a balance left of $727.08, for which check is inclosed herewith, together with a statement of the account.

"We further inclose canceled notes, and $5,000 in Cohansey scrip, which was additional collateral to the loan."

The check and statement of account were then offered, and a letter of September 30 from Mr. Milliken to Mr. Law:

"I have received a letter from your assistant cashier, dated September 28, inclosing a check for $727.08 as the balance from the transaction stated in the letter.

"I must confess to surprise that the sale should have been made without notice to me, as I had a distinct understanding with Mr. Lea, your predecessor, and with you, that no sales should be made without notice and an opportunity to my people to take up the stock and pay off your loan.

"While you are doubtless entirely within your legal right, it would seem that a gentleman's agreement had been overlooked."

To this Mr. Law replied on October 4:

"Your letter of recent date has been referred to Mr. Lea, and he asks that you call to see him here on Wednesday next between 12 and 2 o'clock."

Apparently the company was not satisfied with the form of statement sent by the bank on September 28, as the following letters will show:

From the assistant cashier, October 18:

"If you will be good enough to return the memorandum of the Cohansey transaction previously sent you, we will be glad to have it made up in the

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form you desire. We kept no copy of it, and while the figures could be gathered from our books, it would save considerable time if you would let up have the use of the memorandum for a few days."

From Mr. Milliken, October 19:

"As requested, I inclose the original memo of the Cohansey transaction. I am sorry to trouble you, but as this is my voucher, I am anxious it shall explain the whole matter.

"I appreciate very much your attention to it."

From the assistant cashier, October 25:

"Please find inclosed herewith complete statement of the transactions of the Cohansey Glass Manufacturing Co. with this bank. If this is not in the form you desire, or you wish any explanation of the entries, I will be very glad to furnish it to you."

The company also proved a resolution of its directors, passed in June, 1914, which (after reciting that the stock had been pledged in December, 1904, by the board's authority, but that the minutes contained no note of the board's action) empowered Mr. Milliken to execute such other assignment as might be necessary to effectuate the pledge. The company also called one of its directors, who testified to an assurance from Mr. Lea, the predecessor of Mr. Law, that the stock would not be sold without first consulting the company. After offering, but immediately withdrawing, three papers signed by some of the company's creditors (to which we shall hereafter refer), the company then rested.

On behalf of the bank, Mr. Law testified to a conversation with Mr. Milliken in the spring, concerning the suggested private sale of the stock, and to Mr. Milliken's assent thereto; and the bank's vice president testified to a similar assent or acquiescence while the sales were proceeding. This was the case for the bank, and it is plain that the evidence thus outlined presented the question of fact whether the company, acting by its president, had agreed to the method of sale, and perhaps presented the further question whether the sale had been ratified. The question of ratification is not now before us, as the court ruled it out, and as this ruling was in favor of the company it is, of course, not assigned for error.

[2] Upon the other question, it is clear that the president could not bind the company if he lacked authority to make the agreement, and therefore, in order to prove such lack of authority, the company offered in rebuttal the papers that had already been offered in chief, but had then been withdrawn. The trial judge excluded them, unfortunately without reading, "on the practical ground that I shall instruct the jury that the conversations detailed by the witnesses should not amount to a waiver of any of the rights of the plaintiff." The company offered nothing further in rebuttal, and the case was submitted to the jury on the question whether the agreement set up by the bank had been made. We are now asked to reverse, on the ground that the sentence just quoted misled counsel into believing that none of the company's rights had been waived—in effect, that the judge would direct a verdict for the company—whereas the question whether

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the company had waived its right to notice and to a public sale was immediately submitted.

In an unreported opinion refusing a new trial the learned District Judge has explained that he supposed the papers were offered to rebut the defense of ratification, and that he excluded them because he intended to rule that the evidence on this subject was not sufficient, and did not "amount to a waiver of any of the rights of the plaintiff"—that is, did not amount to ratification. From the colloquy that followed, it plainly appears that he intended to submit the other question, for he stated what measure of damage he would lay down in case the jury should reach that point, clearly meaning that the verdict might be for the bank, and in that event, of course, no damages would be found. What we are concerned with, therefore, on this record, is the effect of the ruling on the question that was submitted, namely, the agreement set up by the bank and (involved in this) Mr. Milliken's power to agree. The company had offered the papers "on the question of the authority which the creditors who signed these papers had given to Mr. Milliken," arguing that "[the papers] showed the rights of the other creditors," and declaring that the offer was to prove "that it made no difference what Mr. Milliken talked about with these officers. He had not the power, and could not take away the rights of other people." This was plain enough, and, although the court unfortunately misunderstood it, the company is entitled to the benefit of its exception, and to have the papers considered now in the light of the purpose that the court failed to grasp. On the other hand, the court's ruling is to be judged by its actual effect, and not by the reason that was given to support it. In a word, the company was offering to show Mr. Milliken's lack of power to make the agreement in question, and to that end was offering the papers to prove that the company's principal creditors (among them the bank itself) had in effect taken control of its affairs, and therefore that Mr. Milliken no longer had—and the bank was charged with knowledge thereof—the apparent power to agree that might otherwise have belonged to his office as president. We have therefore examined the papers, and are of opinion that, if admitted, they would not have proved his lack of power in 1915 to do what the jury has found that he did.

No further offer was made, and no other question is presented by this record. If the learned judge had been convinced that his ruling had harmed the company, we are confident that his well-known fairness would have led him to grant a new trial.

The judgment is affirmed.

CLARKSON COAL & DOCK CO. v. NORTHERN LAKES S. S. CO.
NORTHERN LAKES S. S. CO. v. CLARKSON COAL & DOCK CO.

(Circuit Court of Appeals, Eighth Circuit. April 17, 1918.)

Nos. 4967, 4968.

1. WHARVES ⟸20(1)—OWNERS—DUTIES OF.
The owner of a dock owes a duty to a ship docking there at its invitation to exercise ordinary care to prevent injury, and so is liable for injuries to a ship where the force of the wind was able to move a bridge or trestle used in unloading, because the jaws of the clamp intended to make the trestle fast did not firmly grasp the web of the rails on which it ran.

2. WHARVES ⟸20(2)—INJURIES TO VESSELS—NEGLIGENCE.
Where a vessel which tied up at a dock at the invitation of the owner was injured when the wind moved a bridge or trestle provided for unloading, the dock owner cannot escape liability, it appearing that the clamp intended to make the trestle fast did not firmly grasp the web of the rails on which it ran, by showing that it purchased the device from reputable manufacturers and installed it under the direction of competent engineers; that rule applying only to latent defects.

3. WHARVES ⟸20(1)—INJURIES TO VESSEL—ACT OF GOD.
Where a ship was injured at dock when a high wind moved a bridge or trestle used in unloading, which ran on rails, the dock owner could not escape on the ground that the injury was attributable to the act of God; it appearing that the velocity of the wind was not unusual for that locality in that time of year.

4. WHARVES ⟸20(7)—DAMAGE TO VESSEL.
Where the damages to a vessel included loss of net earnings, and the evidence on the subject conflicted, *held*, that a decree fixing the earnings at a sum between the various estimates was warranted.

Appeal from the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Libel by the Northern Lakes Steamship Company against the Clarkson Coal & Dock Company. From a decree for libelant, respondent appeals, and libelant cross-appeals, asserting the insufficiency of the damages. Affirmed on both appeals.

Thomas H. Garry, of Cleveland, Ohio, and H. R. Spencer, of Duluth, Minn. (R. W. Spencer, of Duluth, Minn., and Goulder, White & Garry, of Cleveland, Ohio, on the brief), for plaintiff.

Henry H. Flor, of St. Paul, Minn. (A. E. Boyesen and P. J. McLaughlin, both of St. Paul, Minn., on the brief), for defendant.

Before SANBORN, Circuit Judge, and TRIEBER and YOUMANS, District Judges.

YOUMANS, District Judge. During the navigation season of 1914, the Northern Lakes Steamship Company owned and operated the steamer Champlain. During the same season the Clarkson Coal & Dock Company owned and operated a coal dock with unloading rigs thereon at Duluth, Minn. The dock was known as the Clarkson dock.

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The last-named company was engaged in the business of receiving coal by lake shipment and transporting it into the interior by rail.

The Clarkson dock is situated on the harbor front and extends out into the harbor from the shore 800, or 1,000 feet. It is about 500 feet wide. On the northerly side there is a dredged slip of about 200 feet in width. Loaded vessels went into this slip and made fast to the dock for the purpose of discharging their cargoes. Running along the edge of the dock lengthwise and about 5 feet from the slip was a single steel railroad rail mounted on and spiked to timbers. About 250 feet from the slip was another single steel rail, parallel to the rail next to the slip. On these two steel rails was erected a bridge or trestle holding the unloading device. At the end of the trestle were two steel legs. These legs were mounted on trucks, each truck having four flanged wheels. These trucks at each end of the trestle rested on the steel rails. Upon the legs thus mounted was constructed the steel trestle, extending over and across the dock for a distance of about 250 feet and at a height of about 50 feet. The entire structure could be rolled along the dock on the steel rails, and could be placed at any point where it was desired to unload a cargo. This structure occupied the easterly half of the dock. A similar structure, mounted and operated in the same way, occupied the westerly half.

The two structures were so built that they could be placed end to end and attached to each other, thus forming a trestle or bridge extending over the entire width of the dock. They were thus fastened together at the time of the accident shown in the testimony in this record. At the slip end of the bridge or trestle was an adjustable steel boom that could be extended out over the vessel. From the end of this boom steel buckets were lowered into the hold of the vessel being unloaded, and when filled these buckets were hoisted by steel lines by machinery on the bridge or trestle, and dumped into cars, which were run out over the bridge or trestle and dumped on the dock. This movable bridge or trestle was very heavy, and was held in place by adjustable clamps applied to the steel rail on which the legs supporting the trestle rested. The jaws of the clamps were designed to drop over and around the ball of the rail, and after being put in place were tightened against the web of the rail by turning a threaded screw.

On the afternoon of April 25, 1914, the outer trestle was shifted to a point near the outer end of the dock and connected end to end with the inner trestle, forming one continuous bridge as already described. On the following day the steamer Champlain arrived at the port of Duluth with a cargo of coal consigned to the Clarkson dock. The vessel did not immediately go into the slip, for the reason that the unloading boom of the trestle extended out over the slip. Later in the day the vessel shifted over alongside the Clarkson dock. On the morning of the next day the work of discharging the cargo from the hold of the vessel began, and continued during the day and the following night. A wind sprang up from the northeast during the early part of the night, and by 4 or 5 o'clock the next morning, the 28th, it had attained a velocity of 40 to 50 miles an hour or greater. The work of unloading was suspended about half past 5 o'clock in the

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morning, and the unloading boom was left extended out over the deck of the vessel. Just before 6 o'clock the end of the bridge next to the trestle began to move along the track, and when it had run a distance of about 75 feet the trucks next to the slip left the track, the bridge collapsed, and a portion of it fell on the vessel, causing the damage complained of.

The Clarkson Coal & Dock Company appeals from the decree adjudging damages against it, and the Northern Lakes Steamship Company appeals because, as it contends, the amount of damages found by the court is not as large as it should be under the testimony. The six assignments of error of the Clarkson Coal & Dock Company can be reduced to one. That one is that the facts fail to show that it was negligent.

The testimony fairly shows: (1) That the Champlain came into the slip and moored at the dock at the invitation of the Clarkson Coal & Dock Company. (2) That when screwed up the jaws of the clamps did not press tightly against the web of the rail. (3) That an appreciable space was left between the jaws of the clamp and the web of the rail.

The Clarkson Coal & Dock Company contends: (1) That it procured from a reliable manufacturer and used under the direction of a competent engineer the best device obtainable for holding the bridge in place on the rails. (2) That the bridge fell as the result of an unavoidable accident, or an act of God.

[1, 2] The use of a clamp, the jaws of which would not tightly grip the web of the rail, was obviously inadequate to prevent a movement of the bridge along the rail. One of the objects of the use of the clamp was to prevent this movement by the force of the wind or any other power. The inadequacy of the clamp was patent, and inspection would have disclosed the ineffective character of the clamp for this purpose. The vessel was taken into the slip and tied up to the dock upon the invitation of the dock owner. The owner of the dock owed to the owner of the ship the duty of exercising ordinary care to prevent injury to the ship. Smith v. Burnett, 173 U. S. 430, 19 Sup. Ct. 442, 43 L. Ed. 756. That duty was not met by the use of a clamp that ordinary inspection would have disclosed did not grip the web of the rail. Union Pacific Railway Co. v. Daniels, 152 U. S. 684, 14 Sup. Ct. 756, 38 L. Ed. 597. The Clarkson Coal & Dock Company cannot absolve itself from liability by showing that it purchased the device from reputable manufacturers and put in the device under the direction of a competent engineer. That rule applies to latent defects, and not to patent defects. Richmond & Danville Railroad Co. v. Elliott, 149 U. S. 266, 13 Sup. Ct. 837, 37 L. Ed. 728; Westinghouse Electric & Manufacturing Co. v. Heimlich, 127 Fed. 92, 62 C. C. A. 92.

[3] The contention that the accident is attributable to an act of God is not sustained by the testimony. It was shown by the officer in charge of the Weather Bureau at Duluth that the velocity of the wind at and about the time the bridge fell was not unusual for that locality. The court was warranted in finding that the velocity of the wind was not such as to make the falling of the bridge an unavoidable

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accident or an act of God. United States v. Kansas City Southern Railway Co. (D. C.) 189 Fed. 471; Great Lakes Towing Company v. American Shipbuilding Company, 243 Fed. 849, 156 C. C. A. 361.

[4] In the cross-appeal of the Northern Lakes Steamship Company it is assigned as error that it was not awarded $7,817.36, with interest and costs, the full amount of damages claimed by it. The court found that the libelant was damaged in the sum of $6,803.03, with interest and costs. The court made no findings of fact, nor was it requested to do so. The damages of the libelant consisted of three items: (1) The cost of repairs; (2) the wages of the crew during the detention; and (3) the amount the vessel could have earned during the period it was detained for repairs. The first two items were susceptible of accurate determination. The third item could not be determined with the same degree of accuracy.

Mr. C. W. Bryson, the manager of the Northern Lakes Steamship Company, testified that the Champlain during one trip of the season, 1914, earned $324 per day, and that upon another trip during the same season the same vessel earned $326 per day. Mr. Robert H. Kidd, a marine surveyor and a ship builder, testified that the earning power of the Champlain during the season mentioned was $400 to $450 per day, and that the average daily expense of that vessel would be $225. According to Mr. Kidd's figures the net earnings of the Champlain would have been $175 to $225 per day. The court allowed a sum for demurrage or net earnings in excess of the amount testified to by Mr. Kidd and less than the amount testified to by Mr. Bryson. We cannot say that the amount found by the court was not correct, or that the testimony warrants a larger amount.

The decrees in both cases will be affirmed, with costs to the Northern Lakes Steamship Company in No. 4967, and to the Clarkson Coal & Dock Company in No. 4968.

NATIONAL ENAMELING & STAMPING CO. v. ZIRKOVICS.*

(Circuit Court of Appeals, Eighth Circuit. April 12, 1918.)

No. 4931.

1. MASTER AND SERVANT ⟸204(2)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

Rev. St. Mo. 1909, § 7828, requiring belting machinery to be guarded, imposes a positive duty on the master, and abolishes the defense of assumption of risk by servants.

2. COURTS ⟸366(23)—FEDERAL COURTS—PRECEDENTS.

Construction by the Missouri Supreme Court that Rev. St. Mo. 1909, § 7828, requiring the guarding of machinery, abolishes the defense of assumption of risk by the employé, is conclusive on the federal courts.

3. MASTER AND SERVANT ⟸281(8)—FINDINGS—INJURIES.

A finding that plaintiff, who was injured while passing sheets of metal through a kettle containing molten zinc, for the purpose of galvanizing them, was not guilty of contributory negligence, *held* warranted.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied June 3, 1918.

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4. MASTER AND SERVANT ⊂=121(2)—INJURIES TO SERVANT—STATUTES—CONSTRUCTION.

Statutes providing for the guarding of belting machinery, etc., being highly remedial, and enacted for the protection of life, should be liberally construed, to carry into effect the legislative intent.

5. MASTER AND SERVANT ⊂=121(5)—DUTY TO GUARD—"MACHINERY"—"MACHINE."

Under Rev. St. Mo. 1909, § 7828, declaring that machines and machinery in all establishments, when dangerous to employés, shall be guarded, when possible, a kettle in which zinc was molten, and which was part of the machinery for galvanizing sheets of metal passed through the kettle, should be guarded, if possible; for, while a machine is a concrete thing, consisting of all parts and devices necessary to operation, machinery is only a part of a machine designed to work with other parts, etc.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Machine; Machinery.]

6. MASTER AND SERVANT ⊂=121(2)—GUARDING OF MACHINERY—STATUTES—CONSTRUCTION—"POSSIBLE."

Under Rev. St. Mo. 1909, § 7828, requiring the guarding of machinery when possible, the term "possible" was intended to mean practicable, and should be so construed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Possible.]

7. EVIDENCE ⊂=513(1)—EXPERT TESTIMONY—GUARDING MACHINERY.

Expert testimony as to the practicability of guarding machinery is admissible, although it is not conclusive on the jury, which is the final judge of the facts.

8. APPEAL AND ERROR ⊂=1002—REVIEW—VERDICT.

A verdict on conflicting evidence is conclusive on the appellate court.

9. TRIAL ⊂=260(1)—INSTRUCTIONS—REFUSAL.

The refusal of requested instructions covered by the charge of the court is not error.

10. TRIAL ⊂=252(1)—INSTRUCTIONS—REFUSAL.

The refusal of abstract instructions without support in the evidence is proper.

11. APPEAL AND ERROR ⊂=1004(1)—REVIEW—VERDICT.

It is the well-settled rule in the national courts that a verdict of the jury in assessing damages in an action to recover for personal injuries is conclusive.

Hook, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Action by Kristo Zirkovics against the National Enameling & Stamping Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Robert A. Holland, Jr., of St. Louis, Mo. (F. C. Sharp, Thomas G. Rutledge, and J. M. Lashly, all of St. Louis, Mo., on the brief), for plaintiff in error.

William R. Gentry, of St. Louis, Mo. (William L. Bohnenkamp, M. F. Watts, and Edwin W. Lee, all of St. Louis, Mo., on the brief), for defendant in error.

Before HOOK and SMITH, Circuit Judges, and TRIEBER, District Judge.

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TRIEBER, District Judge. This is a writ of error prosecuted by the defendant in the court below, to reverse a judgment entered upon a verdict of a jury in favor of the defendant in error, for injuries sustained in an accident, while in the employ of the defendant. For convenience the parties will be referred to as they appeared in the court below.

The amended petition of the plaintiff, upon which the cause was tried, alleged that the defendant was operating a manufacturing establishment in the city of St. Louis, and the plaintiff was in its employ; that in said manufacturing establishment the defendant maintained a certain machine, or piece of machinery, commonly designated as a kettle, in which kettle certain metals were melted by the use of fire, under and around said kettle, and which was connected with machinery placed thereon and therein in such a manner that sheets of metal were carried into and through said kettle, coming in contact with the molten metal therein, and thus galvanizing the sheets of metal passed through said kettle; that the duties of the plaintiff required him to come into close proximity to the said kettle, while the machinery was being operated, and that from time to time portions of the molten metal contained in said kettle would, in the usual operations thereof, spurt out from said kettle, so as to endanger the safety of employés working about said kettle, and therefore the machinery was dangerous to persons employed thereabout, while engaged in their ordinary duties; that the laws of the state of Missouri require such dangerous machinery to be guarded, when possible, which the defendant had failed and neglected to do, although by the exercise of ordinary care it could have been done; that, while thus engaged in the duties of an employé of the defendant, a slight explosion occurred in the molten metal, whereby he was greatly injured, his body burned in numerous places, one of his eyes entirely destroyed, and the other partly destroyed. A demurrer of the defendant to this petition having been overruled, the defendant filed an answer, and, in addition to a general denial, pleaded assumption of risk and contributory negligence.

While there are a number of assignments of error, the issues of law involved are few. Most of the assignments of error refer solely to the inapplicability of the statute of Missouri to the place where the plaintiff was working, which had also been raised by the demurrer to the amended petition. Certain other assignments of error refer to alleged errors of the court in its charge to the jury. As to this last it is sufficient to say that no exceptions were taken by the defendant to any part of the charge of the court, and for this reason these assignments of error cannot be considered.

The important issues involved, which were raised by the demurrer, and by the request for a directed verdict and some special instructions asked, are: (1) Whether the kettle at which the plaintiff was employed, and where he was injured by the explosion of the metal, was required by the statutes of the state of Missouri to be guarded. (2) Was the accident caused by reason of the contributory negligence of the plaintiff? (3) Did the plaintiff assume the risk of explosion, as he knew that these explosions occurred frequently?

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[1, 2] The statute upon which the plaintiff bases his cause of action is as follows:

"Sec. 7828 [Rev. St. Mo. 1909.] *Belting, etc., to be Guarded.*—The belting, shafting, machines, machinery, gearing and drums, in all manufacturing, mechanical and other establishments in this state, when so placed as to be dangerous to persons employed therein or thereabout while engaged in their ordinary duties, shall be safely and securely guarded when possible; if not possible, then notice of its danger shall be conspicuously posted in such establishments."

This statute has been construed by the Supreme Court of Missouri as imposing a positive duty on the employer, and that it abolishes the defense of assumption of risk by the employé (Simpson v. Witte Iron Works, 249 Mo. 376, 155 S. W. 810), and this construction has been held to be binding on the national courts by this court in Columbia Box Co. v. Saucier, 213 Fed. 310, 129 C. C. A. 656, and Atlas Portland Cement Co. v. Hagen, 233 Fed. 24, 147 C. C. A. 94.

[3] Was the plaintiff guilty of contributory negligence? This claim is based on the testimony of some witnesses for the defendant that an explosion could not occur if the zinc was properly dried, and it is therefore claimed that the explosion must have been caused by the failure of the plaintiff to properly dry the metal before dropping it into the kettle, as he had been advised and it was his duty to do. But the undisputed evidence was that it had been dried by him before he placed it in the kettle. There was also evidence that the zinc was porous, and that the slabs were frequently found with cracks in them, and that it was absolutely impossible to make it dry at all times. In addition there was evidence that there would frequently be explosions, even when the zinc is properly dried. Upon that evidence the finding of the jury is conclusive. No exceptions were taken to the charge of the court on that issue, and it was clearly correct.

[4, 5] This leaves for determination the main question involved, whether under the statute it was the duty of the defendant to guard the kettle where the plaintiff was at work, and, if so, whether it was possible to guard it. Prior to 1909 the statute was confined to "belting, shafting, gearing, and drums," but in 1909 it was amended by inserting the words "machines and machinery."

At the very outset, we must consider the well-settled rule of law that statutes of this nature, enacted for the protection of life, are highly remedial, and must be liberally construed to carry into effect the intention of the Legislature. The intention of the Legislature is emphasized by the fact that in 1909 it saw proper to amend the act as before stated. There could have been but one object for this amendment, namely, to safeguard more fully the lives of workmen than the original act had done. This statute was so construed by the Supreme Court of Missouri in Simpson v. Witte Iron Works, 249 Mo. 376, 155 S. W. 810.

Whether the kettle by itself, unconnected with any other machinery, would fall within the meaning of the statute, it is not necessary to determine in this case, as the evidence establishes the following facts: The kettle was in a large room, where sheets of iron were galvanized.

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To perform this work a large machine, consisting of many parts, was used. There was a space surrounded by four brick walls, within which was the iron kettle. There was a space between the walls and the kettle, where charcoal was placed for the purpose of heating the kettle and melting the zinc placed in it. Over the kettle, and forming a part of the galvanizing machine, were rollers, shafts, runways, belts, and other machinery, some of which extended into the pot. From this description we are of the opinion that the melting pot was a part of the machinery used for the purpose of galvanizing sheet iron.

There is a broad distinction between "machines" and "machinery." A machine is a concrete thing, consisting of all the parts and devices necessary to its operation. On the other hand, machinery is only a part of a machine, designed to work with other parts, so as to effect the common end. Brower v. Locke, 31 Ind. App. 353, 67 N. E. 1015; Commonwealth v. Lowell Gaslight Co., 12 Allen (94 Mass.) 75; Seavey v. Central Mutual Fire Insurance Co., 111 Mass. 540; Wreggitt v. Barnett, 99 Mich. 477, 58 N. W. 467; Benedict v. City of New Orleans, 44 La. Ann. 793, 11 South. 41.

In the Lowell Gaslight Case it was held that the service pipes and consumers' meters, all connected and operating together, constituted a part of the machinery. In Wreggitt v. Barnett the court held that a smokestack used in a manufacturing establishment was included as machinery. In East Tenn., etc., R. Co. v. Thompson, 94 Ala. 638, 10 South. 280, a supply pipe of a water tank was held to be a part of the machinery.

The contention that the statute must be limited "solely to dangers of employés coming in contact with agencies of power and motion, while moving in their normal orbits, and not the dangers of metals being ejected from any apparatus," is too narrow a construction of this statute, and would, in many instances, defeat the beneficent object intended by the Legislature. Phillips v. Shoe Co., 178 Mo. App. 196, 165 S. W. 1183; American Ice Co. v. Porreca, 213 Fed. 185, 129 C. C. A. 529; Freedom Casket Co. v. McManus, 218 Fed. 323, 134 C. C. A. 119; U. S. Gypsum Co. v. Karnaca, 216 Fed. 857, 133 C. C. A. 61 (decided by this court); McCarney v. Bettendorf, 156 Iowa, 418, 136 N. W. 920; U. S. Cement Co. v. Cooper, 172 Ind. 599, 88 N. E. 69.

Counsel for defendant relies on Simpson v. Witte Iron Works, 249 Mo. 376, 155 S. W. 810, Deiner v. Sutermeister, 266 Mo. 505, 178 S. W. 757, and Strode v. Columbia Box Co., 250 Mo. 695, 158 S. W. 22. These cases, it is claimed, construe this statute as inapplicable to the facts in the instant case. But in our opinion they are clearly inapplicable on the facts. In the Simpson Case the employé, while walking, stumbled over a stationary belt. The court held that, even if the belt had been guarded, it would not have prevented the accident. There are some expressions in the opinion which, when applied to a different state of facts, are misleading. In the Deiner Case the action was founded on a statute requiring scaffolds and other structures used in the erection of a building to be safely and securely supported and of sufficient width to be safe for employés walking upon them, and it

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was held that it did not apply to hoists; the court applying the maxim ejusdem generis. In the Columbia Box Company Case the injury was caused by the breaking of a belt 14 feet above the floor, and the court held that the statute did not apply to breaks or explosions, which are liable to give way from the strains incident to their movement. We are of the opinion that, upon the facts established, this pot or kettle was within the meaning of the statute "machinery," and was required to be guarded if possible.

[6-8] Was it possible to guard it? "Possible," as used in the statute, evidently was intended to mean practicable, and should be so construed. Both sides introduced the testimony of experts, and, as is always the case where such testimony is introduced, it was conflicting. While the testimony of experts is not conclusive on a jury, which is the final judge to determine the facts, it is proper to introduce it, and should be considered by the jury. The finding of a jury upon such conflicting evidence, and using its own judgment, is conclusive, and will not be disturbed by the appellate court. There was substantial evidence to establish the practicability of guarding the kettle.

The question of contributory negligence was fairly submitted to the jury, and its finding, there being substantial evidence to warrant it, is final.

There were a number of special instructions asked on behalf of the defendant, which were refused by the court, and proper exceptions saved. A number of them are in relation to the construction of the statute; it being claimed that under this statute there is no liability. In view of what has been said, these instructions were properly refused.

[9, 10] There were some other instructions asked, but they were either fully covered by the charge of the court, or they were clearly erroneous—some abstract, without any evidence to support them. They have been fully considered by us, and we fail to discover that the court committed any error in refusing them.

[11] The contention that the verdict of the jury is excessive cannot be considered by this court, as it is the well-settled rule of the national courts that the verdict of the jury assessing damages in an action to recover damages for a personal injury is conclusive. St. Louis & Iron Mountain Ry. Co. v. Craft, 237 U. S. 648, 661, 35 Sup. Ct. 704, 59 L. Ed. 1160; Railroad Co. v. Fraloff, 100 U. S. 24, 31, 25 L. Ed. 531.

The judgment is affirmed.

HOOK, Circuit Judge (dissenting). The controlling question in this case is whether a pot or kettle jacketed in brick and holding molten metal is within section 7828, Rev. Stat. Mo. 1909, which requires the guarding of "belting, shafting, machines, machinery, gearing, and drums" in factories. More narrowly it is whether the pot is a "machine" or "machinery," as those terms are employed in the Missouri statute.

The apparatus was used for galvanizing sheet iron. Slabs of zinc were reduced to a molten state in the pot by a fire beneath. The supply of the molten mass was maintained by adding slabs as required. Moisture on or in a slab, when put in, would cause an eruption or ex-

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plosion of the liquid metal, and plaintiff, who was doing that work, was injured on such an occasion. Formerly the galvanizing was done by immersing the sheets of iron by hand; but at the time of the accident detachable rollers and chains operated by power were fastened to the pot to conduct the operation.

My Associates decline to consider whether the pot of molten metal by itself would be within the statute, but they hold that it became so because of the mechanical attachment. In other words, they are of the opinion that "the melting pot was a part of the machinery used for the purpose of galvanizing sheet iron"; and this, though two things are clear in the record: First, it was not shown and did not appear that the attached machinery was in operation at the time of the accident; and, second, no one contends that the attached machinery had the remotest bearing on the accident. It would have happened just the same, had the rollers and chains been lifted out and put aside. This casual, irrelevant circumstance is held to impart a definite character to the pot that must otherwise, at least, be doubtful. Equally would the attachment of a power wringer to a washtub filled with suds make the tub of suds machinery within the Missouri statute, though the wringer was idle. The wide scope of this conclusion of my Associates is shown by some of the decisions cited to support it. Commonwealth v. Lowell Gaslight Co., 12 Allen (94 Mass.) 75; Wreggitt v. Barnett, 99 Mich. 477, 58 N. W. 467; East Tenn., etc., R. Co. v. Thompson, 94 Ala. 636, 10 South. 280. In the Massachusetts case it was held that mains, service pipes, and meters of a gas company were machinery, within the meaning of a tax law requiring the deduction of the value of "real estate and machinery." The Michigan case was an action for damages for the removal of a shingle mill outfit "consisting of engine, boiler, belts, saws, pulleys and other machinery." The plaintiff averred "that defendant removed said machinery." The court said: "We think it would be overtechnical to say that a smokestack was not included." In the Alabama case it was held that the supply pipe of a water tank was "a part of the ways, works, machinery, or plant connected with or used in the business of a railroad company," within the meaning of a civil damage statute.

Statutes of the kind before us should be ungrudgingly construed with liberality to accomplish their beneficent objects, but there are limits beyond which courts cannot go without indulging in legislation. No one could reasonably contend that a gas meter, a smokestack, or a water supply pipe was machinery within the Missouri statute, however they might be regarded in other relations or for other purposes. If it were otherwise, strange questions would arise over guarding them with protective devices. In Simpson v. Witte Iron Works, 249 Mo. 376, 155 S. W. 810, the plaintiff fell over a belt placed near the floor, while it was not running; but it was held that the case was not within the statute, although "belting" is one of the terms used. The court said that the statute contemplates the safeguarding of agencies of power and motion, and only when such agencies are in action. The construction is a reasonable one, and is of course binding upon us. A word or term may mean one thing in one place and quite a different thing in another

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place; and when it appears in legislation due attention should be given to the purpose of the statute, as well as to the context in which it is found. Holy Trinity Church v. United States, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226. The inquiry here is not whether the pot of metal was in a broad, comprehensive sense a part of the machinery of defendant's manufacturing plant, but whether in a much narrower sense it was, when considered by itself, machinery within the particular statute. The injury was caused by the melted zinc in the pot, not by the mechanical attachment. The latter had nothing to do with it.

I cannot escape the conviction that a construction has been given the local law at variance with that settled by the highest judicial tribunal of the state.

O'TOOLE et al. v. MEYSENBURG et al.

MEYSENBURG et al. v. O'TOOLE et al.

(Circuit Court of Appeals, Eighth Circuit. April 2, 1918.)

Nos. 4875, 4879.

1. USURY ⇐16—WHAT CONSTITUTES.
An agreement that land mortgaged to secure certain indebtedness should stand as additional security for other indebtedness secured by deed of trust on other property *held* not usurious; foreclosure of deed of trust having resulted in a deficiency in excess of the additional security.

2. USURY ⇐53—WHAT CONSTITUTES—COMMISSION FOR MAKING LOAN.
Where a creditor, to facilitate the debtor's exchange of property, made new loans and assisted in transfer of securities, etc., a payment for the creditor's services and use of his credit must be deemed a commission for making the loan, and to constitute usury, where it increased the compensation for the creditor's use of funds beyond the legal rate of interest.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Usury.]

3. USURY ⇐65—WHAT CONSTITUTES.
A payment in addition to the legal rate of interest for the extension of an existing loan is usurious.

4. USURY ⇐23—WHAT CONSTITUTES.
Where a creditor exacted the legal rate of interest, a sum added to the principal of the note for the purpose of making it even money, etc., is usury.

5. USURY ⇐49—WHAT CONSTITUTES—INTEREST.
Past-due interest may be added as principal by an agreement after it is due, without subjecting the transaction to taint of usury.

6. USURY ⇐2(1)—WHAT LAW GOVERNS.
The intention of the parties as to the law they desired to apply to a contract will govern, if such selection be made in good faith, and be not opposed to the public policy of the forum.

7. USURY ⇐2(2)—CONTRACTS—ENFORCEMENT.
It is not, generally speaking, against public policy to enforce a contract usurious at the forum, but valid at its situs.

8. USURY ⇐117—CONTRACTS—WHAT LAW GOVERNS.
Evidence *held* to show that a contract was a Missouri contract, though the note was on a printed form, dated "Grafton, Ill.," for a sum made payable at that place.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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9. USURY ⊂=113—WHAT LAW GOVERNS—PRESUMPTION.
When a contract is usurious in all jurisdictions, and its situs is uncertain, the courts will not indulge the presumption that the parties had in mind the usurious character of their transaction, and intended to select the situs where the least penalty was imposed.

10. MORTGAGES ⊂=490—FORECLOSURE—OBLIGATION.
Where a creditor, after the execution of a deed of trust, paid taxes on the land, he is on foreclosure entitled to be compensated for the same.

Cross-Appeals from the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

Suit by Robert L. Meysenburg and another against Joseph P. O'Toole and others. From decree of foreclosure, both parties appeal. Reversed and remanded, with directions to enter decree as indicated.

Edward J. Vaughn, of Los Angeles, Cal., and John M. Moore, W. B. Smith, J. Merrick Moore, and H. M. Trieber, all of Little Rock, Ark., for plaintiffs.

Marion C. Early, of St. Louis, Mo., and Rose, Hemingway, Cantrell, Loughborough & Miles, of Little Rock, Ark., for defendants.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

STONE, Circuit Judge. From a decree in foreclosure of deed of trust cross-appeals are here. The dispute is entirely concerned with the amount allowed by the decree. The appellants (defendants) claim that it should be materially reduced because of the inclusion of usurious items, and also because a credit should have been allowed for a sum realized in another foreclosure upon other land. The plaintiffs claim the decree should be augmented by the amount of a commission ($1,100) which was deducted by the court as usurious. The court excluded several items as usurious and gave judgment for the balance, with interest. Our determination is an affirmance of the action of the trial court, with a slight difference in the amount of the decree, due doubtless to error in computation of interest.

The note secured by the deed of trust was dated April 30, 1914, and was for $38,500, bearing 6 per cent. annual interest. The foreclosure decree was of October 23, 1916, and covered this note and subsequent tax payments, with interest upon both. This note was composed of the following items: An earlier 90-day note, dated March 13, 1912, for $30,000, with interest. Of this interest $3,338.85 was unchanged in form; the remaining $450 had been included in a note for $1,000, dated June 12, 1912, with $550, which was a commission paid for an extension of the $30,000 loan. Therefore the first two items were $33,338.85 and $1,113 ($113 being interest on the $1,000 note). The next item was for $2,673.30, which represented principal ($2,500) and interest of a note given December 4, 1912, to procure a further extension. The other items, except two, were for undisputed expenditures made in connection with the property, such as taxes, abstracts, etc., which total $811.76. Of the two other items, one was the sum of $400 advanced to defendants to pay a broker for securing a loan to plaintiff, with the $38,500 note as collateral. The plaintiff re-

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fused to take a new note, unless the defendants procured such a loan for him. They were compelled to employ a broker, and borrowed this sum from plaintiff to pay the brokerage. The above items total $38,336.91. For the purpose of making the note an even amount to aid its business use, the parties added $163.09, the last item. Defendants contend that of the above items the $30,000 note, with its interest, the two notes for $2,673.30 and $1,113, and the added item of $163.09, are usurious. The $30,000 note was made up of three items—$22,000 cash, $6,900 to additionally secure another loan, and $1,100 commission for making the loan. The cash item is not challenged. The other two are.

These two items came from rather involved dealings as follows: At the time of and prior to the making of the note for $30,000, William H. Journey was the owner of 207 acres of farm land near Grafton, Ill., and at the same time his mother owned an adjoining 160 acres. The title to the farm owned by Journey, as well as to his home at Grafton, was in Meysenburg's name, but was really held by him as security for a debt of $24,000 due from Journey. Shortly before the execution of the note, Journey and other parties, desiring to acquire the Arkansas land covered by the deed of trust foreclosed in this case, had arranged a trade therefor under the following conditions: In return for the Arkansas land was to be given the farms of Journey and his mother, together comprising 367 acres, and $20,000 in cash, to be secured through a loan upon the farm property, less 20 acres; these 20 acres, containing a quarry, Journey was to repurchase for $2,000 cash and a note for $4,000, secured by mortgage on this quarry property. To make this trade it was, of course, necessary to secure the transfer from Meysenburg of the title to the Journey farm of 207 acres, which necessarily involved the release of that property as security for the above $24,000 debt. Journey's home place, the only other security for this debt, appears in the evidence as of little value, so that this step on Meysenburg's part involved the abandonment of practically all of his security for the Journey debt. Meysenburg agreed to reconvey to Journey this farm, taking thereon a deed of trust for $20,000, and to furnish the needed $22,000 cash, which was to be secured by a deed of trust upon the Arkansas property. As, however, this reduced the amount of Meysenburg's security for the $24,000 debt, it was agreed that the Arkansas property should stand as additional security up to $6,900 of the $24,000 indebtedness, so that if the Journey farm, on foreclosure, should not take care of this indebtedness, any balance should be made from the Arkansas property. As compensation or commission for his services in the above transactions, it was agreed that Meysenburg should receive $1,100, to be secured by the Arkansas property, so that the $30,000 note represented the sum of $22,000 cash and the above items of $6,900 and $1,100.

[1, 2] Later there was a foreclosure on the Illinois land, which resulted in a deficiency of more than the $6,900 above provided for. Under this statement it should be evident that this amount is not open to the objection that it was usurious. As to the item of $1,100, it is contended that this was a proper charge for the use of the services and credit of the plaintiff in making the exchange of the properties possible.

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These services and credit were the rearrangement of certain securities for an existing indebtedness and the loan of an additional sum. We see in such no substantial difference from a commission to a lender for making a loan. The finding of the chancellor was to this effect, and should be sustained. Such commissions are usurious. 39 Cyc. 971, and citations.

[3-5] Passing from the $30,000 note to the later items of the larger note which are challenged: The item of $2,673.30 was a note for $2,500 (with interest thereon) given for an extension of existing indebtedness. This was rightly found by the chancellor to be usurious as a commission, for such forbearance is upon the same footing as a commission for making a loan. De Wolf v. Johnson, 10 Wheat. 393, 6 L. Ed. 343; 39 Cyc. 941, and citations. The next item of $1,113 was the principal, $1,000, and interest of a note made up of two items —$550 for a further extension on existing indebtedness, and $450 past-due interest upon the $30,000, note. The first of these items is clearly usurious; the second is not, since past-due interest may be added as principal by an agreement made after it is due. Bramblett v. Deposit Bank, 122 Ky. 324, 92 S. W. 283, 6 L. R. A. (N. S.) 612, and note; Sanford v. Lundquist, 80 Neb. 414, 118 N. W. 129, 18 L. R. A. (N. S.) 633, and note; 39 Cyc. 967, and citations. As to the item of $163.09, added to round out the note for $38,500, that item was clearly no part of the indebtedness supposed to be represented by the note. The chancellor correctly excluded it.

[6-9] As usurious items entered into the note protected by the foreclosure, that entire instrument is tainted. The next cleavage between the parties is as to the effect of this usury upon the amount collectible on the note. This difference arises from a contention as to whether the usury law of Missouri or that of Illinois governs. The Missouri law forfeits interest in excess of 6 per cent. The Illinois law forfeits the entire interest. The question is as to the situs of the contract. The situs of contracts is one of the troublesome problems of private international law, but one rule stands forth clearly: That the intention of the parties as to the law they desired to apply will govern, if such selection be made in good faith, and be not opposed to the public policy of the forum. Wayman v. Southard, 10 Wheat. 1, 48, 6 L. Ed. 253; Pritchard v. Norton, 106 U. S. 124, 1 Sup. Ct. 102, 27 L. Ed. 104; Coghlan v. South Carolina R. Co., 142 U. S. 101;[1] U. S. Savings & Loan Co. v. Beckley, 137 Ala. 119, 33 South. 934, 62 L. R. A. 33, and valuable note, 97 Am. St. Rep. 19; 5 R. C. L. 938, 978. It is not, generally speaking, against public policy to enforce a contract usurious at the forum, but valid at its situs. 5 R. C. L. 981, and citations. The good faith of the parties here in their choice of situs is not questioned. It is therefore a question as to their intention. This is to be gathered from the terms of the instrument and from the circumstances surrounding them at the time the contract was made.

The contract, taken alone, at its face value, would suggest an Illinois contract. It is a note upon a printed form, dated "Grafton, Ill.," for a sum of money made payable "at the Grafton Bank." The undis-

[1] 12 Sup. Ct. 150, 35 L. Ed. 951.

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puted testimony as to the circumstances surrounding the giving of the note are as follows: The note was actually executed and delivered in Missouri; all of the negotiations took place in Missouri; the major item in the note was an earlier note for $30,000, which by its terms, history, and circumstances was a Missouri contract; that former note had been executed upon a blank form of note of a Missouri bank, at which it was to be placed as collateral for a loan; this later note was to be similarly placed for plaintiff at a certain Missouri bank by defendants; plaintiff refused to take this later note until defendants had so arranged for its hypothecation; the plaintiff swears positively that the parties attached no importance to the form of note, as to where it was dated or payable, and there is no denial of this statement. In short, the contract was made in Missouri; the use of the note was known to and intended by all parties to be in Missouri; it replaced Missouri obligations; no importance was attached to the fact that the form of note filled out purported execution and performance in another state; and the parties had no thought of carrying into their contract any law different from that which had before governed their dealings, or from the place where the contract was made. The result of this combination of circumstances, in our judgment, shows no intention to contract with a view to the Illinois law. It may also be said that, when the contract is usurious in all jurisdictions where any element thereof may exist to which the situs might attach, the court will not indulge in the presumption that the parties had in mind the usurious character of their transaction and intended to select the lightest penalty. Such a selection would be in bad faith and against public policy. Andrews v. Pond, 13 Pet. 65, 10 L. Ed. 61; Heath v. Griswold (C. C.) 5 Fed. 573; Adams v. Robertson, 37 Ill. 45; Mix v. Ins. Co., 11 Ind. 117; Arnold v. Potter, 22 Iowa, 194; Davis v. Tandy, 107 Mo. App. 437, 81 S. W. 457; Craven v. Atl., etc., R. Co., 77 N. C. 289; Daniel, Neg. Inst. § 924; note to 62 L. R. A. at page 60. Therefore the chancellor was right in holding the usury law of Missouri, where the contract was made, to be applicable.

The final contention is that the amount due should be reduced by the more than $16,000 received from foreclosure of the Illinois land under the deed of trust for $20,000. A memorandum agreement between the parties, dated August 19, 1916, and the history of the transactions as given above, show very clearly that this reduction should not be made.

[10] Since execution of the $38,500 note and the deed of trust here under foreclosure, plaintiff has expended $555.66 for taxes upon the land. He is entitled to add this sum, with interest from date of payment, to the amount due upon the note.

The items and amounts which should be considered in reaching the principal due on the note for $38,500 are as follows: The $30,000 note, less the commission of $1,100, or $28,900, with interest at 6 per cent. to April 30, 1914 (date of the note for $38,500), less $450, the portion of the interest which was included in the note for $1,000, dated June 12, 1912; $450, just referred to, with interest thereon from June 12, 1912, to April 30, 1914; the undisputed expenditures

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for taxes, abstracts, etc., totaling $811.76; and the amount of $400 advanced to appellants for brokerage. This total, at 6 per centum from the date of the note, plus the taxes paid since, with interest from date of payment, should be the amount for which decree should have been entered. This amount is $39,418.28, and should bear interest at the rate of 6 per cent. per annum from the date of the decree below. To this amount should be added reasonable allowances to the trustee and his attorney, to be determined by the trial court.

The judgment will be reversed and remanded, with instructions to enter a decree in conformity herewith; the costs to be upon the appellees.

WOERHEIDE et al. v. BARBER ASPHALT PAVING CO.

(Circuit Court of Appeals, Eighth Circuit. April 2, 1918. Rehearing Denied July 8, 1918.)

No. 4802.

1. CONTRACTS ⟸9(1)—VALIDITY—UNCERTAINTY.
 A contract giving defendant, a manufacturer of composition roofing, the exclusive right to use and sell patented cleats for such roofing during the life of the patent, and obligating defendant to purchase certain cleats, etc., *held* void for uncertainty.
2. SALES ⟸98—ENFORCEMENT—BREACH.
 Where a contract provided that defendant should purchase 25,000 sets of cleats monthly, the fact that defendant in one month purchased less than that number is an inconsequential breach, and will not destroy its rights, where the amount was made up the following month.
3. CONTRACTS ⟸105—PERFORMANCE—EFFECT.
 Complete performance of only one of five or six important executory contract obligations cannot prevent avoidance of the contract, where others equally important remain executory and are uncertain.
4. CANCELLATION OF INSTRUMENTS ⟸57—CONTRACTS—ACCOUNTING.
 Where a contract which was legally uncertain was substantially performed by both parties up to the date of the attempted avoidance, complainant is not in a suit to cancel the contract entitled to an accounting.

Munger, District Judge, dissenting.

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Suit by William H. Woerheide and others against the Barber Asphalt Paving Company. From a decree dismissing the bill, complainants appeal. Reversed, with instructions.

Phillip W. Haberman, of New York City, and Henry S. Caulfield, of St. Louis, Mo. (Gustave L. Stern and George F. Haid, both of St. Louis, Mo., on the brief), for appellants.

Henry N. Paul, Jr., of Philadelphia, Pa., and Allen C. Orrick, of St. Louis, Mo. (Nagel & Kirby, of St. Louis, Mo., on the brief), for appellee.

Before CARLAND and STONE, Circuit Judges, and MUNGER, District Judge.

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STONE, Circuit Judge. Action by William H. Woerheide and the Kant-Leak Kleet Company against the Barber Asphalt Paving Company to have certain contracts declared void. Additional relief, such as might follow annulment of the contracts, was asked, in the nature of an accounting and a prevention of further institution or prosecution of suits affecting patents covered by the contracts. From a dismissal of the bill plaintiff appeals.

As a bar to any consideration of the case upon its merits appellee interposed the charge that appellants come with "unclean hands." We have carefully examined the entire evidence bearing thereon, and find it does not sustain the construction placed thereon by appellee. The original contract, dated March 15, 1910, was followed by two contracts, dated February 25, 1911, and June 8, 1914, each of which was expressed as being in addition to and as modifying the contract or contracts preceding it. They covered the exploitation and sale of two patented metal cleats, used to secure manufactured roofing in place, known as the Kant-Leak Kleet and the Kontinuous Kant-Leak Kleet, or Klincher-Kleet. Such portions as are necessary to an understanding of the points decided are placed in the margin.[1]

[1] Contract of March 15, 1910.

* * * * * * * * * *

Whereas, the parties of the first part are the exclusive owners of a certain new and useful cleat for securing prepared roofing; * * *

And, whereas, the Barber Asphalt Paving Company is desirous of securing the exclusive right to use, employ and sell cleats embodying the said invention, or improvements or modifications thereof, in connection with the sale of its roofing; * * *

Now, therefore, this agreement witnesseth:

1. The parties of the first part, in consideration of the sum of one dollar paid to them by the party of the second part and the other considerations contained herein, hereby grant to the party of the second part, its successors and assigns, the exclusive right and license to use, employ and sell the said "Huttig's Kant-Leak Kleet," and the invention covered by the above recited application, or the patent granted or to be granted thereupon, and such improvements, modifications or alterations thereof, as may be either owned by, or invented by or patented to the parties of the first part to the full end of the term for which said patents are or may be at any time granted. * * *

4. The parties of the first part further agree to manufacture said cleats * * * fully up to the standard of those heretofore made, * * * and in such quantities as may be necessary to supply the demand of the party of the second part and its customers therefor; and in order to further provide for the demand of the party of the second part and its customers for these cleats, the parties of the first part shall at all times, keep on hand, at the plant of the party of the first part * * * a sufficient supply of said cleats for the requirements of the party of the second part.

5. The parties of the first part hereto agree that they will at their own expense save harmless the party of the second part from any suits or actions which may be brought against the said party of the second part, or any of its customers, charging the sale or use of said cleats to constitute an infringement of any existing patents. * * *

6. The parties of the first part further agree to maintain the exclusiveness of the rights herein granted to the party of the second part, by promptly instituting the necessary proceedings to enjoin any infringement upon the patent or patents covering the said cleats, or upon the trade-marks used in connection with their sale, and to diligently prosecute said actions at their own expense, it being the end and purport of this agreement that the exclusive

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The validity of these contracts is attacked on the ground of lack of mutuality in that certain vital executory obligations of appellee are so uncertainly defined in the contract that they are incapable of judicial ascertainment and enforcement. The three contracts were intended to be treated as one agreement, are susceptible of being so regarded, and will be so considered. There was no attack upon the contracts until some months after the last of the above modifying contracts. Therefore the contention that the contract was uncertain and indefinite need be determined only in connection with the agreement in its final form as affected by the two additions and modifications. However, the sum total of appellee's obligations as outlined by all of the contracts is best reached by first considering those obligations in each of the three contracts seriatim, and afterwards summarizing such as remained active in the final agreement.

[1] A better conception of the value to be placed upon the contract provisions may be gained if the situation of the parties at the time

rights herein granted to the party of the second part, shall be fully maintained by the parties of the first part at their own expense.

7. In consideration of the foregoing covenants by the parties of the first part, the party of the second part hereby agrees to purchase from the parties of the first part, the cleats manufactured and sold by them and to which this agreement refers, in such quantities as may be necessary to fill its orders for the same, the price to be twenty-five cents ($.25) per set of one hundred and eight (108) cleats (with sufficient galvanized nails, packed in cartons, together with direction for laying), f. o. b. Maurer, New Jersey; terms, 30 days net, or 2% discount for cash in ten (10) days from date of shipment.

8. The party of the second part further agrees to feature and offer to the trade their high grade roofings, packed with "Kant-Leak Kleets," but reserve the right to pack and sell said goods with or without the cleats, or otherwise as the party of the second part may desire.

9. The party of the second part agrees in connection with its current advertising of roofing material to include favorable references to said cleat and to advocate its use and sale in such periodicals as it may deem advisable; but as this advertising is without expense to the parties of the first part the extent of it is left to the sound judgment of the party of the second part. By high grade roofings in this clause is meant the standard Genasco roofings, as now manufactured by the party of the second part, or goods of the same quality, packed in private brands. It does not include "Phœnix" roofing, or similar cheap roofing. It being the intent of this clause that in return for the exclusive sales rights, etc., acquired by the party of the second part, they will advertise and advocate the sale of their high grade roofing packed with "Kant-Leak Kleets," as long as there is a substantial demand therefor.

10. * * * The party of the first part shall not be required to supply more than five hundred thousand (500,000) sets of said cleats during any one year of the life of this agreement, unless the party of the second part shall give notice in writing at least ninety (90) days in advance, stating their requirements in excess of the foregoing stipulated amount for any one year or portion of such year. * * *

Contract of February 25, 1911.

* * * * * * * * * * *

We agree to reduce our present agreement price of "Kant-Leak Kleets" to you to twenty-two and a half cents per set, f. o. b. Maurer, N. J. Terms net cash on tenth of month following shipments. * * *

This reduction is made with the understanding and agreement on your part, that you will reduce your present prices on all of your roofing supplied and packed with "Kant-Leak Kleets" on and after May 1st, 1911, five cents per

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is understood. Appellant Woerheide had shortly before invented a method of fastening in place prepared roofing. This device was to replace the broadheaded nails and cement then generally in use. It was the custom of manufacturers of prepared roofing to pack and ship therewith the necessary fastenings. It was therefore highly advantageous, if not necessary, that a sales arrangement for these cleats be made with some manufacturer of such roofing. Appellee was such manufacturer on a large scale, and packed with its roofing nails and cement as fasteners. The cleat had been on the market a year and had, considering its novelty, met with a degree of success. However, it could, in that short time, hardly be said to have established a place in the trade. It was still rather a novelty, apparently with an attractive future. If it were successful, its exclusive control would be of value to a manufacturer of roofing. In this setting the original contract was made.

The provisions therein affecting the appellee refer to the exploi-

square, and that you will maintain such prices to within five cents per square off the price charged by you for the same grades of roofings, supplied and packed with large headed nails and cement.

In further consideration of this reduction of price, you agree to offer and sell all of your high grade smooth and sanded surfaced roofings (Genasco and Private brands) supplied exclusively with our "Kant-Leak Kleets" for laying same, except in such instances where your customers may demand the old-style supplies, viz., large-headed nails, or tin caps nails and cement. * * *

We further agree to co-operate with you in conducting an advertising campaign during the present year, in behalf of your high grade roofings supplied with our "Kant-Leak Kleets." Said advertising matter to consist of mailing literature, samples, and demonstrating boards, featuring the "Kant-Leak Kleets," to be prepared and furnished by you to your customers gratis. The expense of such advertising to be borne jointly and equally by you and ourselves. The extent of this advertising to be determined by your own good judgment, but it being understood and agreed that our total expense and liability during the year, for such advertising, shall not exceed a total sum of [on] equivalent to two and a half cents per set, for every set of "Kleets" purchased from us by you during said year. * * *

Contract of June 8, 1914.

* * * * * * * * * *

Whereas, the said contract likewise covered improvements, modifications, and alterations to said Kleet, and William H. Woerheide has notified the Kleet Company that such an improvement on the Kant-Leak Kleet has been developed and a United States patent on said improvement has been allowed, application for same having been filed on June 13, 1913, and serial number of same being 773,491 and has placed the same at the disposal of the Kleet Company, in order that the Kleet Company in turn may grant the Barber Company its rights in same, as required by the said agreement of March 15, 1910, and the amending addendum to same of February 25, 1911; and

Whereas, the Barber Company and the Kleet Company desire that the said contract of March 15, 1910, as modified by the Kleet Company's addendum agreement with the Barber Company of February 25, 1911, shall be further modified:

Now, therefore, in consideration of the sum of one dollar ($1.00) duly paid by each of the parties hereto unto the other, receipt of which is hereby acknowledged, and other good and valuable considerations hereby acknowledged received, It is mutually agreed as follows, to wit:

It is agreed that the Kleet Company hereby grants to the Barber Company,

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tation and to the purchase of the cleats—to the creation of a demand for them and the supply of that demand exclusively through the appellee. What obligations in these directions were placed by the original contract upon appellee? The contract of 1910 provided that the appellee agreed to purchase the cleats "in such quantities as may be necessary to fill its orders for the same"; to "feature and offer to the trade their high-grade roofings, packed with 'Kant-Leak Kleets,' but reserve the right to pack and sell said goods with or without the cleats, or otherwise as the party of the second part [appellee] may desire"; and "in connection with its current advertising of roofing material to include favorable references to said cleat and to advocate its use and sale in such periodicals as it may deem advisable; but as this advertising is without expense to the parties of the first part the extent of it is left to the sound judgment of the party of the second part." In the same clause it defined "high-grade roofings" as being its "standard

its successors and assigns, in addition to the rights which it already has in the Huttig Kant-Leak Kleet, the exclusive right and license to use, employ and sell the improved and modified kleet as covered by the above-mentioned application filed June 13, 1913, or as covered by the patent granted or to be granted thereupon, * * * to the full end of the term for which such patents are or may be at any time granted.

The original Kant-Leak Kleet covered by the agreement of March 15, 1910, is hereinafter referred to as the Kant-Leak Kleet, while the improved and modified Kant-Leak Kleet referred to herein as covered by application filed June 13, 1913, is hereinafter referred to as Kontinuous Kant-Leak Kleet. * * *

The Barber Company agrees to accept delivery of and purchase not less than one hundred fifty thousand (150,000) sets of kleets to be delivered at the rate of twenty-five thousand (25,000) sets per month, during the balance of the calendar year 1914, and to pay twenty cents (20¢) per set for Kant-Leak Kleets so delivered, and seventeen cents (17¢) per set for Kontinuous Kant-Leak Kleets so delivered; delivery to be made at the Barber Company's plants at Maurer, New Jersey, and Madison, Illinois, as ordered by the Barber Company.

Beginning with and including the calendar year 1915 it is agreed that the kleets, delivered as hereinbefore stated, shall be purchased by the Barber Company at the following prices: * * *

It is further agreed that the Barber Company will feature and offer the Kontinuous Kant-Leak Kleets to the trade in connection with at least one of their brands of prepared roofing to the end of this agreement; provided, however, that this shall not be construed to apply to their Genasco or other high grade roofing, in connection with which the original agreement and addendum of February 25, 1911, already provides, on the conditions therein specified, for the use of Kant-Leak Kleets.

It is agreed that the Barber Company shall have the right to sell both the Kant-Leak Kleets and the Kontinuous Kant-Leak Kleets purchased hereunder from the Kleet Company separately without roofing to any other persons or corporations.

This agreement is made in duplicate and shall form an addendum to and modification of and become a part of said agreement of March 15th, 1910, * * * which agreement was afterwards assigned to the Kleet Company and modified by an addendum entered into between the Kleet Company and the Barber Company, dated February 25, 1911. * * *

It is understood and agreed that all of the provisions of said agreement of March 15, 1910, as modified by said addendum of February 25, 1911, shall not only apply to the Kant-Leak Kleet but shall likewise apply to the Kontinuous Kant-Leak Kleet and the patent granted or to be granted under said application of June 13, 1913, except as herein modified. * * *

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Genasco roofings," or goods of the same quality packed in private brands, and continued:

"It being the intent of this clause that in return for the exclusive sales rights, etc. acquired by the party of the second part, they will advertise and advocate the sale of their high-grade roofing packed with 'Kant-Leak Kleets,' as long as there is a substantial demand therefor."

Summarizing—as to exploitation, it agreed to "feature" and offer to the trade the cleats with a certain brand of high-grade roofing, to include favorable references to the cleat in its current advertising of roofing material, and to advocate its use and sale in such periodicals as it may deem advisable. This advertising and advocacy of the cleats to be to the extent deemed advisable by appellee, and to continue so long as there was a substantial demand for the cleats. The net result of this obligation is that appellee is to exploit the cleat in the various ways generally set forth, but the time for, instruments, and extent of this exploitation are not defined within any ascertainable limits. The appellee could do little or much in presenting the cleats to the trade, and yet be within the contract.

As to purchase of the cleats, it agreed to purchase in such quantities as might be necessary to fill its orders therefor, but expressly reserved "the right to pack and sell said goods with or without cleats or otherwise," as it "may desire." Appellee was not obligated to buy a single set of cleats unless it might desire to do so. The entire value to appellants of a contract of sale was the creation and satisfaction of a demand for the cleat. Those were the only subjects concerning which the appellee even pretended to bind itself, and in those regards it did not define its obligations. Nor can it be said that, although the four corners of the contract do not give this definition, they do point to where it can be found in extraneous facts, as where a contract is made to supply the needs of an established business. Here there was no established business in the legal sense in which that term is used in such connection. It is true that appellee had an established business in prepared roofing, and as a part thereof furnished roofing fasteners, but it did not agree unconditionally to substitute cleats as the fastener to be sent with all or any definite ascertainable portion of its roofing. On the contrary, it agreed to undertake to create a demand for this cleat, then practically a novelty. It did not bind itself to meet even the demand it might arouse. Nor can it be said that it assumed a business risk through an attempt to introduce a novelty, because it entirely controlled the manner and extent of that attempt.

The outcome of repeatedly expressed dissatisfaction by appellants with the small purchases by appellee was the addendum agreement of February 25, 1911. This agreement made several changes in the existing arrangement. Up to that time the appellee had offered its Genasco roofing with cleats at a higher price than with old style fastenings. To lessen this barrier to the sale of cleats, appellants agreed to reduce the price of cleats to appellee 2½ cents per set, and appellee agreed to lower its roofing price to the trade 5 cents per square, and to maintain the price at not to exceed 5 cents above that of the same grade of roofing offered with old style fastenings.

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The uncontrolled option to pack the cleat with its Genasco roofing was replaced by a provision that the cleats should be packed with all high-grade roofing, except in those instances where the customer might demand the old style. The parties also agreed to co-operate in an advertising campaign during the year of 1911 through literature, samples, and demonstrating boards featuring the cleats. This advertising matter was to be prepared and furnished by appellee to its customers gratis. The cost thereof was to be equally divided; the extent thereof to be determined by the appellee, with a maximum expenditure fixed for appellants. The net results of this addendum agreement upon the contract of 1910 were, so far as appellee's obligations, as follows: It regulated the relative selling prices of high-grade roofing with cleats and with old-style fastenings; it replaced appellee's uncontrolled option to pack in one high-grade roofing (Genasco) by a requirement to use cleats in all its high-grade roofing, except where customer objected; and it provided for an advertising campaign during that current year. The first two requirements were fixed, definite, and beyond control of appellee; the last was controlled entirely by appellee.

For about eight months the parties proceeded under this arrangement, but not without friction. Appellants were still deeply disappointed at the amount of cleats ordered, and complained at length. Appellee suggested a lower price of cleats in return for its further reducing its price of roofing packed with cleats to that of roofing packed with nails and cement. Appellants contend they never agreed to this change. However that may be, the appellee made the reduction in roofing price and insisted on paying appellants for cleats upon the basis suggested. As to whether this deduction in cleat price was proper became a matter of difference between the parties. The sum thus involved reached, in 1914, the amount of over $13,000. Appellants were getting into financial straits. Woerheide had in the meanwhile invented a modification of the Kant-Leak Kleet, known as the "Kontinuous Kant-Leak Kleet," or "Klincher-Kleet." Under these circumstances the parties undertook to arrange for the past and future. This took form in a loan by appellee to appellants, a release by appellants of all claim on account of the above reduction of cleat price, and a contract, dated June 8, 1914, adding to and modifying the earlier amended agreement. While these three matters were disposed of at or about the same time, they were not so related that the other two entered into or formed any part of the contract then made. This last contract imposed upon appellee obligations as follows: To accept delivery of and purchase, during the remainder of the year 1914, 150,000 sets of cleats, to be furnished at rate of 25,000 sets per month, paying 20 cents per set for Kant-Leak and 17 cents per set for Kontinuous Kleets, delivered at Maurer, N. J., or Madison, Ill., as ordered by appellee, and to feature and offer Kontinuous Kleets with a brand of popular grade roofing until end of the agreement. By the concluding clause of this agreement "all of the provisions" of the prior amended agreement "shall likewise apply to the Kontinuous Kant-

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Leak Kleet, * * * except as herein modified." Under this broad provision it is thought would be included the obligation to include favorable references to the Kontinuous Kleet in appellee's current advertising of roofing material, and to advocate its use and sale in such periodicals as it may deem advisable, the extent of such advertising and advocacy to be left to the sound judgment of appellee.

Treating the three agreements as one final agreement, a summary of the obligations of appellee thereunder is as follows: To feature and offer to the trade the two cleats (Kant-Leak with all of its high-grade roofing, and Kontinuous with a popular grade roofing) during the life of the patents; to include favorable references to both cleats in its current advertising of roofing material, and to advocate their use and sale in such periodicals as might seem advisable to appellee, such advertising and advocacy to continue during a substantial demand for the cleats, to the extent determined by the sound judgment of appellee; to pack Kant-Leak Kleets with all high-grade roofing, except where the customers might demand old-style fastenings; to maintain price of high-grade roofing so packed to within 5 cents per square of price with old-style fastenings; to purchase 150,000 sets (kind not specified) in last half of 1914 at monthly rate of 25,000 sets, delivered at Maurer, N. J., or Madison, Ill. (as ordered by appellee), at 20 cents per set for Kant-Leak Kleets and 17 cents for Kontinuous Kleets. Of these obligations, which are so uncertain or indefinite that they cannot be determined and enforced? The requirements to feature and offer the cleats to the trade are definite as to duration but uncontrolled as to manner or extent. The requirement to advertise and advocate their use is left undefined as to extent. The requirement to pack Kant Leak Kleets with all high-grade roofing except where customer demands old-style is definite in the sense that it is an application to an established business (sale of high-grade roofing with fastenings), the limits of which can be ascertained. The requirement as to maintenance of high-grade roofing price is definite. The requirement as to purchase of 150,000 sets in 1914 may have been indefinite in its terms, but it was performed in all substantial respects before any attempted rescission, and therefore must be regarded as definite. There is no requirement that appellee purchase any Kontinuous Kleets after 1914.

The contract was for the life of the patents, which would have continued, after the attack upon the contract, for about 11 years on the Kant-Leak Kleet and about 17 on the Kontinuous Kleet. It cannot be said that any of the above obligations are subordinate in importance. Each has a direct bearing upon the volume of the purchase and sale of cleats, which was the one main object of the contract. Each was a material element of the consideration for which appellants assumed the obligations upon their part. They have not been fully or substantially performed, and some of them are incapable of full performance short of the life of the contract. Several of them are not capable of measurement in case of breach, so that appellants could recoup therefor their damages. The contract therefore is void for uncertainty.

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[2, 3] Appellee contends that the purchase of 150,000 sets during 1914 under the contract is such performance as to save the contract from rescission, while appellants deny that such purchase was in accordance with the contract requirements. Both positions are untenable. The basis of appellants' claim is that during the month of July, 20,500 instead of 25,000 sets were ordered; that appellee, during the fall of 1914, failed to feature and advertise the cleats promptly; and that the orders came near the end of the month when it was very difficult to fill them. It is true that only 20,500 sets were purchased in July, and that the contract required 25,000 sets, but 30,000 sets were ordered for August, and 25,000 or more every succeeding month, making a total of more than 150,000 sets. This was such an inconsequential breach as not to affect appellee's claim that, as to the number and monthly ratio, the performance was substantially in accord with the contract. As to the featuring and advertising, the contract requirement is so indefinite that almost any effort in good faith on appellee's part would meet its demand, and there is no suggestion therein as to when this should be begun or done. It may also be said that appellee does not seem to have been remiss in that regard when the war and business conditions are considered. As to the orders for cleats being given at or near the month end, there is no limit of this sort in the contract. On the contrary, it requires appellants to keep on hand at all times enough cleats to meet appellee's needs. Although appellee's performance of this part of the contract must be regarded as substantially complete, yet complete performance of only one of its five or six important executory contract obligations cannot prevent the avoidance of the contract, if others equally important remain executory and are legally uncertain. Santaella v. Lange, 155 Fed. 719, 84 C. C. A. 145; Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co., 114 Fed. 77, 52 C. C. A. 25, 57 L. R. A. 696; Oakland Motor Co. v. Indiana Automobile Co., 201 Fed. 499, 121 C. C. A. 319; Velie v. Kopmeier, 194 Fed. 324, 114 C. C. A. 284; Hudson v. Browning, 264 Mo. 58, 174 S. W. 393; Higbie v. Rust, 211 Ill. 333, 71 N. E. 1010, 103 Am. St. Rep. 204; Killebrew v. Murray, 151 Ky. 345, 151 S. W. 662; Hopkins v. Iron Co., 137 Wis. 583, 119 N. W. 301. That every part of the consideration be definite or every part be indefinite is not the gauge of the validity of a contract. However, the law requires that the important, essential elements in the consideration be ascertainable with reasonable certainty. This is true because the law will not hold a party bound to a contract against his will, when the substance of what he is to get in return is executory, and is so shadowy in its outline that the other party can refuse to perform with impunity, since either the contract does not compel it, or no court can say what damage it has caused if it fail to act.

[4] Appellants, as a portion of their relief, ask an accounting. The facts reveal no basis for such. The evidence convinces that there has been substantial performance of the contract by both parties up to the date of attempted avoidance. The entire trouble is found in the contract itself. It was not at its making strong enough to hold, and it had not, through performance, become so up to the time appellants saw fit to withdraw therefrom.

The judgment should be reversed, with instructions to enter a decree declaring the contracts void, and the appellee without further right to use or sell cleats manufactured under the above patents, except such as it may have on hand at the date of said decree, and perpetually enjoining appellee from further institution or prosecution of suits or actions relating to said letters patent for the purpose of having any devices adjudged infringements thereof.

MUNGER, District Judge (dissenting). In my view of this case, the agreement of the Barber Company to purchase the cleats in sufficient quantities to fill its orders therefor, to offer and sell the Genasco and private brands of roofings supplied exclusively with the cleats, except where the customers demanded the old-style fastenings, and to purchase, and accept delivery of 150,000 sets of cleats in 1914 at a fixed price, were definite and enforceable obligations on its part, so that there was no entire lack of mutuality of obligations. I think the case is governed by the decision of this court in Conley Camera Co. v. Multiscope & Film Co., 216 Fed. 892, 133 C. C. A. 96. It was not necessary that each covenant of one party to the contract had a corresponding covenant of the other party apportioned to that covenant, as one item of consideration was sufficient to support all the promises of appellant. Mississippi River Logging Co. v. Robson, 69 Fed. 773, 16 C. C. A. 400; Staples v. O'Neal, 64 Minn. 27, 65 N. W. 1083; In re Desnoyers Shoe Co. (D. C.) 110 Fed. 533; Sax v. Detroit, G, H. & M. Ry. Co., 125 Mich. 252, 84 N. W. 314, 84 Am. St. Rep. 572; Smith v. St. Paul & D. R. Co., 60 Minn. 330, 62 N. W. 392; Miller v. Board of Com'rs, 17 Colo. App. 120, 67 Pac. 347; Elliott on Contracts, § 231.

SWEPSTON v. UNITED STATES (two cases).

(Circuit Court of Appeals, Sixth Circuit. May 7, 1918.)

Nos. 3033, 3034.

1. CONTEMPT ⟸72—PLACE OF IMPRISONMENT—FEDERAL PRISONERS.
Under Rev. St. Ohio, § 7381, enacted pursuant to recommendation of Congress, making it the duty of sheriffs to receive and keep prisoners of the United States until released by due process of law, a federal court may lawfully sentence one convicted of contempt to imprisonment in a county jail in Ohio.

2. COURTS ⟸405(10)—CONTEMPT—ORDER IMPOSING PUNISHMENT—REVIEW.
Final orders imposing punishment for contempt are criminal in their nature, and reviewable by federal Circuit Courts of Appeals on writs of error, upon which matters of law only can be considered.

3. CONTEMPT ⟸63(4)—ORDER IMPOSING PUNISHMENT—CONSTRUCTION.
An order sentencing a sheriff to jail for contempt for assisting in the escape of a prisoner committed to his custody necessarily involves a finding that the acts charged were intentional.

4. CONTEMPT ⟸58(4)—DEFENSES—ANSWER UNDER OATH.
A disavowal on oath by a person charged with contempt of any intention to commit a contempt is not a complete defense in a federal court, but the whole matter is for determination by the court.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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5. CONTEMPT ⇐66(7)—PROCEEDING FOR PUNISHMENT—RECEPTION OF EVIDENCE.
In a proceeding for contempt tried by the court, the admission of evidence in itself immaterial or irrelevant is not prejudicial error.

6. CONTEMPT ⇐54(4)—PROCEEDINGS FOR PUNISHMENT—SUFFICIENCY OF CHARGE.
Under a charge of contempt, in that respondents did conspire with and permit and assist a prisoner committed to their custody to escape, respondents may be found guilty of permitting and assisting in the escape, although the charge of conspiracy is not proved.

In Error to the District Court of the United States for the Eastern Division of the Southern District of Ohio; John E. Sater, Judge.

Separate proceedings for contempt by the United States against Alonzo Swepston and against Donald Swepston. From orders finding respondents guilty, and imposing punishment, defendants bring error. Affirmed.

Pugh & Pugh, of Columbus, Ohio, G. S. Claypool and John P. Phillips, both of Chillicothe, Ohio, and James I. Boulger, of Columbus, Ohio, for plaintiffs in error.

Stuart R. Bolin, U. S. Atty., of Columbus, Ohio.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. These are contempt cases, and it is sought to have the final order made in each of them reviewed. Charles L. Dye was indicted in the court below for violation of section 16, Act Cong. Feb. 8, 1875 (18 Stat. pt. 3, p. 310 [Comp. St. 1916, § 5966]), and on arraignment the accused entered a plea of guilty. He was sentenced to pay a fine of $2,500 and to be confined in the county jail of Ross county, Ohio, for a period of six months. An order of commitment was entered, June 29, 1916, commanding the marshal to deliver Dye at the jail, and on the same day the order was carried into execution. Alonzo Swepston, as the sheriff of Ross county and custodian of the county jail and the prisoners there committed, received Dye as a prisoner, and of course subject to the terms of the order of commitment. Donald Swepston was at the time a deputy sheriff of Ross county and the keeper of the county jail.

Subsequently, on September 14 and 28, 1916, the United States attorney for the Southern district of Ohio filed two verified petitions, one charging Alonzo Swepston, as sheriff, and the other Donald Swepston, as deputy sheriff, with disobedience of the court's order of commitment of Dye, and with violation of their official duties, the one as custodian, and the other as keeper, of the county jail, and particularly of the prisoner, in that each respondent "did conspire" with Dye, "and permit and connive at and assist" him "to escape from said jail, * * * and * * * to be at large and beyond the confines of said county jail," for a substantial part of the time between the date of commitment and the 7th of September, praying in each petition the allowance of an order directing that respondent be arrested and required to answer for contempt of court, because of his violation of the

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order of commitment. At the times the petitions were presented motions were filed for rules against the sheriff and deputy sheriff to show cause why each should not be attached for contempt of the court, and for violation of the order of commitment under which Dye was placed in the custody of respondents to serve such sentence of six months in the Ross county jail. Each motion was supported by affidavit stating that Dye had not been confined in the jail, but had been "at large upon the streets and in saloons and business houses of * * * Chillicothe and * * * Columbus, and in other villages and cities in said district, and upon the highways in Ross and Franklin counties, * * * driving about * * * in an automobile with friends and companions. * * *"

The sheriff and deputy sheriff each answered, with the usual verification, denying the charges set out in the petition against him, the sheriff alleging in his answer that the deputy marshal, who brought the prisoner to the jail and delivered the mittimus, stated that he, the deputy, had orders to ask the sheriff to give the prisoner all the liberty and good treatment he could, that the prisoner was being punished wrongfully and would soon be pardoned, and the sheriff further alleging that it was the custom to make trusties of prisoners serving simply jail sentences and to put them at work about the jail and the jail yard; and it is alleged in both answers that Dye was made a trusty and as such given the privileges mentioned, the deputy, however, alleging that as such trusty the prisoner was "permitted to go outside of the jail and yard several times." It is also alleged in each answer that the respondent did not intend to disobey any order of the court, and "did not intend to commit any contempt against the said court or its process."

The court fixed the time and place of trial; the issues made in both proceedings as stated and the evidence adduced thereunder were presented to and heard by the court and in effect were treated as arising in a single cause. Quite a number of witnesses testified in open court in behalf of the respective parties, both respondents also testifying and presenting affidavits. The court delivered an extended opinion, finding that the charge of conspiracy was not sustained, but that both respondents were guilty of "permitting and assisting Dye to escape." Alonzo Swepston was sentenced to the county jail of Delaware county, Ohio, for a period of 40 days and to pay the costs; and Donald Swepston was sentenced to pay a fine of $60 and costs, and to be committed until payment was made; execution of each judgment and sentence was stayed, upon the giving of a prescribed bond, in order to admit of proceedings in error.

[1] It will be observed that the procedure adopted was in accordance with the usual course of contempt proceedings. The order committing the prisoner to the Ross county jail was lawfully made, and was effective to charge respondents with the duty to receive and safely keep the prisoner pursuant to the commitment. Congress at its first session, September 23, 1789 (1 Stat. 96), adopted a resolution recommending—

"to the Legislatures of the several states to pass laws, making it expressly the duty of the keepers of their gaols, to receive and safe keep therein all prisoners

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committed under the authority of the United States, until they shall be discharged by due course of the laws thereof, under the like penalties as in the case of prisoners committed under the authority of such states respectively," etc.

Although provision was otherwise made later for cases where states, having once complied with this recommendation, subsequently withdrew their action (1 Stat. 225; 3 Stat. 646; R. S. §§ 5537, 5538 [Comp. St. 1916, §§ 10521, 10522]), yet we fail to find any repeal of the original resolution of September 23, 1789. Ohio enacted a statute many years ago, and still maintains one, requiring each sheriff to "receive prisoners charged with or convicted of crime committed to his custody by the authority of the United States, and keep them until discharged by due course of law." 1 O. G. C. § 3179. See, also, 2 Smith & Benedict's Ohio Rev. Stat. § 7381; 57 O. L. 108, making similar provision, and repealing an earlier act to the same effect of December 20, 1806 (8 O. L. 496, 497).

[2] The power to punish for contempt is inherent in all courts; final orders made and imposing punishment in contempt proceedings are criminal in their nature, and are subject to review in the federal Circuit Courts of Appeals on writs of error. Bessette v. W. B. Conkey Co., 194 U. S. 324, 326, 336, 24 Sup. Ct. 665, 48 L. Ed. 997; Brown v. Detroit Trust Co., 193 Fed. 622, 623, 113 C. C. A. 490, and citations (C. C. A. 6). Counsel for respondents rightly concede applicability of the rule that on writs of error, as here, only matters of law can be considered (Bessette v. W. B. Conkey Co., supra, 194 U. S. at page 338, 24 Sup. Ct. 665, 48 L. Ed. 997; In re Grove, 180 Fed. 62, 64, 103 C. C. A. 416 [C. C. A. 3]; Oates v. United States, 233 Fed. 201, 206, 147 C. C. A. 207 [C. C. A. 4]; Sona v. Aluminum Castings Co., 214 Fed. 936, 942, 131 C. C. A. 232 [C. C. A. 6]; In re Independent Pub. Co., 240 Fed. 849, 862, 153 C. C. A. 535, L. R. A. 1917E, 703, Ann. Cas. 1917C, 1084 [C. C. A. 9]); yet they seek to avoid the effect of this rule by insisting that, when the entire record is considered, it will be found that the evidence is more consistent with innocence than with guilt and that the judgments should be reversed for that reason (Harrison v. United States, 200 Fed. 662, 664, 119 C. C. A. 78 [C. C. A. 6]; Union Pacific Coal Co. v. United States, 173 Fed. 737, 740, 97 C. C. A. 578 [C. C. A. 8]). We cannot accept this view; the evidence clearly tends to sustain the opposite view; the decision of the trial court upon the facts must therefore be accepted as conclusive. Sona v. Aluminum Castings Co., supra, 214 Fed. at page 492, 131 C. C. A. 232; Oates v. United States, supra, 233 Fed. at page 206, 147 C. C. A. 207.

[3] Nor are we impressed with the objection that the proofs fail to show intent on the part of the contemnors. They were chargeable with knowledge of their legal duties respecting the terms and effect of the order of commitment, and the law imputes an intent to accomplish the natural result of one's own act. Contemnors could not in the nature of things assist the prisoner to escape, except through purposeful disrespect for both the dignity of the court and its order. As Mr. Justice Holmes said, in Ellis v. United States, 206 U. S. 246, 27 Sup. Ct. 600, 51 L. Ed. 1047, 11 Ann. Cas. 589, when speaking of the de-

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fendant's act in permitting his associate in business to employ men for nine hours in violation of the Hours of Service Act (206 U. S. 257, 27 Sup. Ct. 602 [51 L. Ed. 1047, 11 Ann. Cas. 589]):

"If a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law under those circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent."

[4] It is insisted that respondents' disavowals upon oath of any intention to commit a contempt were a conclusive defense. The effect of this is to say that a contemnor, instead of the court, may control the issue, if the contemnor be willing to assume the risk of a charge of perjury later. United States v. Shipp, 203 U. S. 563, 575, 27 Sup. Ct. 165, 51 L. Ed. 319, 8 Ann. Cas. 265. Disavowals, it is true, are always material facts, especially as respects questions of punishment; and it is also true that the common-law rule in certain classes of contempt cases permitted the accused to purge himself through answer under oath; but the common-law rule of purgation does not prevail in the federal courts; indeed the settled rule now is that disavowal by sworn answer or otherwise is not conclusive, and that the whole matter is for the court upon the evidence. Globe Newspaper Co. v. Commonwealth, 188 Mass. 449, 453, 74 N. E. 682, 3 Ann. Cas. 761; United States v. Shipp (second hearing), 214 U. S. 386, 405, 29 Sup. Ct. 637, 53 L. Ed. 1041; Oates v. United States, supra, 233 Fed. at page 207, 147 C. C. A. 207; Kirk v. United States, 192 Fed. 273, 279, 112 C. C. A. 531 (C. C. A. 9); United States v. Huff (D. C.) 206 Fed. 700, 703; United States v. Carroll (D. C.) 147 Fed. 947, 951; United States v. Sweeney (C. C.) 95 Fed. 434, 437.

[5] The assignment as to claimed inadmissible testimony must be overruled. Remembering that the proceedings were conducted before the court alone, it was but natural that counsel should be indulged in some latitude in developing facts and circumstances tending to show times and places of the prisoner's absence from the jail. The evident purpose to minimize—indeed in some respects to conceal—such absences made this course necessary; in the end, however, the material facts were obtained; and while some matters heard were apparently irrelevant, and in some instances explained through hearsay, yet in each instance they seem to have led up to ultimate facts that were both pertinent and material. It is not perceived why this course was prejudicial to respondents. It is to be presumed that the court at last considered only the facts and circumstances that were in reality admissible and also calculated to support the judgments claimed; and this was in accord with settled rules of practice in cases tried without a jury. Oates v. United States, supra, 233 Fed. at page 205, 147 C. C. A. 207, and citations.

[6] Since the causes were submitted here upon oral argument, counsel for respondents have by additional brief claimed that the charge upon which they went to trial was that the respondents conspired with Dye to escape from the jail. It is admitted that the charge involved other matters, but the insistence is that the conspiracy was the gist of the charge. True, the conspiracy alleged was not proved; though,

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as already stated, Judge Sater found both respondents guilty of "permitting and assisting Dye to escape." This finding was clearly permissible, regardless of the charge of conspiracy; the fact of permitting and assisting might well have existed, and under the evidence apparently did exist, apart from the alleged conspiracy. Further, the proceedings were not by indictment; they were by petitions to attach for alleged contempt of the process and authority of the court. Respondents themselves regarded the petitions as charging them with assisting to escape, independently of the charge of conspiracy and connivance, since each in his answer specifically denied "that he assisted said Charles L. Dye to escape from said jail."

It is not claimed that the proceedings for contempt were inconsistent, nor were they, with the fact that the acts of respondents were also punishable under either the federal or the state statute defining the duties of jailers in respect of federal prisoners. R. S. § 5409 [Comp. St. 1916, § 10308]; 3 O. G. C. § 12832. However, it is claimed that, if respondents were punishable under those statutes for "permitting and assisting" the prisoner to escape, they were each entitled to a trial by jury in the contempt proceedings. Reliance in this behalf is placed on Act Oct. 15, 1914 (38 Stat. pt. 1, pp. 730, 738, §§ 21 and 22, Comp. St. 1916, §§ 1245a, 1245b), known as the Clayton Act. It is enough to say of this (1) that no demand for a jury was made, and (2) that section 24 of the act expressly excepts from its operation proceedings of the kind here involved. Section 24 provides:

"That nothing herein contained shall be construed to relate to contempts committed * * * in disobedience of any lawful * * * order * * * entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and other cases of contempt not specifically embraced within section 21 of this act, may be punished in conformity to the usages at law and in equity now prevailing." Comp. St. 1916, § 1245d.

The complete answer, then, to the latter contention, is the fact that the order which the contemnors are found to have violated was entered in the case of United States v. Dye.

The judgment in each cause will be affirmed. However, it has come to our attention that Donald Swepston, the plaintiff in error in No. 3034, has been wounded while in the service of the United States in the American Expeditionary Force in France, and that the District Judge has recommended that a pardon be granted to him covering his offense here involved, in which recommendation the District Attorney has joined. Accordingly, our mandate in No. 3034 will await the disposition of this application for pardon, and will be withheld until further order.

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UNITED STATES v. OREGON-WASHINGTON R. & NAV. CO.

(Circuit Court of Appeals, Second Circuit. April 24, 1918.)

No. 229.

1. INTERNAL REVENUE ⟸9—CORPORATION—EXCISE TAX—NATURE OF ACT.
Corporation Excise Tax Act Aug. 5, 1909, § 38, must be construed as imposing an excise tax upon the right to do business in corporate form; so, if persons choose the corporate form for business, the corporate income may be estimated upon the assumption that the form is to be regarded as the reality.

2. INTERNAL REVENUE ⟸9—CORPORATION EXCISE TAX—"INCOME."
Under Corporation Excise Tax Act Aug. 5, 1909, § 38, the term "income" must be accepted as those more or less periodic earnings, as distinguished from permanent sources of wealth; hence, where the sole stockholder of a corporation which furnished the capital released a debt in favor of the corporation, such sum should be treated as capital rather than income, though such a release cannot be treated as a mere matter of bookkeeping, but as adding to the corporate assets.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Income.]

3. PLEADING ⟸339—DEMURRER—WITHDRAWAL.
Whether the trial court will allow a demurrant to withdraw his demurrer is a matter of discretion, and whenever a demurrer is interposed the demurrant takes that risk.

4. PLEADING ⟸339—DEMURRER—WITHDRAWAL—ABUSE OF DISCRETION.
The trial court's refusal to allow plaintiff, which had demurred to the answer, to withdraw the demurrer on it being overruled, cannot be treated as an abuse of discretion, where no request to withdraw was made.

Ward, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Southern District of New York.

Action by the United States against the Oregon-Washington Railroad & Navigation Company. There was a judgment overruling a demurrer to the answer, and dismissing the complaint, and the United States brings error. Affirmed.

Writ of error to a judgment overruling a demurrer to the answer, without leave to plead over, and dismissing the complaint. The complaint was for an excise tax against the defendant under section 38 of the Act of August 5, 1909 (36 Stat. 112, c. 6). The complaint alleged that on January 10, 1913, the defendant filed its report showing an income of $2,282,192.33, which was incorrect; the true income being $8,472,861.92. The relief demanded was for 1 per cent. upon the difference, $6,190,769.57, amounting to $61,907.70.

The answer omitting denials, showed in substance as follows: That the defendant was organized in November, 1910, all its stock being held by the Oregon Short Line Railroad, itself a part of the Union Pacific Railroad system and controlled by that company. The Union Pacific Railroad caused certain properties to be conveyed to the defendant by certain subsidiary corporations, which paid for them by a draft in favor of the sellers, drawn by the defendant and accepted by the Short Line. This draft the Short Line paid, and received back its proceeds from the selling corporations as dividends upon their stock, substantially all of which the Short Line held. The amount of these dividends was somewhat larger than the value of the property conveyed as it stood on the books of the selling corporations or as the value

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of their stock stood on the books of the Short Line. The amount of this difference was the sum here in question, $6,190,769.57, which therefore showed as a profit on the books of the Short Line.

The payment of the consideration by this acceptance the Short Line charged against the defendant, partly as payment for the stock of the defendant and partly as money lent it; the total sum paid by the Short Line being $50,000,000 for the stock and $50,450,000 as money lent. Early in 1911 the defendant delivered $40,000,000 of bonds to the Short Line, for which it received a credit of $36,000,000 leaving it indebted to the Short Line for money lent in the sum of about $14,450,000. To prevent an apparent profit to the Short Line from the transaction, it wished to reduce this indebtedness by the amount of that profit, and on June 30, 1911, released its debt against the defendant to the amount of $6,190,769.57. This release the plaintiff seeks to treat as a part of the defendant's income.

Francis G. Caffey, U. S. Atty., of New York City (Ben A. Matthews, Asst. U. S. Atty., of New York City, of counsel), for the United States.

Henry W. Clark, of New York City, for defendant in error.

Before WARD and ROGERS, Circuit Judges, and LEARNED HAND, District Judge.

LEARNED HAND, District Judge (after stating the facts as above). [1, 2] The act in question has been authoritatively held to be an excise upon the right to do business in corporate form, Anderson v. Forty-Two Broadway Co., 239 U. S. 69, 36 Sup. Ct. 17, 60 L. Ed. 152; Stratton's Independence v. Howbert, 231 U. S. 399, 34 Sup. Ct. 136, 58 L. Ed. 285. As such the income is the measure of the tax upon the right, and not the property upon which the tax is assessed. If persons choose the corporate form for business, we think that the corporate income may be estimated upon the assumption that the form is to be regarded as the reality. Indeed, this is nearly a corollary from the premise that the tax is upon the right to do business in that form. We are not, therefore, disposed to say that a sole stockholder's release of a debt against the corporation is mere matter of bookkeeping. As the stockholder views it, that is no doubt the case, at least while the corporation stays solvent; indeed, it is no more than if a mortgage were changed into a debt. Viewed from the corporation's side, we cannot, however, agree that the increased value of the stockholder's shares is to be deemed a charge upon the corporation equivalent to the canceled debt. His right as stockholder is, it is true, a chose in action; but it is, of course, not to be taken as a claim upon the corporation when its net assets are in question, else it could never get any increase of assets, for shares are always proportionally increased in value as the assets increase. At least when we have, as here, a question turning upon the right to use the corporate form, we must treat the release as involving an actual addition to the corporate assets.

However, the tax, though it includes income "from all sources," nevertheless includes "income" only, and the meaning of that word is not to be found in its bare etymological derivation. Its meaning is rather to be gathered from the implicit assumptions of its use in common speech. The implied distinction, it seems to us, is between permanent scources of wealth and more or less periodic earnings. Of course, the term is not limited to earnings from economic capital; i. e., wealth

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industrially employed in permanent form. It includes the earnings from a calling, as well as interest, royalties, or dividends, though in the case of corporations this may be of slight importance. Yet the word unquestionably imports, at least so it seems to us, the current distinction between what is commonly treated as the increase or increment from the exercise of some economically productive power of one sort or another, and the power itself, and it should not include such wealth as is honestly appropriated to what would customarily be regarded as the capital of the corporation taxed.

Now, it seems to us hardly arguable that the cancellation of the debt in question was not in the category of capital. The corporation had just commenced its business; the cancellation of the debt was a means of contribution to its capital account, quite as though the money had been contributed by the stockholder only to enhance the value of his stock. The financial relief, so given, will, it is true, be eventually reflected in the income, since the defendant will no longer be entitled under the act to deduct the interest on the debt; but that only brings out more clearly its character as capital contribution. We regard the difference as precisely equivalent to the difference between the cancellation of a portion of the mortgage bonds and a cancellation of an equal proportion of their coupons. Common usage would, if we are right, unfailingly allocate the first as an increase in capital assets and the second as an increase in income. That, as we view it, is the proper test of the act.

Nor does Stratton's Independence v. Howbert, supra, look to the contrary. The court divided in that case upon the propriety of regarding as income the whole of each yearly extraction of minerals from a deposit necessarily limited in amount; but the decision proceeded upon the assumption that the common understanding of the term "income" did not cut so fine, but lumped together the whole gross output. Our present decision depends altogether upon the correctness of our own interpretation of the same common usage, when applied to a case like this.

[3, 4] The District Court refused to allow the plaintiff to plead over, upon the ground that the matter rested in its discretion and that the plaintiff had not asked for any exercise of that in discretion, but based its claim upon an absolute right. We agree that the cases are very rare in which a party should not be allowed to withdraw a demurrer, which is all that would have been necessary here; for no further pleading was proper, unless the defendant demanded it. Still the matter does lie in discretion, and the demurrant always accepts the risk of being taken at his word. There are certainly no grounds shown in the record which would justify our saying that the refusal was an abuse of discretion, at least in the face of the statement in the opinion that no such appeal to it was made.

The judgment is affirmed, with costs.

WARD, Circuit Judge (dissenting). I quite agree with the majority of the court that the credit given by the Short Line upon the defendant's indebtedness to it was a gift, and not a mere bookkeeping entry.

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It was not a return of capital, and I think was clearly a part of the defendant's gross income derived from all sources during the year in question. The meaning of the word "income" does depend upon its context; but this gift did come in during the year, was a part of the year's net income defined by the act, and I find no difficulty in calling it income. The excise tax sued for is measured by the defendant's net income, ascertained by deducting from its gross income received from all sources certain specified items, which do not cover gifts. The Income Tax Laws of 1913, 1916, and 1917 expressly provide that only the income of gifts is to be taxed, from which it may be inferred, that but for this provision, the gifts themselves would have been taxed as income.

In re REICHERT TOWING LINE.

RICE v. BROOKLYN ASH REMOVAL CO.

(Circuit Court of Appeals, Second Circuit. April 24, 1918.)

Nos. 213, 214.

1. NEGLIGENCE ⟸121(5)—ACTIONS—BURDEN OF PROOF.
In tort cases, one relying on inevitable accident as a defense must either point out the precise cause, and show that he was in no way negligent, or must show all possible causes, and that he was not in default in connection with any one of them.

2. SHIPPING ⟸209(3)—LIMITATION OF LIABILITY—EVIDENCE.
In a proceeding by the owner of a tug, under Rev. St. §§ 4283–4285 (Comp. St. 1916, §§ 8021–8023), for limitation of liability for injuries to the tow, resulting when the tug's crank pin broke, evidence *held* insufficient to show that the breaking was the result of an inevitable accident, but to indicate that it resulted from the insufficient size of the shaft to stand the stress necessarily imposed on it.

3. SHIPPING ⟸79—LIABILITY.
The owner of a tug having vessels in tow is primarily liable for injuries thereto, while a second company, which, under a contract with another to tow the vessels, engaged the services of the tug, is secondarily liable.

4. SHIPPING ⟸205—LIMITATION OF LIABILITY.
A towing company, which engaged another to tow vessels that it was under contract to tow, cannot take advantage of Rev. St. §§ 4283–4285 (Comp. St. 1916, §§ 8021–8023), providing for limitation of owners, etc., because it was neither owner nor charterer pro hac vice.

5. SHIPPING ⟸208—LIMITATION OF LIABILITY.
Though an accident to a tow was the result of negligence, the owner of the tug is not, under Rev. St. §§ 4283–4285 (Comp. St. 1916, §§ 8021–8023), liable beyond the value of the tug, where it was without knowledge of the defect causing the accident.

6. SHIPPING ⟸209(3)—LIMITATION OF LIABILITY—BURDEN OF PROOF.
The owner of a vessel, seeking to limit its liability, under Rev. St. §§ 4283–4285 (Comp. St. 1916, §§ 8021–8023), has the burden of proving it was without knowledge or privity of the defect causing the accident.

7. SHIPPING ⟸209(3)—LIMITATION OF LIABILITY—EVIDENCE.
In a proceeding where the corporate owner of a tug, whose crank pin broke, allowing its tow to drift on the rocks, sought to limit its liability,

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under Rev. St. §§ 4283–4285 (Comp. St. 1916, §§ 8021–8023), to the value of the tug, evidence *held* insufficient to show that the officers of the corporate owner were not aware of the insufficiency of the crank pin.

Appeals from the District Court of the United States for the Eastern District of New York.

Libel and petition by the Reichert Towing Line, Incorporated, owner of the steam tug James Roy, for limitation of liability, to which the Home Insurance Company and others answered, filing claims, consolidated with a libel by Jacob Rice against the Brooklyn Ash Removal Company, which brought in the petitioner and the Moran Towing & Transportation Company. From a decree limiting liability, etc., Jacob Rice, libelant, appeals, as did the claimants in the limitation proceedings. Reversed and remanded, with directions.

Macklin, Brown & Purdy, of New York City (P. M. Brown, of New York City, of counsel), for appellants.

Alexander & Ash, of New York City (Peter Alexander, of New York City, of counsel), for appellee Brooklyn Ash Removal Co.

Foley & Martin, of New York City (William J. Martin and G. V. A. McCloskey, both of New York City, of counsel), for petitioner.

Park & Mattison, of New York City (Samuel Park and H. E. Mattison, both of New York City, of counsel), for appellee Moran Towing & Transportation Co.

Before WARD and ROGERS, Circuit Judges, and LEARNED HAND, District Judge.

WARD, Circuit Judge. This is a petition of the Reichert Towing Line, Incorporated, owner of the steam tug James Roy, for a limitation of liability under sections 4283–4285, U. S. Revised Statutes (Comp. St. 1916, §§ 8021–8023). January 5, 1915, the tug took in tow four scows loaded with dirt and ashes, in two tiers of two boats each, from Long Dock, Erie Basin, through Buttermilk Channel, East River, and Hell Gate, bound for Flushing creek. At about 10 a. m., in perfectly clear weather and light wind, when about 80 to 100 feet off Negro Point, the crank pin of the crank shaft broke, and the flood tide carried tug and tow on Scaly Rocks, causing the loss of the boats Mathilde R. and Bump, and damage to the boats H. B. Hornbeck and Frank C.

The petitioner ascribes the disaster to inevitable accident, while the answers of the insurers of the Mathilde R. and of the owners of the other three boats allege that the tug was unseaworthy and insufficient and deny that the petitioner was without privity or knowledge. Subsequently the owner of the Mathilde R. filed a libel against the Brooklyn Ash Removal Company, charterer of the boat, which brought in the petitioner, the Reichert Company and the Moran Towing & Transportation Company under the fifty-ninth rule, charging the Reichert Company with using an unseaworthy and insufficient tug and the Moran Company, which was under a contract for towage of all the Ash Removal Company's boats for a period of five years from January 3, 1914, and which employed the tug James Roy, with liability for the negligence of the owners of that boat, as its agents.

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The Moran Company answered the libel, alleging that the disaster was due to inevitable accident, viz. the breaking of the crank pin of the tug James Roy, and that if the accident were held not to be inevitable, then that the owners of the tug were solely responsible because of failure to supply a seaworthy and efficient tug. The petitioner surrendered the tug, which was sold, and the proceeds, deducting expenses, were paid into the registry of the court, in the sum of $320.20. Both causes were tried together.

[1-3] Liability turns upon the question whether the breaking of the crank pin was due to inevitable accident. The tug was built in 1869, rebuilt in 1901, and purchased by the petitioner in 1907. She had a single high pressure cylinder 20x20, and when built was allowed to carry 80 pounds of steam on the original boilers, which was afterwards increased to 124 pounds on the new boilers. At the time of the disaster she was carrying 115 pounds and running at half stroke, which diminished the pressure. The main shaft was 6 inches in diameter and the crank pin, made of hammered steel, was 4½ inches in diameter. It was put in to replace another steel crank pin of the same dimensions, which had broken in November, 1911. The break was near the after end of the pin; the metal showing no sign of flaw. The shoe of the rudder was bent to one side, and the tips, ⅞ inches thick, of two cast-iron adjoining blades of the propeller, were broken off.

There was testimony that, in view of the increase of steam pressure on the boilers from 80 to 124 pounds, the crank pin should have had a diameter of at least 6½ inches, and it was also shown that at the time the new crank pin was put in the prevailing practice was to supply tugs with a boiler pressure like that of the James Roy with crank pins not less than 6 inches in diameter. The strength of the pin increases in proportion to the cube of the diameter.

The District Judge found from the expert testimony that for the required margin of safety of five to one, the bending stress, which is the dangerous one in the case of a crank pin, required a diameter for metal having the tensile strength of this pin, a very little over 4½ inches, viz. 4.59 for a steam pressure of 115 pounds, and 4.56 for a pressure of 112 pounds. This is a small difference, but the owner must take the risk of it.

At the time of the disaster the tug, with a tow quite usual for her, in the center of a favorable tide, carrying 115 pounds, but diminished by proceeding at half stroke, broke this crank pin. Unless caused by inevitable accident, it is plain that the crank pin was insufficient, and the tug unseaworthy. The owner says it was caused by the propeller striking a submerged log. This is pure conjecture, there being not the least affirmative evidence of it, and we reject the explanation as improbable. The propeller was of cast iron, and pitted and discarded for insufficiency about a year afterwards. The tips of two adjoining blades ⅞ inches thick, breaking by striking a submerged log, would immediately relieve the shaft and crank pin from any pressure at all. It is suggested that the log got fast between the propeller and the rudder post, where there is a clearance of but a

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few inches. In that case other blades of the propeller would have struck the log, and they, or indeed the whole propeller itself, would have been carried away before this steel pin would have broken. The bending of the rudder shoe, which is pointed out as evidence of the log having been jammed there, is entirely consistent with the tug striking on the rocks. If conjecture is to be resorted to at all, we think it would be much more probable the shaft had got out of alignment. However, even in tort cases, where there is no contractual liability, one relying upon inevitable accident as a defense must either point out the precise cause, and show that he is in no way negligent in connection with it, or he must show all possible causes, and that he is not in fault in connection with any one of them. The Merchant Prince [1892] Prob. Div. 188; The Edmund Moran, 180 Fed. 700, 104 C. C. A. 552; The Lackawanna, 210 Fed. 262, 127 C. C. A. 80; The J. Rich. Steers, 228 Fed. 319, 142 C. C. A. 611. The presumption of fault the Reichert Company has not overcome, and therefore it must be held liable for negligence in the limitation proceeding, and liable primarily because of the unseaworthiness of its tug in the subsequent suit brought by the owner of the Mathilde R.; the Moran Company being secondarily liable because of its towage contract with the Ash Removal Company, and the Ash Removal Company, by the concession of its proctors, liable for any deficiency.

[4-7] The Moran Company cannot take advantage of the laws limiting the liability of shipowners, because it was neither the owner nor the charterer pro hac vice of the tug James Roy. Although the Reichert Company has been held liable for negligence, it will not be liable beyond the value of the tug, if it was without knowledge or privity of the insufficiency of the crank pin. The burden of proving this is on it. Its officers knew of the prior breaking of a steel crank pin of the same size, and no sufficient explanation of that accident is given. They do not show whether they knew the size of the pin, or whether they knew the prevailing practice as to the size of such pins, nor whether, if they did, they made any inquiry whatever as to what the requirements of such crank pins should be, in view of the prevailing practice of employing a much stronger one. Although the boat had been inspected by the United States local inspectors some three or four months before the accident, and the owners employed an engineer to supervise their equipment from time to time, we do not think that they have discharged the burden of proving their want of knowledge or privity.

The decrees are reversed, and the court below is directed to enter a decree in the limitation proceeding, denying the petition, with costs, and a decree in the suit of Rice against the Brooklyn Ash Removal Company in favor of the libelant against the Reichert Towing Line primarily, the Moran Towing & Transportation Company secondarily, any deficiency to be recovered of the Brooklyn Ash Removal Company, with the usual order of reference; costs of this court to the libelant in the same order.

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PACIFIC MAIL S. S. CO. v. WESTERN PAC. R. CO.

(Circuit Court of Appeals, Ninth Circuit. May 6, 1918.)

No. 3109.

1. COMMERCE ⟸85—INTERSTATE COMMERCE—EXTENT OF AUTHORITY OF COMMISSION.

While an interstate railroad company is subject to the act to regulate commerce, and the provisions of its tariffs filed pursuant to section 6 (Comp. St. 1916, § 8569) must be strictly observed, yet the Interstate Commerce Commission is without jurisdiction over ocean carriage of export and import traffic destined to or coming from nonadjacent foreign countries.

2. CARRIERS ⟸30—INTERSTATE COMMERCE—TARIFFS—CONSTRUCTION.

As a joint rate cannot be made between an interstate railroad company and a carrier by water transporting property between the United States and a nonadjacent foreign country, provisions in the tariffs of a railroad company filed in accordance with Act to Regulate Commerce, § 6 (Comp. St. 1916, § 8569), for absorption of switching charges and state tolls on traffic destined to or originating in foreign countries, *held*, in view of rule 71 of the Interstate Commerce Commission, to apply only to state tolls imposed on land carriage, and not tolls and charges imposed on the water carrier.

3. TENDER ⟸12(2)—INTEREST—ALLOWANCE.

Though defendant, an ocean carrier, indebted to a railroad company for freight, tendered payment of part of the indebtedness, interest may be allowed on the entire sum recovered.

In Error to the District Court of the United States for the Second Division of the Northern District of California; Wm. C. Van Fleet, Judge.

Action by the Western Pacific Railroad Company, a corporation, against the Pacific Mail Steamship Company, a corporation. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Knight & Heggerty and Charles J. Heggerty, all of San Francisco, Cal. (C. W. Durbrow, of San Francisco, Cal., of counsel), for plaintiff in error.

A. R. Baldwin and A. P. Matthew, both of San Francisco, Cal., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. The Western Pacific Railroad Company, to be called "plaintiff," brought this action against the Pacific Mail Steamship Company to recover $7,341.46, as the inland proportion on freight charges on through shipments moving between points in the United States and oriental ports. The Steamship Company, admitted that $5,233.08 of the sum claimed was due, but denied any greater indebtedness. Tender and refusal were had. The Steamship Company, as an offset, pleaded that the terminal tariffs of the Railroad Company published and filed as required by the act to regulate commerce, provided that the Railroad Company would absorb state toll on the shipments involved, and alleged that the terminal tariffs, while published

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by the Railroad Company, were applicable to import and export cargo interchanged by the parties at Piers 42 and 44 at the port of San Francisco; those piers being where the Steamship Company received and discharged cargoes. It was further pleaded that the Steamship Company, under the rules of the Board of State Harbor Commissioners of the port of San Francisco, was required to pay the charges assessed for state toll; that these charges were paid by the Steamship Company for the Railroad Company with the knowledge of the latter and according to the general custom then existing at San Francisco.

These additional facts appear in the answer: The Railroad Company published and filed with the Interstate Commerce Commission, as required by law and the rules of the Commission, its terminal tariffs providing for the absorption by it, among other charges, of the state tolls assessed by the Board of State Harbor Commissioners for the port of San Francisco, on shipments originating or delivered at wharves served by the Southern Pacific Company, the Atchison, Topeka & Santa Fé Railway Company, and the Belt Line Railroad, "on all competitive traffic" originating at or destined to oriental ports in cases where the Western Pacific "receives the line haul." The tariffs covering absorptions to be made are more fully cited as follows:

"At San Francisco, Cal., this company will absorb switching charge of $2.50 per car for switching freight, carloads, to or from wharves served by the Southern Pacific Company, the Atchison, Topeka & Santa Fé Railway (coast lines) and the State Belt Railway; also will absorb state toll. Loading and unloading charges will also be absorbed except on lumber and its products. At Oakland (Western Pacific Mole), Cal., this company will absorb wharfage and handling charges on all freight except lumber and its products and empty carriers returned.

"2. On all competitive traffic, except as provided for in paragraph No. 1, received from or delivered to vessels at wharves of the Southern Pacific Company, Atchison, Topeka & Santa Fé Railway Company (coast lines), or State Belt Line Railway at San Francisco, Cal., this company will absorb switching charge of $2.50 per car; also will absorb state toll."

In compliance with the rules of the Board of State Harbor Commissioners, the Steamship Company paid the state tolls on the shipments received on board from the railroad and delivered on Piers 42 and 44 from the ships, the tolls "which were required to be paid by the vessels of the Steamship Company receiving and discharging such cargo," amounting to $2,069.25, and also paid the freight for the Railroad Company in error on 30 packages carried by the Steamship Company and delivered to the Railroad Company, making a total of $2,108.38 paid by the Steamship Company in behalf of the Western Pacific. The Steamship Company collected $7,341.46 on shipments originating at Manila and transported to San Francisco and there delivered to the Railroad Company, the amount named representing the freight accruing on such shipments to the Railroad Company for transporting from San Francisco to final Eastern points, and the Steamship Company retained out of the amount so collected $2,069.25, state tolls, which it is alleged the Railroad Company under its terminal tariffs agreed to absorb, and also retained freight charges of $39.13.

[1, 2] Judgment on the pleadings for the full amount and interest

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was given to the Railroad Company, and the Steamship Company brought writ of error. The question is whether the Steamship Company was entitled to offset the $2,108.38 against the amount demanded by the Railroad Company. It is accepted as of course that the Railroad Company is subject to the act to regulate commerce, and the provisions of its tariffs filed pursuant to the provisions of the act must be strictly observed, and that the Interstate Commerce Commission is without jurisdiction over ocean carriage of export and import traffic destined to or coming from nonadjacent foreign countries. Pennsylvania R. R. Co. v. International Coal Mining Co., 230 U. S. 184, 33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315; Cosmopolitan Shipping Co. v. Hamburg-American Packet Co., 13 Interst. Com. Com'n 266.

Section 6 of the act to regulate commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 380 [Comp. St. 1916, § 8569]) provides that every common carrier subject to the provisions of the act shall file and keep open to inspection schedules showing rates and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad or by water when a through rate and joint rate have been established; that if no joint rate over the through route has been established the several carriers in such through route shall file the separately established rates and charges applied to through transportation. The schedules shall plainly state the places between which property will be carried, and shall also state separately all terminal charges and all other charges which the Commission may require, all privileges or facilities granted, and any rules which may change, affect, or determine any part of the aggregate of such rates and charges or the value of the service rendered to the shipper or consignee. The schedules must be printed and copies kept for use of the public in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of the section apply "to all traffic, transportation and facilities defined in this act."

Inasmuch as it is beyond controversy that transportation and traffic by ocean carriers engaged in transportation to nonadjacent foreign countries is not defined or included in the act to regulate commerce, it must follow that the jurisdiction of the Interstate Commerce Commission cannot extend to carriers engaged in such traffic. In Cosmopolitan Shipping Co. v. Hamburg-American Packet Co., supra, the Commission recognized the limitations upon its jurisdiction where the question of control over ocean carriers was presented, and announced that the line must be drawn decisively between those carriers whose rates and practices the Commission could control and those which it could not control, and held that joint rates could not be made between carriers subject to the act and those not subject to it. In Chamber of Commerce of New York v. New York Central & Hudson River R. R. Co., 24 Interst. Com. Com'n 55, the Commission, assuming it had no jurisdiction over ocean rates, said that rates to and from ports must be published as independent from the ocean transportation and are subject to the provision of the act to regulate commerce.

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In obedience to the limitations referred to, reference may be had to rule 71 of the Interstate Commerce Commission Tariff Circular 18–A (subdivision "b"), wherein the Commission has explicitly declared that ocean carriers between ports of the United States and foreign countries not adjacent are not subject to the terms of the act to regulate commerce, nor to the jurisdiction of the Commission, and also to the provision that the inland carriers of traffic exported to or imported from a foreign country not adjacent must publish their rates and fares to the ports and from the ports, and that the rates must be the same for all, regardless of what ocean carrier may be designated by the shipper. The rule further provides that, "as a matter of convenience" to the public, the carriers of inland traffic may publish in their tariffs such through export or import rates to or from foreign points as they may make in connection with ocean carriers; but such tariffs must distinctly state the inland rate or fare as provided by the rules, and need not be concurred in by the ocean carrier, "because concurrence can be required from, and is effective against, only carriers subject to the act." Another subdivision authorized forwarding export and import traffic under through billing, but there must be separation of the liability of the inland and of the ocean carrier, and it must show the tariff rate of the inland carrier.

With the foregoing provisions making clear distinction between the liability of the inland carrier and of the ocean carrier, it would seem to be conclusive that the tariff of the Railroad Company must be limited to the field of the operation of the service performed by it, and cannot relate to liability, service, or obligation of the ocean carrier. The office of the terminal tariff is to inform the shipper and receiver of freight just what services and charges of a local nature may be made, and which are not incorporated in the tariffs of rates on the main lines. We have an illustration in the Western Pacific terminal tariff, where it is published that the road will absorb switching charges fixed at $2.50 per car, and also state toll. The main line rate provides for carrying the shipment without additional charge to the point of delivery to the connecting ocean carrier. By the terminal tariff there is notice that there will be absorption of two additional charges, the switching charge of connecting rail carriers and whatever state toll there may be as incidental to the rail haul by the rail carrier.

We think that the switching charge means the charge for delivery service of the connecting rail line and that the state toll covers the charge by the state for like service where toll may be charged as an incident to the rail haul and within the service comprehended by the Act to Regulate Commerce. This is but to say that, where the rail carrier has delivered at ship's tackle, it has completed the rail service as contemplated by the tariffs filed pursuant to the act of Congress, and from then on the service and obligations, including tolls levied by the state, are to be assumed by the water carrier transporting to a nonadjacent country, not regulated or controlled by the referred to act. The reasonableness of such a view accords with the general applicability of the act to regulate interstate commerce by confining the scope of regulations to such charges for transfer services as are within the field of

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the rail carrier. Within such field the power is very broad, and the extent of the jurisdiction must be carefully observed; but things incidental to traffic not within the purview of the act are with equal care to be excluded from its provisions. The argument that the absorption of the tolls under investigation may be like taking up a drayage charge is not persuasive, inasmuch as the Interstate Commerce Commission, by its conference ruling (No. 441), has especially provided for drayage charges, in connection with through shipment; that is, charging for services by dray which the rail carrier can and does adopt as its own. We are therefore brought back to the point that a charge which the carrier cannot make as its own, as, for example, the service of an ocean ship transporting to a nonadjacent country, is not to be included as one assumed.

It is suggested by the Steamship Company that it has been the custom for the rail carrier to pay charges like those involved in this controversy. No written contract for payment is alleged, and we cannot reach a point where there is ambiguity which would permit the court to rest its decision upon a custom.

[3] Tender of payment of one part of the indebtedness having been made, interest upon the entire sum recovered was properly allowed by the District Court. Lilienthal v. McCormick, 117 Fed. 89, 54 C. C. A. 475; Donaldson v. Severn River Glass Co. (D. C.) 138 Fed. 691.

Judgment affirmed.

NATIONAL CARBON CO. v. ALASKA S. S. CO.

THE EUREKA.

(Circuit Court of Appeals, Ninth Circuit. May 6, 1918. Rehearing Denied July 1, 1918.)

No. 3102.

1. SHIPPING ⊂=132(5)—CARRIAGE OF GOODS—AUTHORITY OF AGENTS.
Evidence *held* to establish the authority of shipping agents to act for a ship in respect to cargo received for a voyage.

2. SHIPPING ⊂=125—DAMAGE TO CARGO—LIABILITY OF VESSEL.
A ship detained at Colon by slides in the canal *held* liable for damage to cargo, which it refused to deliver there for transshipment, although the shipper notified it of the perishable character of the goods and offered to pay all expense of discharging.

Appeal from the District Court of the United States for the Southern Division of the Western District of Washington; Edward E. Cushman, Judge.

Suit in admiralty by the National Carbon Company against the steamship Eureka; the Alaska Steamship Company, claimant. Decree for respondent, and libelant appeals. Reversed.

Appeal from a decree dismissing a libel alleging the following facts:

On September 8, 1915, libelant, National Carbon Company, shipped at New York on the Eureka, bound for San Francisco, certain dry battery cells consigned to libelant at San Francisco. The ship sailed, but about October 1,

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1915, libelant heard that the Panama Canal was closed to navigation. Inquiry was at once made of the ship's agents at Philadelphia as to the whereabouts of the vessel. The agents replied that the vessel was detained because of the canal slide, and was at Colon, whereupon libelant notified the agents of the ship that the goods were perishable and offered to pay costs for discharging and restowing cargo to be disturbed in reaching the goods. The agents failed to deliver and refused demands for delivery. Libelant alleges that nothing was done by those in charge of the ship until about November 22d, when the cargo was delivered to libelant at New Orleans, and it was found to be damaged as a result of the failure of the ship to perform its contract.

The steamship company, claimant, answered that the ship was owned by the Pacific Coast Steamship Company, and subchartered through others to the Oregon-California Shipping Company, to which last company the shipments were delivered for transport, freight prepaid, that alleged demands for delivery were not made, and that by certain clauses in the bills of lading the ship was exonerated:

"That in case the steamer shall * * * be prevented from any cause from proceeding in the ordinary course of her voyage, to transship the goods to their destination by any other steamer; * * * that the carrier shall not be liable for loss or damage occasioned by causes beyond his control or accidents of navigation of whatsoever kind; * * * that the carrier shall not be liable for loss or damage occasioned by * * * change of character, * * * or any loss or damage arising from the nature of the goods, * * * nor for any loss or damage caused by the prolongation of the voyage.

"(2) No carrier shall be liable for delay, nor in any other respect than as warehouseman, while the said property awaits conveyance from any point of transshipment. * * *

"(8) When the loading, transport, transshipment, or delivery is prevented in consequence of ice, weather, epidemic, quarantine, blockade, war, sedition, strikes, troubles, labor agitations, and all analogous circumstances whatever, the captain, the company, or the agents shall be entitled to load, discharge, transship, put into warehouse or quarantine depot, or into a lighter, hulk, or craft, and to deliver all or any part of the goods, whether the terminus of the voyage or not, and all expenses of transshipment or warehousing of customs, * * * and all extra expenses of whatever kind incurred in consequence of the above circumstances will be entirely for account of the shipper, consignee, or party claiming the goods."

The answer also alleges that, when it was apparent that the canal would remain closed for some time, the owners and charterers and agents of the ship tried to find some method of transshipping the cargo to destination, and whether the ship could be sent via the Straits of Magellan; that after diligent investigation they believed it was best for the consignors and consignees of the cargo that the ship be diverted to New Orleans and her cargo there transshipped by rail to destination, and that the Oregon-California Shipping Company on November 5th ordered the ship to proceed to New Orleans, at which port she arrived November 12th; that before proceeding to New Orleans the consignees were advised of the movement of the ship, and that libelant consented to the ship going to New Orleans and transshipment of cargo by rail; that the cargo was discharged at New Orleans, and libelant's cargo delivered to libelant about the 16th of November. For further defense the answer pleads provisions of the bills of lading excusing the carrier from damage to goods on account of inherent weakness, natural causes, and other things, and asserts that the damage, if any, arose from one of the excepted causes; that the bills of lading requiring notice of damage to be filed with the steamship company were not complied with.

Howard S. Harrington, Harrington, Bigham & Englar, and T. Catesby Jones, all of New York City, Revelle & Revelle, of Seattle, Wash., and Denman & Arnold, William Denman, and William B. Acton, all of San Francisco, Cal., for appellant.

Bogle, Graves, Merritt & Bogle, of Seattle, Wash., Platt & Platt,

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Robert Treat Platt, and Hugh Montgomery, all of Portland, Or., and Farrell, Kane & Stratton, of Seattle, Wash., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). The District Court based its decision upon the ground that the evidence was insufficient to establish that Rubelli's Sons, of Philadelphia, were general agents of the ship, and not merely agents for soliciting freight for the Oregon-California Shipping Company. In order, therefore, to reach a decision upon the contention that this was error, we have carefully read the evidence, which is in the form of depositions and records, and without making lengthy statement will give our conclusions. Reid v. Fargo, 241 U. S. 544, 36 Sup. Ct. 712, 60 L. Ed. 1156; The Nyack, 199 Fed. 383, 118 C. C. A. 67.

[1] Two shipments were made, one from New York, another from Philadelphia. The contracts of carriage were made by Mitchell, the traffic manager for the libelant, with Phelps Bros. & Co., of New York, and Rubelli's Sons, of Philadelphia. About September 7th Mitchell wrote to Rubelli's Sons, at Philadelphia, inclosing bills of lading, and advising them that the charges had been prepaid to destination, and asking them to send to the National Carbon Company ocean bill of lading. The bill of lading for the goods shipped from New York to San Francisco was signed by J. W. English, for Oregon-California Shipping Company, Incorporated; English being connected with Phelps Bros. & Co., who were the New York agents of Rubelli's Sons at Philadelphia. The goods shipped at Philadelphia were under bills of lading signed R. B. Bates, for Oregon-California Shipping Company, Incorporated; Bates at the time being assistant manager for Rubelli's Sons. On October 1, 1915, Mitchell, having read in the papers that there had been a slide in the Panama Canal, telegraphed Rubelli's Sons for information of the whereabouts of the Eureka, and when the ship would reach California points. On October 2d Rubelli's Sons answered that the ship arrived "this side Cristobal September 29th." On October 8th Mitchell went to Philadelphia, and on the next day advised Kurz, a partner in Rubelli's Sons, and Davis and Bates, employés of the partnership, that the goods of the National Carbon Company were perishable, and that he thought it advisable to take them out of the ship. Examination of the stowage plan of the ship was made, and Mitchell told them that, rather than have further delay, he would go to Colon, take the goods, and pay all expense of taking out other goods to get at libelant's, and would put the other goods back in the hold, if necessary, as they could not afford to have their battery cells remain there. Mitchell, after explaining the character of the goods, then demanded the goods; but Rubelli's Sons & Co., although they stated they were doing all in their power to get the managers of the Oregon-California Shipping Company to transship the goods, or do something in order to satisfy demands, refused to deliver. Repeated demands were made about the 14th and 16th days of October, but delivery was refused.

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We think it evident that, if the goods had been delivered in Colon at that time, the damage would have been obviated, for there were a number of ships plying between Colon and New York, upon some of which freight room could have been obtained. Mitchell again went to Philadelphia about October 22d, and was shown a copy of a telegram which Rubelli's Sons had sent on the 18th instant to the Oregon-California Shipping Company, saying that the National Carbon Company insisted that the shipments should not go via Magellan, because the batteries would be worthless on arrival at destination, and that the National Carbon Company offered to pay all expenses of discharging, including loading back any other goods, in order to forward their goods from Colon. Transshipment was advised, and response asked. About October 22d, in a circular signed by Rubelli's Sons, agents, and addressed to those who had cargo on the Eureka for the Pacific Coast, possible arrangements respecting transshipment of all cargo across the isthmus were set forth, with statement by Rubelli's Sons that they, "as agents" for the Oregon-California Shipping Company, were in daily touch with the captain of the steamer, and that from his first report it was hoped that the steamer could pass through the canal about October 10th, but that it would be January, 1916, before the canal would be opened.

About November 1st, Kurz, of Rubelli's Sons, went to Portland, Or., in order to get definite action at Portland. After conferences with the Oregon-California Shipping Company, Kurz cabled to the master of the ship with respect to possible transshipment, but finally, on November 4th, cabled the master to "sail to-morrow morning to New Orleans; * * * we will be there on arrival." The ship went to New Orleans, and reached there about November 21st. In New Orleans Mitchell met Kurz, of Rubelli's Sons, and Williams, the general manager of the Oregon-California Shipping Company, at New Orleans. The goods of the libelant were unloaded and found to be badly damaged as a result of extreme heat. Mitchell made claim upon the Oregon-California Shipping Company, and then shipped his goods to New Jersey, where they were repaired and thereafter sold.

It is clear also that between October 9th and 22d the Oregon-California Shipping Company knew of probable long delays in reopening of the canal, and was in consultation concerning the possible transfer of the cargo of the Eureka, and the possible liability of the shipping company because of the delay on account of the slides. Kurz, who while in Portland signed the cables to the master of the ship, acted for the shipping company and evidently was in close direct relation to the shipping company with respect to the matters involved in the telegrams. It is also recalled that the bills of lading were signed by the employés and agents of Rubelli's Sons, and the merchandise was received on the ship on the faith of the bills of lading. In our opinion, when the circumstances are all considered, they show that Rubelli's Sons acted directly for the shipping company, and the ship is liable for the damages by detention after refusal to deliver at Colon. The Coventina (D. C.) 52 Fed. 156.

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[2] The case is quite like that of The Martha (D. C.) 35 Fed. 313. There, when the ship put into a port for repairs, and it was made known to the consignee that a long delay of the ship was necessary, he applied to the owners of the steamer, through her agent at New York, for delivery of the freight, glycerine, and offered to pay the full freight under the bill of lading, together with all his incidental expenses. The shipowner refused to make delivery, and, after notification by libelant that he would hold the ship for damages consequent upon detention, suit was brought for damages. Judge Benedict held that, the shipowner having refused to make delivery and having, without reasonable excuse, held the goods on the contract in the ship until her arrival at New York, the liability of the ship for all damages caused to the libelant by reason of the detention seemed clear.

Nor can claimant prevail under the exceptions contained in the bill of lading. Libelant bases its action for damages, not upon delay, but upon refusal of the owner to comply with the demand to deliver to it the merchandise at Colon. The carrier is also liable, where the shipper has notified the carrier of the perishable nature of his goods, and the carrier without reason or necessity has deprived the shipper of the benefit to flow from such shipment. Swift v. Furness, Withy & Co. (D. C.) 87 Fed. 345; The Citta de Messina (D. C.) 169 Fed. 472.

There can be no serious doubt that long continuous excessive heat damaged the battery cells. If the ship had sailed from Colon about October 11th, when transshipment was advised by the master of the ship, the damage would have been avoided. But the master asked instructions of the appellees, and they responded by finally sending orders to sail for New Orleans. Appellant did all it reasonably could to save its property from damage, and ought to have redress for the holding of its perishable goods after demand.

The decree is reversed, and the case will be remanded, with directions to enter a decree in favor of libelant for $4,953.08 as damages, together with interest and costs.

Reversed.

ADAMS v. YUKON GOLD CO. et al.

(Circuit Court of Appeals, Ninth Circuit. May 6, 1918.)

No. 3058.

1. MINES AND MINERALS ⟸29(4)—PLACER MINES—LOCATION.
A location of a placer claim, which by mistake contains an excessive area, is invalid only as to the excess.

2. MINES AND MINERALS ⟸26—PLACER MINES—RELOCATION.
Where a placer location is voidable, because excessive, another may not locate on the excess without giving notice to prior locators to select authorized area.

3. TENANCY IN COMMON ⟸45—RIGHT OF COTENANT.
One cotenant cannot bind his companions in interest in a matter relating to the joint property, unless special authority is granted; nor can one cotenant convey by metes and bounds to the prejudice of others.

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4. MINES AND MINERALS ⇐26—LOCATIONS—EXCESS.

Where complainant, who located on a part of a placer claim which contained an excess of area, notified only two of the joint co-owners, and did not locate as directed by them, *held*, that he was no more than a trespasser, and acquired no title.

Appeal from the District Court of the United States for the Fourth Division of the Territory of Alaska; Chas. E. Bunnell, Judge.

Suit in equity by S. C. Adams against the Yukon Gold Company, a corporation, and others, to quiet title to the Anaconda Fraction and the Anaconda No. 2, placer properties on Otter creek, Alaska. Decree for defendants, and complainant appeals. Affirmed.

This is a suit in equity, brought by Adams, appellant, against Yukon Gold Company, and certain individuals, appellees, to quiet title to the Anaconda Fraction and the Anaconda No. 2, placer properties situate on Otter creek, Alaska. The appellees claim that they and their grantors located the ground in controversy in April, 1909, as a portion of the Prospector Association placer claim. The facts found by the District Court are as follows:

The Prospector placer claim, when located and staked out in 1909 by appellees and their grantors, contained an area of 187 acres, or an excess of 27 acres. The excess area was included by mistake, and without intention on the part of the locator of acquiring more than 160 acres. In April, 1911, Adams measured the Prospector claim and found that it was in excess of 160 acres. Thereafter he went to Muckler and Chittic, two of the co-owners of the Prospector claim, and notified them of his intention to stake such excess. These two co-owners told him, if the claim contained an excessive area, "to stake such excess from either end or the side of said claim." Some of the co-owners of the Prospector claim were well known in the vicinity where the claims were situate, and lived thereabouts, but they were not notified nor advised of the fact that the claim contained an excess; nor were they ever advised of the "instructions or directions" given by the co-owners, Muckler and Chittic, to Adams to take up such excess at either end or side line of the claim; nor did they authorize or ratify the act of Muckler and Chittic. Thereafter, on May 23, 1911, when the locators of the Prospector and their grantees, except Muckler and Chittic, were without knowledge that the claim contained an excess, Adams, without the knowledge of the owners, except the two named, went onto the Prospector claim and pretended to make a placer location of the Anaconda Fraction, claiming 120 feet in width by 2,640 in length. The ground located as the Anaconda Fraction is wholly within the exterior boundaries of the Prospector claim, but none of its boundaries cover or adjoin any boundary line of the Prospector claim, and the Anaconda Fraction is not located either at one end or one side of the Prospector claim. The boundaries of the Anaconda Fraction were marked, discovery was made by Adams and his colocator, and notice of location was recorded in the Otter precinct.

On July 19, 1913, the locators of the Prospector and their grantees, except Muckler and Chittic, not knowing that the Prospector claim contained an excess of 160 acres, Adams went within the boundaries of the Prospector claim and made a placer location, called the Anaconda Fraction No. 2, marked the the boundary, discovered gold, and recorded notice of location, claiming land 125 feet in width by 5,280 feet in length. As marked upon the ground, the claim is 5,374 feet long, 130 feet wide at the easterly boundary, and 125 feet wide on the westerly boundary. The southerly boundary of the Anaconda Fraction No. 2 is not coextensive with the southerly boundary of the Prospector claim, and the westerly end line of the Anaconda Fraction No. 2 is 254 feet easterly from the easterly end line of the Prospector, and the conflict between the Anaconda Fraction No. 2 and the Prospector, after casting off the excess on the westerly end, is to the extent of 14.31 acres.

The court found that Adams did not stake or locate either of these two lo-

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cations on "either end or side of said Prospector claim, as he was requested to do by said Muckler and Chittic"; that when the locations were made by Adams the Prospector was a valid mining location, and Adams intended to take up a portion of the excess area contained in the Prospector claim; that it was practicable for Adams to take the excess area contained within the boundaries of the Prospector in a more compact form than that included within the Anaconda Fraction and the Anaconda No. 2; that, except Muckler and Chittic, the locators and the grantees of the Prospector did not know that the claim contained an excess area until after the commencement of this action, and that thereafter they caused a survey to be made, and made an amended location, by casting off such excess at the westerly end of said claim, and by drawing in their lines and stakes so that the area of the claim as amended contained only 160 acres.

From these facts the court concluded that, when Adams went within the boundary lines of the Prospector claim and pretended to locate the two claims referred to, the Prospector claim was a valid subsisting mining location; that Adams acquired no right to any part of the area contained within the boundaries of the Prospector claim; that his two locations were null and void; that the appellees were owners of the premises described as the Prospector Association claim as originally staked and located by them, less the excess area contained within the original boundary lines of the Prospector claim as marked upon the ground and described in the amended location notice. Decree was thereafter entered in conformity with the conclusions of the court.

E. Coke Hill, of Ruby, Alaska, William A. Gilmore, of Seattle, Wash., and James E. Fenton, of San Francisco, Cal., for appellant.

Richard C. Harrison, of San Francisco, Cal., Henry Roden, of Juneau, Alaska, John L. McGinn, of San Mateo, Cal., and R. F. Lewis, of San Francisco, Cal., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). [1] Many of the errors assigned go to the sufficiency of the evidence to sustain the findings; but a careful reading of the record satisfies us that the findings are all in accord with the evidence and must stand. We therefore pass to the consideration of what legal principles should control. Under the ruling of McIntosh v. Price, 121 Fed. 716, 58 C. C. A. 136, Zimmerman v. Funchion et al., 161 Fed. 859, 89 C. C. A. 53, Waskey v. Hammer, 170 Fed. 31, 95 C. C. A. 305, and Jones v. Wild Goose M. & T. Co., 177 Fed. 95, 101 C. C. A. 349, 29 L. R. A. (N. S.) 392, a location of a placer claim made in good faith, but by mistake containing an excessive area, is not wholly void, but is invalid only as to the excess, which may be rejected from such portion as the owner may select, and until the owner is advised that there is an excess, and has had a reasonable time within which to make his selection, his possession extends to the entire claim, and any one who goes upon it and makes a location becomes a trespasser, and his location is a nullity and void for any purpose.

[2, 3] Appellant contends, however, that the Anaconda locations made by Adams are excluded from within this general rule because Adams, having told Chittic and Muckler, two owners in the Prospector claim, that there was an excess, and having obtained from them permission to locate the excess area, fulfilled all legal duty resting upon him, and that the consent of other co-owners for him to locate the

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excess was not required. But we have the general rule that one cotenant cannot bind his companions in interest in a matter relating to the joint property, unless special authority is granted. He cannot make a promise on behalf of all cotenants or dispose of the property. Nor can he convey by metes and bounds to the prejudice of a cotenant. Varnum v. Abbot, 12 Mass. 474, 7 Am. Dec. 87; Lindley on Mines, p. 791. Of course, if Chittic and Muckler were the agents of their cotenants by implied or express delegation of authority, and gave the permission in the exercise of their authority as agents, the cotenants would be bound. But the facts negative the position that any such agency for the cotenancy existed, for the findings are that the co-owners, except Muckler and Chittic, had no knowledge that there was an excess until after this suit was brought. Therefore, the doctrine of agency being irrelevant to the case, we come back to the question what general rules must control.

It seems clear that the owners, other than the two referred to, being ignorant of the fact that their claim contained an excess area, could not be prejudiced by the general consent given by Chittic and Muckler. As co-owners they were entitled to the possession of the entire claim, and, if there was an excess, to be advised of the fact, to the end that they might, within a reasonable time, make a selection of what ground they intended to preserve as their true claim. Presumably this was a valuable right, and, in the absence of a showing of substantial effort to give a notice to all co-owners of record, notice to two is not a compliance with the spirit of the mining laws, which in their liberality have preserved the right of selection. A contrary view might put many co-owners of a mine at the mercy of one of their fellows, and possibly lead to a practical surrender by one co-owner of the most valuable portions of the claim.

We are not called upon at this time to decide just what form of notice would be regarded as sufficient to give to co-owners of record notice that there is an excess, or what excuse for failure to give actual notice would be held sufficient, because in this instance Adams failed to make effort to notify any owners except two, although some others were in the vicinity, and the record of the names of all was within easy access.

The justice of the views we have expressed is made more apparent by the further finding of the court that Muckler and Chittic were told by Adams, if the claim contained an excessive area, to stake such excess from either end or the side of the said claim; but it is found that Adams did not make his locations on either end or side of the Prospector claim, as he was requested to do by Muckler and Chittic. Reference to the map sustains this finding, in that it shows the Anaconda Fraction as a strip taken off the southerly boundary of the Prospector claim, with its southerly boundary not running parallel with the southerly line of the Prospector, but at an angle, so as to leave a strip of ground between the southerly boundary of the Prospector and the southerly boundary of the Anaconda Fraction. It also shows that the Anaconda No. 2, which includes the Anaconda Fraction, has for its southerly boundary the southerly line of the Prospector, which is iden-

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tical with the northerly line of the Mohawk, and extends westerly of the west line of the Prospector.

The case thus resolves itself into one where, without notice or attempt to give notice to co-owners entitled to be notified of an excess area, the appellant went within the limits of a valid placer location, and without giving the owners opportunity to cast off the excess area endeavored to make locations for the benefit of himself. His attitude became that of a trespasser, and he cannot profit by his pretended locations.

The decree is affirmed.

NEW YORK CENT. R. CO. v. MUTUAL ORANGE DISTRIBUTORS.

(Circuit Court of Appeals, Ninth Circuit. May 6, 1918.)

No. 3055.

1. COURTS ⟸326—FEDERAL COURTS—JURISDICTION.
 Under Judicial Code, § 24, par. 1 (Comp. St. 1916, § 991[1]), diversity of citizenship of the parties will not give the federal court jurisdiction, where the amount involved is less than $3,000.
2. COURTS ⟸326—FEDERAL COURTS—JURISDICTION—FEDERAL QUESTION.
 Where a bill of lading for an interstate shipment required the owner or consignee to pay the freight, an action by a connecting carrier to recover freight due is governed by the Carmack Amendment (Act June 29, 1906 [Comp. St. 1916, §§ 8604a, 8604aa]), and under Judicial Code, § 24, par. 8 (Comp. St. 1916, § 991[8]), is within the jurisdiction of the federal District Court, regardless of the amount involved.
3. CARRIERS ⟸52(1)—CARRIAGE OF GOODS—BILL OF LADING.
 A bill of lading is an instrument of twofold character; it is at once a receipt and a contract for carriage.
4. LIMITATION OF ACTIONS ⟸24(1)—STATUTES—APPLICABILITY.
 An action by a connecting carrier for unpaid freight claimed to be due on an interstate shipment *held* based on the bill of lading, so that, where brought in the federal District Court for California, Code Civ. Proc. Cal. § 337, prescribing a period of four years, is applicable, instead of sections 338, 339.

In Error to the District Court of the United States for the Southern Division of the Southern District of California; Oscar A. Trippet, Judge.

Action by the New York Central Railroad Company against the Mutual Orange Distributors. A demurrer having been sustained, the complaint was dismissed, and plaintiff brings error. Reversed, with directions to overrule the demurrer.

The court below having sustained a demurrer to the complaint, and the plaintiff having declined to amend, judgment was entered, dismissing the action, at the plaintiff's cost—the plaintiff bringing the case here by writ of error. Among the grounds of the demurrer was one to the effect that the trial court had no jurisdiction of the action, for the reason that no federal question was involved in it, nor was there such diverse citizenship of the parties as to give the court jurisdiction; and the other was that it appeared from the complaint that the action was barred by subdivision 1 of section 338 of the Code of Civil Procedure of the state of California, and also by subdivision 1 of section 339 of the same Code.

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The complaint was filed January 20, 1917, and shows that the plaintiff is a railroad corporation duly organized under the laws of the state of New York, for the carriage of freight and passengers for hire over its line of railway, extending from, among other places, the city of Buffalo to New York City, and a connecting carrier of the Atchison, Topeka & Santa Fé Railway Company, also a common carrier of freight and passengers for hire; that the defendant to the action is a corporation of the state of California, and that on or about January 23, 1913, it shipped, at Cucamonga, Cal., over the line of the Atchison, Topeka & Santa Fé Railway Company, to Kansas City, Mo., a carload of oranges, consisting of 384 boxes, under and in pursuance of a bill of lading in the usual form, one of the conditions of which is that "the owner or consignee shall pay the freight and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery"; that subsequently the defendant diverted the shipment to Wichita, Kan., and subsequently made various other diversions, specifically stated in the complaint, including one to the plaintiff company—the fruit being delivered to the plaintiff at Buffalo, N. Y., March 11, 1913, and by it transported within a reasonable time to Albany, in that state, from which point it was diverted by the defendant to New York City, where it was by the plaintiff placed for delivery at Duane street, and where upon inspection it was discovered that the fruit was unfit for human consumption and was thereupon condemned by the board of health of the city and ordered destroyed.

The complaint alleges that the defendant at the time of the making of the contract of shipment agreed to pay the freight charges legally due for the transportation of the fruit, and that the Atchison, Topeka & Santa Fé Railway Company agreed for itself and its connecting lines to transport the fruit as directed by the defendant. The complaint also alleges that by the terms of the contract, and under and in accordance with the tariffs and classification applicable thereto and in force and on file with the Interstate Commerce Commission at the time of the receipt of the shipment, the freight, refrigeration, car service, and other lawful charges and expenses of the transportation contracted for by the Santa Fé Company and its connecting carriers, amounted to the sum of $401.27, specifically itemized in the complaint, which total amount the complaint alleges the plaintiff was and is under the Constitution and laws of the United States "bound to collect, and which amount is justly due the plaintiff from the defendant, but defendant has refused and still refuses to pay the same, or any part thereof, although often requested so to do; that under and in accordance with the terms and provisions of an act of Congress approved February 4, 1887 [Act Feb. 4, 1887, c. 104, 24 Stat. 379], entitled 'An act to regulate commerce,' and acts amendatory thereof and supplemental thereto, there is now due, owing, and unpaid by defendant to plaintiff said sum of $401.27"—for which sum, with interest and costs of suit, the plaintiff prays judgment.

E. W. Camp, U. T. Clotfelter, Paul Burks, M. W. Reed, and Robert Brennan, all of Los Angeles, Cal., for plaintiff in error.

Ward Chapman and L. M. Chapman, both of Los Angeles, Cal., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). The only questions for our consideration are whether the complaint makes a case within the jurisdiction of the federal courts, and, if so, whether the action is barred by the provisions of the California statute that have been cited.

[1] It is obvious that the diverse citizenship of the parties did not confer jurisdiction upon the court below, because the amount involved was less than $3,000. Judicial Code (Act March 3, 1911, c. 231) § 24,

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par. 1, 36 Stat. 1091 (Comp. St. 1916, § 991, subd. 1). The court was therefore without jurisdiction, unless some federal question was involved.

[2] The complaint alleges that the agreed transportation charges amounted in the aggregate to $401.27, which amount the plaintiff was and is, under the Constitution and laws of the United States, bound to collect, and which amount is justly due the plaintiff from the defendant, but to pay which the defendant refuses. The eighth subdivision of section 24 of the Judicial Code (Comp. St. 1916, § 991 [8]) confers original jurisdiction upon the District Courts "of all suits and proceedings (regardless of the amount in controversy) arising under any law regulating commerce"—the exception to that paragraph of the statute having been abrogated by the subsequent abolishment of the Commerce Court by Act Oct. 22, 1913, c. 32, 38 Stat. 219. In so far as the question of jurisdiction is concerned, the real question therefore is whether the present suit is one arising under any law regulating commerce.

It is useless to refer to the very numerous and somewhat conflicting decisions of the subordinate federal courts upon the subject, for we think the question conclusively settled by the decisions of the Supreme Court in the cases of Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257, and St. Louis, etc., Railway Co. v. Starbird, Administrator, 243 U. S. 592, 37 Sup. Ct. 462, 61 L. Ed. 917, that Congress by the amendment of section 20 of its act (Act June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 584, 593 [Comp. St. 1916, §§ 8604a, 8604aa]), known as the Carmack Amendment of the Interstate Commerce Act, fixed both the liabilities and obligations of the parties to interstate shipments of freight; the court saying in the latter case, among other things:

"As the shipment in this case was interstate, there can be no question that, since the decision in the Croninger Case, supra, the parties are held to the responsibilities imposed by the federal law, to the exclusion of all other rules of obligation. Since the Carmack Amendment, the carrier in this case is liable only under the terms of that act of Congress, and the action against it to recover on a through bill of lading for the negligence of connecting carriers as well as of itself was founded on that amendment."

That amendment, as will be seen from its terms, requires every common carrier, receiving property at a point in one state for transportation to a point in another state, to issue a receipt or bill of lading therefor, and makes the initial carrier liable, not only for its own negligence, but also for that of any connecting carrier—the compensation to which the carriers are entitled being also required to be established in the method prescribed by the federal statute. See sections 2, 4, 7 of the act entitled "An act to amend an act entitled 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission" (34 Stat. 584, 586, 589, 595).

The bill of lading issued for the shipment here involved was issued under and pursuant to that statute, and whether the contract thereby evidenced was violated, and, if so, the extent of such violation, were necessarily federal questions (243 U. S. 592, and previous cases of the

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same court cited on page 596 thereof, 37 Sup. Ct. 462, 61 L. Ed. 917). Among the provisions of the bill of lading is this clause of section 8 thereof:

"Sec. 8. The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery. * * *"

[3, 4] The action, as has been seen, was commenced more than three years, but within four years, from the time the oranges were shipped. The first subdivision of section 338 of the California statute, relied upon in bar of the action, prescribes the period of three years for the commencement, among others, of "an action upon a liability created by statute other than a penalty or forfeiture." The other provision so relied upon is section 339 of the same Code of Procedure, which reads in part as follows:

"Within two years:

"1. An action upon a contract, obligation or liability not founded upon an instrument of writing, other than that mentioned in subdivision two of section three hundred and thirty-seven of this Code; or an action founded upon an instrument or writing executed out of the state; or an action founded upon a contract, obligation or liability, evidenced by a certificate, or abstract or guarantee of title of real property, or by a policy of title insurance: Provided, that the cause of action upon a contract, obligation or liability evidenced by a certificate, or abstract or guarantee of title of real property, or policy of title insurance shall not be deemed to have accrued until the discovery of the loss or damage suffered by the aggrieved party thereunder. * * *"

But section 337 of the same statute, in prescribing the periods for the commencement of actions other than for the recovery of real property, fixes the period of four years within which may be commenced:

"An action upon any contract, obligation or liability founded upon an instrument in writing executed within this state: Provided, that wherever the time within which any such action must be so commenced would in any case expire by the terms of this section after the first day of June, one thousand nine hundred and six and before the first day of January, one thousand nine hundred and seven, such action may be commenced at any time before the first day of January, one thousand nine hundred and seven, with the same force and effect as if commenced within four years as in this section provided."

The contention on the part of the defendant in error is that inasmuch as the complaint does not allege that the defendant thereto was the owner of the property, and does not allege that it was the consignee thereof, there was no express written promise by the defendant to pay the freight, and, further, that the bill of lading constituted a contract between the initial carrier and the shipper only, and contained no promise that the defendant would pay the plaintiff New York Central Railroad Company anything; that the defendant's obligation, if any, arises by implication of law, and further that the written contract covers only the shipment of the property from Cucamonga to Kansas City, and that the obligation respecting the freight from that point to its ultimate destination grew out of the reconsignments or diversions of it alleged in the complaint, thereby creating whatever obligation for the payment of freight arose by implication of law. "From any conceivable standpoint, therefore," the counsel for the defendant in error insists, "the

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obligation is not founded upon a written instrument, and therefore, if it is dependent upon the obligation implied by law, is barred within two years, and if dependent upon the statute, is barred within three years."

We do not think any of these contentions or conclusions sound. "A bill of lading," said the Supreme Court in Pollard v. Vinton, 105 U. S. 7, 8 (26 L. Ed. 998) "is an instrument well known in commercial transactions, and its character and effect have been defined by judicial decisions. In the hands of the holder it is evidence of ownership, special or general, of the property mentioned in it, and of the right to receive said property at the place of delivery. * * * It is an instrument of a twofold character. It is at once a receipt and a contract." It is immaterial whether the property for which such an instrument is issued is to be carried by rail or water. St. Louis, etc., R. Co. v. Knight, 122 U. S. 79, 7 Sup. Ct. 1132, 30 L. Ed. 1077; Friedlander v. Texas, etc., R. Co., 130 U. S. 426, 9 Sup. Ct. 570, 32 L. Ed. 991. And where such an instrument was, as here, issued by the initial carrier of an interstate shipment, it was distinctly adjudged by the Supreme Court in the recent case of Georgia, Florida & Alabama R. Co. v. Blish Milling Co., 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948, such bill of lading governs the entire transportation and fixes not only the obligations of all participating carriers, but also the rights and obligations of all parties to the contract, none of whom can ignore or waive its terms—the construction of which contract and the determination of all rights and obligations arising thereunder being a federal question.

It results that the judgment of the court below must be and is reversed, with directions to overrule the demurrer to the complaint.

DIAMOND et al. v. CONNOLLY et al.

(Circuit Court of Appeals, Ninth Circuit. May 6, 1918.)

No. 3100.

1. TRUSTS ⇐179—TRUSTEES—DUTY OF.
 The rule that forbids one holding a trust relation from making use of private trust property should be strictly enforced.
2. TRUSTS ⇐102(2)—DUTY OF ADMINISTRATOR.
 One appointed administrator is in equity a trustee for the heirs.
3. TRUSTS ⇐371(3)—TRUSTEES—FRAUD—BILL OF COMPLAINT.
 A bill of complaint by those next of kin of an Idaho decedent, living in the United States, against the administrator, who had obtained distribution of the property to himself, etc., under Rev. Codes Idaho, § 5702, by false representations that he was the next of kin, *held* sufficient to charge a fraudulent breach of trust by the administrator.
4. JUDGMENT ⇐690—CONCLUSIVENESS—PERSONS CONCLUDED.
 Decisions of the Idaho state court that complainants' mother, a nonresident foreigner, was entitled to no interest in the estate of an Idaho decedent, *held* not conclusive against the claim against the administrator of complainants, who were those next of kin resident in the United States, that the administrator had procured distribution of the estate to himself and others by false statements.

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5. Trusts ⟸102(2)—Decree of Distribution—Effect.
As an administrator cannot contract with himself individually as to the property of the estate, a decree of distribution in favor of the administrator, based on his false statement that he was next of kin, etc., *held*, in view of Rev. Codes Idaho, §§ 4831, 4834, 5626, 5627, 5666, a fraud upon those next of kin entitled to take, which could not profit the administrator.

6. Trusts ⟸102(2)—Federal Courts—Jurisdiction.
While the federal court cannot nullify a decree of a state probate court, yet as a court of equity it may declare an administrator, who through fraud obtained a decree of distribution in his favor, a trustee, and deprive him of any benefit of such decree.

7. Limitation of Actions ⟸100(7)—Running of Statute.
Complainants' eight-year delay in seeking relief against an administrator who fraudulently represented that he was next of kin, etc., *held*, in view of their efforts on behalf of their mother, etc., not to warrant denial of relief; the case falling within Rev. Codes Idaho, § 4054, subd. 4, requiring actions based on fraud to be commenced within three years, but providing that such actions shall not be deemed to have accrued until discovery of the fraud.

8. Trusts ⟸365(5)—Relief—Denial—Laches.
Complainants' eight-year delay in seeking relief against the administrator, who obtained an estate to which complainants were entitled as next of kin, *held*, in view of complainants' delay in ascertaining their rights, not to warrant denial of relief on the ground of laches.

9. Equity ⟸84—Laches—Denial of Relief.
Where defendant was guilty of fraud, a court of equity should be reluctant to deny relief, merely on the ground of laches.

10. Trusts ⟸366(3)—Proper Parties.
Where an administrator, by a false and fraudulent statement that he and certain of his relatives were next of kin, obtained a decree of distribution in their favor, the sureties on the administrator's bond are proper parties to a suit to hold the administrator and other distributees as trustees, etc.

Appeal from the District Court of the United States for the Northern Division of the District of Idaho; Frank S. Dietrich, Judge.

Bill by Celia Diamond, and others against Lawrence F. Connolly, administrator of the estate of John Corbett, deceased, and individually, and others. From a decree dismissing the bill of complaint, complainants appeal. Reversed and remanded, with directions.

Caleb Jones, of Spokane, Wash., for appellants.
C. W. Beale, of Wallace, Idaho, for appellees Connolly.
Ezra R. Whitla, of Cœur d'Alene, Idaho, for appellee McBurney.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Celia Diamond and William, her husband, and Bridget McGrail and John, her husband, appellants, all of Pennsylvania, sued Lawrence F. Connolly, individually and as administrator of the estate of John Corbett, deceased, and John J. Connolly and John E. McBurney, of Idaho. Plaintiffs claim to be the heirs of John Corbett, deceased, whose estate was distributed to Lawrence F., John J., and William Connolly and Ellen Udell. Plaintiffs charge

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Lawrence F. Connolly, administrator of the estate, as their trustee, and John J. Connolly and John E. McBurney as sureties on the administrator's bond given by Lawrence F. Connolly, with liability to the limit of the penalty of the bond; they also charge Lawrence F. Connolly individually, and John J. Connolly, as distributees, to the extent of the estate received by each of them. Other distributees were not made parties, because not within the jurisdiction of the court. A fair statement of the more important allegations follows:

Celia and Bridget, who claim to be true and lawful heirs of John Corbett, are sisters, natives of Ireland and daughters of Austin and Bridget Madden, subjects of Great Britain and Ireland. John Corbett was a half-brother of their mother, Bridget Madden, and died in January, 1907, leaving an estate in Idaho. Lawrence F. Connolly applied for appointment as administrator of the estate, was duly appointed, and qualified by giving bond signed by John J. Connolly and John E. McBurney as sureties. In March, 1907, as administrator, Connolly filed an inventory and appraisement showing an estate, personal, valued at $21,356, now alleged to be grossly disproportionate to its real value.

When Lawrence Connolly petitioned the court in Idaho for letters of administration, he represented to the court that William Connolly, John Connolly, and himself were brothers, and that Ellen Udell was their sister, and that they were cousins of John Corbett, and were his heirs at law; Connolly knowing, however, that they were not the next of kin or his heirs at law, and having made the representations with intent to deceive the court and to defraud plaintiffs. On August 2, 1909, Connolly, as administrator, prayed for decree of distribution of the estate, falsely representing to the court that he, his brothers, and his sister were heirs at law of John Corbett, deceased; the representations having been made by Lawrence with the knowledge and assent of his brother and sister, and with intent to deceive the court and to defraud the plaintiffs as the heirs at law. On August 23, 1909, the court, acting upon the petition and by reason of the false representations, decreed distribution to Lawrence, William, John, and Ellen, in equal portions, and thereafter, on the 28th of June, 1912, as administrator, Connolly distributed the estate to himself and to his brothers and sister; each knowing that none of them was rightfully entitled to a share of the estate.

About May, 1910, after Lawrence, John, and William Connolly and their sister, Ellen, "had concealed or not made known the death of the said John Corbett, deceased, for a period of three years and three months from his relatives and next of kin in Ireland, and from his other relatives and next of kin in the United States," and about a year after the decree of distribution by the probate court, the death of John Corbett was first brought to the knowledge of the plaintiffs by neighbors who read of the same in a newspaper. Plaintiffs, who were unable to read and write, at once had a friend write to their mother of the death of their uncle, John Corbett, and they believed, by advice of counsel whom they believed, that their mother was the sole heir of John Corbett, and acted in that belief until about August, 1916, when they went to Idaho and were told by Caleb Jones, an attorney

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at law of Spokane, Wash., that they, plaintiffs, were the heirs of John Corbett in their own right and independent of the right of their mother.

Lawrence Connolly, while administrator, went to Ireland and by fraud and misrepresentation as to the value of the estate procured an assignment, dated April 1, 1911, to himself of all the interest of Bridget Madden, then 85 years old, an illiterate woman of failing understanding, in the estate of John Corbett. Thereafter, in 1912, in behalf of Bridget Madden, suit was instituted in the state courts in Idaho to establish her right to succeed to the estate of John Corbett, deceased; but the Supreme Court of the state determined that Bridget never had any interest or right in the estate. Connolly v. Reed, 22 Idaho, 29, 125 Pac. 213. Thereafter the Attorney General of Idaho, with counsel looking after the interests of Bridget Madden, brought suit to have the estate of John Corbett escheated to the state; but the Supreme Court of the state held adversely to the contentions of the Attorney General and of counsel for Bridget Madden. Connolly v. Probate Court, 25 Idaho, 35, 136 Pac. 205.

Plaintiffs allege that they did all in their power to further the interests of their mother, and pending litigation were informed by a number of attorneys, whom they confided in, that their mother was the sole heir of John Corbett, deceased, and that they would have no direct interest in his estate until her death. Bridget Madden, the mother, died in Ireland on August 26, 1914, but shortly before her death plaintiffs learned that the courts of Idaho had denied her claim to interest in the estate of John Corbett, and plaintiffs were then told that, inasmuch as their mother had been denied right in the estate, plaintiffs could have no right. Not until August, 1916, did they know of the disposition of the Corbett estate, or that they were the heirs of John Corbett, deceased. Thereafter they brought this action.

The District Court held that the allegations of fraud were insufficient; that by the statutes of Idaho the decree of the probate court became conclusive; that plaintiffs were guilty of laches, and were barred by the general statute of limitations. Plaintiffs appeal.

The suit in its main aspect is one seeking to charge Connolly, administrator, as a trustee for plaintiffs, and individually, as a distributee. The complaint makes a strong showing of plaintiffs' ignorance of their rights. From 1910, the time that they knew of Corbett's death, they were diligent in seeking advice and helping their mother, acting however, in the honestly mistaken belief that she was lawfully entitled to the estate of her half-brother, their uncle. Nor did they know that they themselves were his heirs until August, 1916. In the lifetime of the mother, earnest effort in her behalf was made to have the court recognize her claim that she was the only and sole surviving heir of John Corbett and rightfully entitled to the estate. In apparent good faith her claims were litigated until May, 1912, when the Supreme Court of Idaho, in Connolly v. Reed, 22 Idaho, 29, 125 Pac. 213, in an action by Lawrence F. Connolly et al. for writ of prohibition to Reed, as probate judge of Kootenai county, Idaho, held that under the Idaho laws of succession (Rev. Codes, §§ 5700–5715) the mother, Bridget, being a nonresident foreigner, could not take by succession, because she failed to initiate a claim within five years after the death of her

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half-brother, and that even upon the assumption of fraud by Connolly in not having reported to the probate court that Bridget was the only surviving heir to the estate, and in not having advised her that her brother was dead and had left an estate which she was entitled to inherit, she was not prejudiced if she failed to appear and assert her rights within the definite statutory five-year period.

Later the same learned court, in October, 1913, in an application by Lawrence Connolly and others for writ of prohibition directed to the probate judge of Kootenai county to restrain consideration of a petition presented by the state of Idaho in the matter of the estate of Corbett, held that under the statutes of the state (sections 5715, 5716) it was not intended that the property of the deceased person should escheat to the state if he had any heirs who were entitled to succeed thereto, and that a nonresident foreigner could not, by failure to make application to succeed to such estate, deprive resident heirs of the right to succeed thereto. Connolly v. Probate Court, 25 Idaho, 35, 136 Pac. 205. Inasmuch as under the statute of Idaho "heirs" means those next of kin, citizens and residents of the United States, entitled to succeed to the person who dies intestate, we pass the general question of appellants' right of succession as not seriously controverted.

[1] The first point for our attention is: What was the position which Connolly, administrator, occupied toward the estate and these plaintiffs? If his relationship was fiduciary, the principles of law which govern will not in our opinion support the decree; while if he were free to deal wth the plaintiffs as at arm's length, then there is little or no equity in the complaint, and it was properly dismissed. The doctrine of equity as applied by the Supreme Court calls for strict enforcement of the rule that forbids one holding a trust relation from making private use of trust property. Oliver v. Piatt, 3 How. 333, 11 L. Ed. 622; Stahl v. Stahl, 214 Ill. 131, 73 N. E. 319, 68 L. R. A. 617, 105 Am. St. Rep. 101, 2 Ann. Cas. 774.

[2-5] We are satisfied that, when Connolly was appointed administrator, he was in equity a trustee for heirs. His duty, therefore, was to protect the interests of his cestuis que trust. Michoud et al. v. Girod, 4 How. 503, 11 L. Ed. 1076; Johnson v. Waters, 111 U. S. 671, 4 Sup. Ct. 619, 28 L. Ed. 547. In the Appeal of O'Neil, 55 Conn. 409, 11 Atl. 857, the administratrix, a sister of the deceased and an heir, obtained an order of distribution of an estate and intentionally omitted the name of a distributee also a lawful heir. It was found that when the order was made the administratrix knew that appellant was living and was entitled to a share, and that the administratrix obtained the order of distribution by intentionally concealing such knowledge from the probate court, and upon these facts it was held that there was a breach of trust, and that the order of distribution was fraudulently obtained by the administratrix, for the manifest purpose of paying over to herself and the other named distributees the share of the estate that belonged to the appellant.

The averments of the present complaint as stated by us tell the court that Connolly informed the probate court in Idaho that he and his brothers and sisters were the cousins and heirs at law and next of

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kin of the deceased, and therefore entitled to take under subdivision 5, section 5702, Revised Codes of Idaho, which provides for distribution as follows:

"If the decedent leave nether issue, husband, wife, father, mother, brother nor sister, the estate must go to the next of kin in equal degree," etc.

Our construction is that when the cousin set forth that he was an heir at law, well knowing that he was not, he meant that he was the next of kin resident in the United States, and, this being the averment, we think, when it is considered with the allegations as to the intent of Lawrence Connolly falsehood and deception are plainly charged. As administrator Connolly's duty was to see that those, and those only entitled to share in the estate, did so. The suppression of knowledge which he had was the withholding of the truth, and the motive, as set forth, was his greed of personal gain. Pomeroy's Equity Jurisprudence, § 1077. The decisions of the Supreme Court of Idaho, already cited, do not conflict with our view for in those cases, inasmuch as Bridget Madden had no interest in the subject-matter of the suits, no relationship of trust existed between her and the administrator.

It being our opinion that there was a trust relationship, it follows that Lawrence Connolly, administrator, could not make a contract with himself as an individual in respect to the property of the estate. On principle, therefore, he could not profit by a decree of distribution in favor of himself obtained by fraud. Section 5627 of the Idaho Revised Codes, providing what a decree of the probate court must contain, declares that the court must name the person and parts to which each shall be entitled, and that such person may demand and recover his respective shares from the administrator or any person having the same in possession, and that "such order or decree is conclusive as to the rights of heirs, * * * subject only to be reversed, set aside, or modified on appeal." By section 5666 the appeal must be taken within 60 days after the decree is entered. Section 4831 provides that appeal may be taken from a judgment or order of the probate court in probate matters granting letters of administration, against or in favor of setting apart property, settling an account of an administrator, refusing, allowing, or directing the distribution of an estate or the payment of a debt, claim, or distributive share. Section 4834 provides the method of taking the appeal and for giving of a notice and the service thereof on the administrator, and all other parties interested who appeared upon the motion or proceeding which the appellant desires to have reviewed, or upon their attorneys. Sixty days is the time within which the notice of appeal must be filed and served. Section 5626 provides that upon the final settlement of the accounts of the administrator, or at any subsequent time upon the application of the administrator or of any heir, the court must proceed to distribute the residue of the estate in the hands of the administrator among the persons who by law are entitled thereto, and by section 5627 the court must name the persons and the proportions or parts to which each shall be entitled. Under the statutes it was obligatory upon Connolly as administrator to apply to the court in his representative capacity, and

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it is too plain for argument that his duty was to advise the court in absolute good faith of all the knowledge he possessed concerning the persons who under the law were entitled to the estate. Failure to do this, with the intent to profit by concealment when he had the knowledge, must be regarded as fraud sufficient to make the decree recovered by the administrator a fraud as against them.

[6] Having now concluded that the case is one of fraud by a trustee, may equity give relief to the cestuis que trust, or will they have to be dismissed upon the ground that the United States courts will not nullify the effect of the decree of the probate court in Idaho. The answer is that, although the federal court will not disturb the decree of the probate court by annulling or supervising the same, nevertheless as a court of equity it is open to hear the complaint of these appellants, and may deprive the defendants of the fruits of a fraudulent judgment obtained in a state court. In Arrowsmith v. Gleason, 129 U. S. 86, 9 Sup. Ct. 237, 32 L. Ed. 630, a decree was asked setting aside and vacating an order of sale made in the probate court of Ohio and all proceedings therein affecting plaintiff's title to certain lands, and declaring the same and the deeds executed by his pretended guardian to be void and of no effect. It was argued that the United States court had no jurisdiction to make a decree setting aside and vacating the orders of the probate court. But the Supreme Court said:

> "If by this is meant only that the Circuit Court cannot by its orders act directly upon the probate court, or that the Circuit Court cannot compel or require the probate court to set aside or vacate its own orders, the position of the defendants could not be disputed; but it does not follow that the right of Harmening in his lifetime or of his heirs since his death, to hold these lands as against the plaintiff, cannot be questioned in a court of general equitable jurisdiction upon the ground of fraud. If the case made by the bill is clearly established by proof, it may be assumed that some state court, of superior jurisdiction and equity powers, and having before it all the parties interested, might afford the plaintiff relief of a substantial character. But whether that be so or not, it is difficult to perceive why the Circuit Court is not bound to give relief according to the recognized rules of equity, as administered in the courts of the United States. * * *"

After citing Payne v. Hook, 7 Wall. 425, 19 L. Ed. 260, the court said that, while there are expressions apparently asserting a counter doctrine, the later decisions of the Supreme Court show that a federal court may, without controlling, supervising, or annulling the proceedings of state courts, give such relief in cases such as was then before it as is consistent with the principles of equity; that the court in such cases does not act as a court of review, nor inquire into any irregularities or errors of proceedings in another court, but will scrutinize the conduct of the parties, and, if it finds that they have been guilty of fraud in obtaining a judgment or decree, will deprive them of the benefit of it, and of any inequitable advantage which they have derived under it.

The latest decision of the Supreme Court upon the subject is Simon v. Southern Railway Co., 236 U. S. 117, 35 Sup. Ct. 255, 59 L. Ed. 492, which confirms the principle of the earlier decisions. We there-

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fore are of the opinion that, this suit being one to declare the appellees the trustees of the property which they fraudulently obtained, jurisdiction is properly sought in the federal courts.

[7-9] We next inquire whether the cause of action was barred by the provisions of section 4052 or subdivision 4 of section 4054 of the Code of Civil Procedure of the Idaho Revised Codes, which provide that an action upon any contract obligation or liability founded upon an instrument in writing shall be commenced within five years, and that an action for relief on the ground of fraud or mistake should be commenced within three years, and that the cause of action in such case is not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake. The complaint shows that the letters of administration upon the estate of Corbett were issued to Connolly February 20, 1907; that decree of distribution was made August 23, 1909, and distribution was had on the 28th of June and the 3d of July, 1912. Again, we resort to the complaint for information, and find that, after the plaintiffs learned of the death of their uncle in May, 1910, they were laboring under the belief that she, their mother, was the sole heir of her brother. They knew of the mother's claims and suit to enforce them, and they believed that they had no personal interest in the estate of their uncle while their mother lived. Plaintiffs were illiterate people, and naturally confided in counsel whose advice they sought. Their mistake was very natural under the circumstances. The mother died in August, 1914, but plaintiffs were again told that they had no right in the estate of Corbett, because the Supreme Court of the state of Idaho had determined in two suits that their mother had no right, and that therefore they could have no right; and not until 1916, after continued investigation, with the aid of counsel, did they learn that they were the heirs entitled to inherit the estate of their uncle, but that the estate was no longer under the control of the court, and by the fraud practiced upon the probate court had been distributed to Connolly and his brothers and sister. Plaintiffs without delay employed counsel to proceed, and, although advised that they could not recover, they persisted, and in March, 1917, after demand, commenced this suit. Plaintiffs, in our opinion, have shown sufficient reasons for their mistake, and for not having made an earlier discovery of the fraud that had been practiced upon them. Michoud v. Girod, 4 How. 561, 11 L. Ed. 1076; Pomeroy's Equity, § 847; Stearns' Adm'rs v. Page, 7 How. 819, 12 L. Ed. 928.

What has been said applies also to the question of laches. Under the allegations of the complaint a court of equity should be reluctant to deny relief merely upon the ground of laches. Bryan v. Kales, 134 U. S. 126, 10 Sup. Ct. 435, 33 L. Ed. 829.

[10] That the sureties of the administrator are proper parties to the suit is laid down in Payne v. Hook, supra, where it was held that a court of equity, having power to determine the liability of the administrator for his misconduct, may, in order to do complete justice, bring before the court sureties, parties in interest, in case the administrator should fail to pay.

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In view of the conclusions which we have reached, we think that the District Court should allow the proposed amendment offered by the plaintiffs to their complaint. It somewhat more clearly presents the facts upon which plaintiffs rely. The decree of the District Court is reversed, and the cause is remanded, with directions to overrule the order dismissing the complaint, and to require defendants to answer.

Reversed.

PARKERSON v. BORST.

(Circuit Court of Appeals, Fifth Circuit. April 5, 1918.)

No. 3202.

1. JURY ⊂⊃28(6)—WAIVER OF RIGHT TO TRIAL BY JURY.
An objection to the jurisdiction of a federal court on the ground that the citizenship of plaintiff is not as alleged, thus raising an issue of fact, is most properly presented by plea in abatement; but, when a motion to dismiss on that ground is determined by the court without objection, the right of plaintiff to a jury trial on the issue is waived.

2. COURTS ⊂⊃342—FEDERAL COURT—NATURE OF CAUSE OF ACTION.
A bill alleging that defendant's intestate, as agent for the investment of money for complainant, sold notes owned by her and fraudulently substituted others, but which sought only an accounting and money judgment for the notes taken, *held* not to state a cause of action in equity, but in effect one at law for conversion.

3. TRIAL ⊂⊃11(3)—TRANSFER OF CAUSE TO LAW SIDE.
Where a bill in a federal court presents a mere cause of action at law for damages, of which equity is without jurisdiction, a motion to transfer the cause to the law side may be made at any time before the taking of proofs.

4. DISCOVERY ⊂⊃19—IN EQUITY—BILL FOR DISCOVERY.
To give equity jurisdiction of a bill as one for discovery, where it also prays for other relief, it must allege that discovery is essential to such relief.

Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Suit in equity by Mrs. Louise Stone Borst against Mrs. Camilla Putnam Parkerson, testamentary executrix of W. S. Parkerson, deceased. Decree for complainant, and defendant appeals. Reversed.

Edwin T. Merrick, Philip Gensler, Jr., and Ralph J. Schwarz, all of New Orleans, La., for appellant.

E. J. Bowers, of Gulfport, Miss., and D. B. H. Chaffe, of New Orleans, La., for appellee.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

GRUBB, District Judge. [1] The jurisdiction of the District Court is questioned by the appellee; the citizenship of the plaintiff, in the state of Mississippi, as alleged in the bill, being challenged as a matter of fact by the appellant. The question was raised in the District Court by a motion to dismiss the bill for want of jurisdic-

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tion. In the view we have taken of the side of the court upon which the case was properly triable, the issue as to the citizenship of the plaintiff would have been better presented by a plea in abatement in the nature of a plea to the jurisdiction, as held in the case of Hartog v. Memory, 116 U. S. 588, 6 Sup. Ct. 521, 29 L. Ed. 725; upon which plea an issue could have been framed, which would have been triable by a jury. However, the defendant elected to present the question by way of a motion, addressed to the court and tried by him, with the consent of the defendant. This was equivalent to a waiver of defendant's right to a jury trial upon this issue and a consent that it be heard by the District Judge without a jury. The District Judge found, upon the facts submitted to him upon hearing of the motion to dismiss for want of jurisdiction, that the plaintiff was a citizen of Mississippi, and the finding is supported by tendencies of the evidence set out in the record. Giving to the finding the effect a verdict of a jury would have been entitled to, if the issue had been so tried, we do not think the evidence was so clearly against the conclusion of the District Judge as to warrant us in setting aside his conclusion, on the motion to dismiss for want of jurisdiction in the District Court as a federal court.

After the defendant had answered the bill of complaint, but before any testimony was taken by either plaintiff or defendant, the defendant moved the court to transfer the cause to the law side of the docket under the twenty-second equity rule. The plaintiff resisted the motion upon the ground (1) that the bill presented a proper case of equitable jurisdiction; and (2) that the motion, made after answer filed, came too late.

[2] The cause of action presented by the bill of complaint had as its basis the transfer of certain notes which the intestate, who had acted as agent for defendant in the investment of her moneys, had made in his lifetime to others of his clients for whom he was acting in a similar capacity. It seems clear that the authority of the intestate to transfer securities of the plaintiff for reinvestment existed, if properly exercised, and with no restrictions other than those imposed by the law. It is claimed by the plaintiff, and there is evidence in the record tending to support the claim, that the intestate transferred certain of the securities of the appellee to others of his clients, substituting therefor notes, which he had previously procured, either for himself or for another of his clients, when he was interested in the notes or in the success of the maker of them in a way that made it improper for him to have made the transfer; i. e., that he was acting in a dual capacity in the transaction, representing the plaintiff, the buyer, as agent, and being himself either the seller, or personally interested in procuring the transfer to his client, the plaintiff. The relief prayed in the bill was for an accounting, a money decree in a fixed amount ($20,000) against the estate of the intestate for the amount of plaintiff's money or securities used by the intestate to purchase the substituted notes for the plaintiff, and for general relief. The bill did not seek to follow the securities of the plaintiff alleged to have been transferred by the intes-

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tate, or to trace them into the possession of the transferees, nor did it seek to hold them or him as trustees in invitum. It merely sought a money decree against the estate of the intestate, to be satisfied out of its general assets, as damages for the alleged unauthorized transfer or conversion of the money or securities of plaintiff, used by the intestate to purchase the notes, in which, or in the transfer of which, it is claimed the intestate was interested. The relief sought was such that "a judgment for pecuniary damages would adjust and determine all the rights of the parties."

[3] In the case of Buzard v. Houston, 119 U. S. 353, 7 Sup. Ct. 249, 30 L. Ed. 451, the Supreme Court said of a bill praying for that character of relief that, it being "the only redress to which the plaintiffs, if they prove their allegations, are entitled," there was "no ground upon which the bill could be maintained." In the case of Cecil National Bank v. Thurber, 59 Fed. 913–916, 8 C. C. A. 365, the Court of Appeals for the Fourth Circuit said:

"In the present case there is no fund, bank deposit, or particular property which plaintiffs seek to apply to their claim; the conversion of plaintiffs' claim to their own use created simply a pecuniary liability. Even though a cause of action involves equitable features, if the legal remedy by pecuniary judgment is complete, sufficient, and certain, it must be resorted to."

It is manifest that the prayer for an accounting adds nothing to the equity of the bill. It is conceded that the value and amount of plaintiff's securities, alleged to have been converted by the intestate, was evidenced by the face value of the substituted note, and the decree of the District Court found that reference to a master to state the account was unnecessary, since the damages were liquidated by the amount of the substituted note; the securities having been concededly exchanged dollar for dollar with the note taken in lieu of them.

[4] Discovery was not prayed for in the bill. If it is to be considered as included in the prayer for general relief, it still fails to make out a proper bill for discovery, since other relief is also prayed for in it, and there is no averment that discovery was essential to the other relief prayed, nor was any use made of the answer for that purpose. A bill of discovery and relief contains equity only upon these conditions. Story, Equity Pleading, § 324; Russell v. Clark, 7 Cranch, 69, 3 L. Ed. 271; Cecil National Bank v. Thurber, 59 Fed. 914, 8 C. C. A. 365.

We think the plaintiff had a plain, complete, and adequate remedy at law, within the meaning of section 723 of the Revised Statutes (Comp. St. 1916, § 1244), and was entitled to a trial by jury, under the Seventh Amendment to the Constitution, if seasonably insisted upon.

The plaintiff contends that the defendant's motion, made first after answer on the merits, came too late. If the bill presents no cause of action cognizable in equity, the objection may be made at any time, even in the appellate court, or taken notice of by the court itself. If it presents a subject-matter of which both courts of law and courts of equity may take jurisdiction, but in which the remedy at law is plain, adequate, and complete, the objection that there exists such plain, adequate, and complete remedy at law, must be made at the earliest moment. Reynes v. Dumont, 130 U. S. 354–395, 9 Sup. Ct. 486, 32 L. Ed.

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934. The bill presenting a mere cause of action at law for damages for the alleged conversion of plaintiff's securities by intestate, her agent, and no ground for equitable jurisdiction, might well be classified under the first of the two classes mentioned.

The motion, however, was not to dismiss the bill, but to transfer the cause to the law side of the docket of the District Court. Equity rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv) is as follows:

"If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall forthwith be transferred to the law side and be there proceeded with with only such alteration in the pleadings as shall be essential."

Under the terms of this rule, we think a motion to transfer is timely made, if filed before any testimony has been taken and any hearing, other than on motions or on the pleadings, had. The power given to the court by the rule to alter the pleadings, as may be essential to a trial on the law side of the docket, clearly contemplates a transfer after the pleadings are filed. It also shows that no harm can come from a transfer made after answer filed but before proofs taken. The essential difference between a trial in equity and at law, laying aside differences in pleading, is the method of taking proofs and of trial by or without a jury. If transfer antedates the taking of proofs and the beginning of the trial of facts, it is seasonable within the letter and spirit of the rule. If the pleading has been conducted as in a court of equity, its alteration to conform to a trial on the law side is expressly provided for by the rule. The defendant's right to a trial by jury, under the Seventh Amendment, is not waived by his not demanding it in his answer. It requires his consent, or what is equivalent thereto, affirmatively expressed. Entertaining these views, we think the motion to transfer the cause to the law side of the District Court should have been granted.

As the proofs will be different upon a trial with a jury, we refrain from expressing an opinion as to the other questions involved in the appeal.

The decree of the District Court is reversed, and the cause remanded for further proceedings in conformity with this opinion.

LEO FEIST, Inc., v. AMERICAN MUSIC ROLL CO.

(Circuit Court of Appeals, Third Circuit. April 24, 1918.)

No. 2345.

1. COPYRIGHTS ⇐=48—LICENSE—MUSICAL COMPOSITION—MECHANICAL REPRODUCTION.

Under Copyright Act March 4, 1909, § 1 (Comp. St. 1916, § 9517), providing that, if the owner of a copyrighted musical composition uses or permits its use on a mechanical player, any other person may do so at a fixed royalty on notice to him, letters to an owner, which were answered, *held* not to create a personal license, but to be statutory notices.

⇐=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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2. COPYRIGHTS ⇐90—MUSICAL COMPOSITION—SUIT FOR ROYALTIES—COUNSEL FEES AND DAMAGES.

In a suit by the owner of a musical copyright against one using the composition on a mechanical player to recover the royalties fixed by Act March 4, 1909, § 1 (Comp. St. 1916, § 9517), complainant may require the court to exercise its discretion as to allowance of counsel fees and treble damages.

Appeal from District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Suit in equity by Leo Feist, Incorporated, against the American Music Roll Company. From the decree, complainant appeals. Reversed.

Bernheimer & Sundheim, of Philadelphia, Pa. (Francis Gilbert, of New York City, and I. Lasker Greenberg, of Philadelphia, Pa., of counsel), for appellant.

Howard M. Long and Leighton P. Stradley, both of Philadelphia, Pa., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. This bill—which was brought by Leo Feist, Incorporated, the owner of certain copyrighted songs that had been reproduced mechanically by the American Music Roll Company—prayed for an account, an injunction, the recovery of royalties, a counsel fee, and treble damages. Royalties were recovered, but the court refused to exercise its discretion on the subject of counsel fees and damages, holding that the plaintiff had voluntarily licensed the roll company and for that reason could in no event be advantaged by the punitive provisions of Act March 4, 1909, c. 320, 35 Stat. 1075. The appeal raises the single question, whether this refusal was erroneous, and whether the court should have exercised its discretion. Let us first consider the act, so far as it bears on the mechanical reproduction of music.

In February, 1909, the Supreme Court decided (White-Smith, etc., Co. v. Apollo Co., 209 U. S. 1, 28 Sup. Ct. 319, 52 L. Ed. 655, 14 Ann. Cas. 628) that perforated rolls for the piano were not "copies" within the meaning of the statutes then in force, and suggested that, if (as was true) this condition of the law permitted the mechanical reproduction of musical compositions without the payment of royalty, "such considerations properly address themselves to the legislative and not to the judicial branch of the government." Congress followed this suggestion, and in the revised act of 1909 provided for the protection of such compositions by giving to the owner the exclusive right (section 1, cl. "e" [Comp. St. 1916, § 9517]) "to make any arrangement or setting of (the composition), or of the melody of it, in any system of notation or any form of record in which the thought of an author may be recorded, and from which it may be read or reproduced." But—for reasons that are not before us, but probably included the desire to guard against the possible monopoly of mechan-

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ical reproduction—the same clause went on to provide, "as a condition of extending the copyright control to such mechanical reproductions," that whenever the owner of a musical copyright should himself use, or should permit another to use, the copyrighted work upon instruments reproducing it mechanically, or should knowingly acquiesce in such use, any other person might make a similar use of the work upon paying the owner a royalty of 2 cents, and declared that such payment should free the article from further contribution to the copyright, except in the case of a public performance for profit. And in order that the public might know that a musical work had thus been thrown open to general use, the copyright owner, whenever he himself used or licensed another so to reproduce the work, was required to file notice of these facts in the office, the act declaring that the failure to file should be a defense to an action for infringement. As in many cases the owner was thus compelled to sell the right of mechanical reproduction, at a price fixed by the statute, to any one that desired to buy, without regard to his character or his business standing, the clause went on to give some protection to the owner by providing that he might require the compulsory licensee to furnish each month a sworn report of the number of parts produced during the month preceding, and declared that, if he should fail to pay the statutory royalty within 30 days after demand, the court might award the owner, not only costs, but a reasonable counsel fee and a penalty, not exceeding three times the royalty.

Having thus provided for notice to the public that any one was free to reproduce a particular work, the act in a later section (section 25, cl. "e" [Comp. St. 1916, § 9546]) prescribed a method for acquainting the owner with the names of the compulsory licensees, declaring that whenever any person "in the absence of a license agreement" intended to make a mechanical reproduction in reliance on the compulsory license provision of section 1, cl. "e," "he shall serve notice of such intention by registered mail upon the copyright proprietor at his last address disclosed by the records of the Copyright Office, sending to the Copyright Office a duplicate of such notice," and, in order to enforce compliance, the clause gives the court discretion, "in addition to sums hereinabove mentioned," to award the owner a further sum by way of damages, and to grant an injunction until the award is paid.

[1, 2] Turning now to the facts, about which there is almost no dispute, we find that between February 8, 1914, and September 1, 1916, the plaintiff copyrighted 35 songs, and shortly after the respective dates of copyright filed the notice required by section 1, cl. "e." Between August 25, 1914, and May 21, 1916, the defendant sent letters to the plaintiff, and received replies, concerning each of these songs; the true construction of this correspondence being the point of the controversy. The defendant's position—adopted by the District Court—is that any particular letter, with its reply, is a contract of license, and that the legal relation of the parties does not depend on the compulsory license feature of the act. The plaintiff contends that the roll company's letters were essentially notices under section

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25, cl. "e," and that the plaintiff's replies were intended to show acquiescence in what could not be prevented. In our opinion, this contention is correct.

The defendant did not offer its own letters, or copies thereof, in evidence, so that we have only one side of the correspondence. This is not a satisfactory way to prove a contract that is averred to consist of a written request and a written reply, and it might be sufficient to say that, as the answer expressly set up "the special permission and license of the complainant * * * according to a written agreement therefor," and thus undertook to prove such an agreement, the defendant has failed to sustain the burden of proof. But, aside from this, we think the evidence shows that the dealing of the parties referred solely to the compulsory license provisions of the act. We see little sign of an attempt to make a formal agreement. The plaintiff had thrown the songs open to mechanical reproduction, and the roll company knew the situation. But, before reproduction could lawfully begin, the defendant was bound to give the plaintiff notice, and we may assume without impropriety that the missing letters were intended to obey the act. What words were employed we do not know, but we can hardly go wrong in believing that the ordinary terms of business politeness were used. This is indicated by the tone of the replies, in which "permission is granted," or "we are pleased to grant you permission," or "we hereby grant you the right," to use for roll purposes the following number, etc. But it is significant that (except two) all the plaintiff's replies in evidence couple the "permission" or the "right" with a reference to "the terms and conditions of the new copyright law," or some equivalent phrase. Moreover, only three of the letters say how much the royalty is to be, and none of the other letters mentions the word "rate," thus leaving the royalty uncertain. In addition, the two letters just referred to say nothing about "permission," or even about the act, but merely state that the plaintiff is sending copies, or the orchestration, of certain songs. Now, if the defendant's contracts are to be inferred from the plaintiff's replies, it is plain that for the four songs mentioned in these two letters no license can be pretended. But these two letters have their own value in throwing light on the true character of the correspondence: The roll company could not "cut" the songs without obtaining the necessary music, and for this it was applying to the plaintiff. The missing letters probably contained in substance a notice that the defendant was about to avail itself of the act, and asked for the music that was required, no doubt putting the request in courteous words, perhaps in the form of a request for "permission." The plaintiff could not refuse, and replied with equal courtesy and equal looseness; neither party supposing for a moment that they were making a contract outside of the act, and both parties paying little or no attention to the terms that would certainly have been considered, if they had understood that bargaining was in progress. For example, nothing is said concerning the length of time the license was to last, a matter that would not have been overlooked, if the parties had been making a voluntary contract. As we think, they

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both knew that the act had already made the contract, and that nothing remained for them except to comply.

In another respect the defendant showed its understanding of the situation. No letter in evidence says a word about reports—another subject that would hardly have been omitted from a voluntary contract—but in accordance with the act the defendant did make reports from time to time; the last being furnished on March 7, 1916, covering the period ending December 31, 1915. During the subsequent correspondence, extending over several months before suit was brought the plaintiff was continually demanding a further report, not under a contract, but under the Copyright Act, and the defendant never suggested the existence of a contract, but continually acquiesced in the rightfulness of the plaintiff's demands.

We may add that the contracts set up by the defendant would have been superfluous, and are therefore unlikely to have been made. They refer to nothing that the act does not already provide for, namely, the right to use, and the royalty, and would hardly have been relied on now, if some loose language had not been used. Upon such language we are not disposed to lay much weight, especially in the present defective state of the evidence; if we had the defendant's proposals, we should be better able to judge whether a contract outside of the act was what the parties had in mind.

We need not prolong the discussion. In our opinion the controversy is governed by the compulsory license provisions of the act, and accordingly the decree is reversed, and the District Court is instructed to exercise its discretion concerning the allowance of a reasonable counsel fee and punitive damages under section 1, cl. "e," and (if either or both be allowed) to fix the amount thereof.

BOARD OF COM'RS OF KAY COUNTY, OKL., v. POLLARD-CAMPBELL DREDGING CO.

(Circuit Court of Appeals, Eighth Circuit. April 29, 1918. Rehearing Denied August 26, 1918.)

No. 4855.

1. Courts ⇐366(8)—Precedents—Decisions of State Court.
When brought in question in a federal court, the powers and duties of an Oklahoma county and a drainage district must be determined from the applicable Oklahoma statutes, as interpreted by the courts of that state.

2. Drains ⇐55—Duties to Build Bridges.
Under Comp. Laws Okl. 1909, §§ 3050, 3069, and Rev. Laws 1910, §§ 7581, 7609, relating to drainage, highways, and bridges, it is the duty of a county to build bridges more than 20 feet long over drains, across public roads dug by a drainage district as part of its improvement; the bridges being for the benefit of the general public.

3. Action ⇐27(1)—Tort or Contract.
Where the petition alleged plaintiff was the legal holder for value of a warrant issued by the county commissioners against the drainage district fund, but that the district had no funds, though sufficient funds to

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pay the warrant were unlawfully taken by the county commissioners and expended for bridges, which should have been paid for by the county, an action for the face of such warrant is on the implied promise, that is, for money had and received, and is not an action in tort.

4. MONEY RECEIVED ⊜1—ACTIONS—MAINTENANCE.

An action for money had and received may in general be maintained, whenever one has money in his hands belonging to another, which in equity and good conscience he ought to pay over to that other.

5. MONEY RECEIVED ⊜6(6)—ACTIONS AGAINST COUNTY—RIGHT TO MAINTAIN

Where the commissioners of a county, to defray the expense of building bridges, for which the county alone was liable, took from the funds of a drainage district an amount sufficient to pay a warrant duly issued to plaintiff for value, and plaintiff was thus denied payment, plaintiff may recover from the county in an action for money had and received.

In Error to the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Action by the Pollard-Campbell Dredging Company, a corporation, against the Board of County Commissioners of Kay County, Okl. There was judgment for plaintiff, and defendant brings error. Affirmed.

J. F. King, of Newkirk, Okl. (F. C. Duvall, of Newkirk, Okl., on the brief), for plaintiff in error.

Grant Stanley, of Oklahoma City, Okl., for defendant in error.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

STONE, Circuit Judge. Suit by the Pollard-Campbell Dredging Company against the board of county commissioners of Kay county, Okl., on a warrant for $4,630.98, issued in payment of work done in connection with drainage district No. 1 of that county. The warrant specifically provided that the payment should be "out of the drainage fund of drainage district No. 1." The prayer of the petition was, not for payment out of that fund, but for a general judgment against the county. The liability of the county, as distinguished from the drainage district fund, was predicated upon allegations that the fund was exhausted, that the commissioners refused to make further levies against the landowners in the district, and that the county commissioners had improperly diverted to county purposes from this fund sufficient to pay the warrant.

Several points were presented for consideration, but the decisive ones are as to the propriety of the use by the county of part of the drainage district fund to build bridges more than 20 feet long over drains across public roads dug by the district as a part of the drainage improvement, and as to the right to bring an action of this character against a county. The funds in question were derived from special assessments levied as benefits against the land within the district, and available only for expenditures in connection with the drainage project. The county took from the district fund the cost of the bridges, under the theory that, the expense being occasioned solely

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by the drainage work, the district, and not the county, should pay for the bridges.

[1, 2] The county and district are creatures of statute; therefore this controversy, involving the powers and duties of each, must be determined by an examination of the Oklahoma written law, as interpreted by the courts of that state. The applicable statutes are found in sections 3050 and 3069, Compiled Laws of Oklahoma 1909, part of the drainage law, and sections 7581 and 7609, Revised Laws of Oklahoma 1910, relating to highways and bridges. The Supreme Court of Oklahoma, in Wilkins v. Hillman, 45 Okl. 451, 145 Pac. 1111, L. R. A. 1915D, 249, has passed upon this precise question, and considered all of the above sections. After a thorough examination and discussion of the statutes and decisions, the court held that it was the duty of the county to build this character of bridges, saying:

"The bridges required are for the benefit of the general public and special assessments cannot legally be made to pay the expense of constructing same. The expense of building said bridges is a subject of general taxation."

[3-5] It is therefore determined that the county erroneously used the drainage district funds for its own purposes, without legal warrant. The situation, then, is that the plaintiff holds a warrant payable from the drainage funds; that demand for payment thereof has not been met, because of insufficient funds; that sufficient funds to pay the warrant were erroneously taken by the county; that those funds were expended for legitimate, beneficial county purposes. In this status the holder claims right of recovery under either of two theories, namely, that the county must answer for the sum it improperly abstracted and applied to its own beneficial use, and that the county must answer for the refusal of the county commissioners to reassess benefits in the drainage district to an amount sufficient to absorb this indebtedness. As, in our judgment, the first theory is sound, it will be unnecessary to consider the second.

While plaintiff in error contends that this suit is tort for conversion, and therefore is not maintainable against the county, a careful reading of the petition convinces us that the suit is not of that character. The allegations essential here are, in substance, that plaintiff is the legal holder for value of a warrant issued by the county commissioners against the drainage district fund; that demand for payment thereof has not been complied with, because the district had no funds; that sufficient funds to pay the warrant were unlawfully taken by the commissioners from such fund and expended for bridges, which should have been paid for by the county, and not by the district. The relief prayed is for the face of the warrant, with interest from its date, and costs. In First National Bank v. Pickens, 7 Ind. T. 725, 104 S. W. 947 (Court of Appeals of Indian Territory, 1907), a petition similar in its essential averments was held to be a suit upon a contract implied in law. We take the present suit, like that, to be for money had and received. As said in Strough v. Board of Supervisors, 119 N. Y. 212, 219, 23 N. E. 552, 554:

"The promise upon which the action for money had and received is founded is implied by law from the duty, resting upon one who wrongfully

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withholds from another money which he cannot conscientiously retain, to account for and restore it to the person or party equitably entitled to it."

Such an action "may in general be maintained whenever one has money in his hands, belonging to another, which, in equity and good conscience, he ought to pay over to that other." 27 Cyc. 849, and citations. And "the question, in an action for money had and received is: To which party does the money, in equity, justice, and law, belong? All that plaintiff need show is that defendant holds money which, in equity and good conscience, belongs to him. * * *" 27 Cyc. 854, and citations.

Here the plaintiff has given full value for this warrant and ought to receive payment therefor. The only reason it has not promptly had its money is that the county has taken the funds and applied them to other purposes beneficial to the county, and for which they should not have been used. A clear right of recovery has been shown. The county cannot thus appropriate to its own beneficial interest, for a legitimate county purpose, and retain the money of another. Colusa County v. County, 117 Cal. 434, 49 Pac. 457; Green v. Custer County, 8 Idaho, 721, 71 Pac. 115; Board of Commissioners v. Pike Civil Township, 168 Ind. 535, 81 N. E. 489; Board of Commissioners v. Trees, 12 Ind. App. 479, 40 N. E. 535; Clinton School Township v. Bank, 18 Ind. App. 42, 47 N. E. 349, 350; Boyd v. School Township, 124 Ind. 193, 24 N. E. 661; Boyd v. School Township, 123 Ind. 1, 23 N. E. 862, 863; Barney v. County, 33 Iowa, 261; Butler v. County, 15 Kan. 178; Endriss v. County, 43 Mich. 317, 5 N. W. 632; Borough of Henderson v. County, 28 Minn. 515, 11 N. W. 91; Crump v. County, 52 Miss. 107; Waitz v. County, 1 Nev. 370; Womble v. County, 74 N. C. 421; Newman v. County, 45 N. Y. 676; Bridges v. Board of Supervisors, 92 N. Y. 570; Strough v. Board of Supervisors, 119 N. Y. 212, 23 N. E. 552; City of Salem v. County, 25 Or. 449, 36 Pac. 163; Tarrant County v. Rogers (Tex. Civ. App.), 125 S. W. 592; Auerbach v. Salt Lake County, 23 Utah, 103, 63 Pac. 907, 90 Am. St. Rep. 685.

The judgment is affirmed.

MENTE et al. v. DE WITT RICE MILL CO.

(Circuit Court of Appeals, Eighth Circuit. April 25, 1918.)

No. 4874.

1. ESTOPPEL ⇐63—EQUITABLE ESTOPPEL—INJURY.

Defendants' refusal to carry out a contract of sale, on the ground that performance depended upon the making of another contract never executed, did not estop them, in an action for breach, from attacking the contract because there was no meeting of the minds, for the two grounds were not inconsistent.

2. ESTOPPEL ⇐57—EQUITABLE ESTOPPEL—PREJUDICE.

Defendants' refusal to carry out a contract of sale on a stated ground did not estop them from attacking the contract because there was no meeting of the minds, for the assertion of nonliability on the first ground could not have given defendants any advantage.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

3. ESTOPPEL ⟸58—EQUITABLE ESTOPPEL—PREJUDICE.
Defendant's refusal to carry out a contract of sale on a stated ground did not estop them from attacking the contract because there was no meeting of the minds, in absence of prejudice to plaintiff.

4. SALES ⟸23(4)—CONTRACTS—MEETING OF MINDS.
Where plaintiff's agent, who orally negotiated with defendant, had no authority to bind his principal, so that the arrangement was no more than an offer by defendant to make a contract on those terms, plaintiff's acceptance, which added conditions as to delivery and as to sales to others, etc., is such a modification of the offer that there was no meeting of the minds, resulting in a binding contract.

In Error to the District Court of the United States for the Eastern District of Arkansas.

Action by Eugene W. Mente and Emanuel V. Benjamin, copartners trading as Mente & Co., against the De Witt Rice Mill Company. There was a judgment for defendant, and plaintiffs bring error. Affirmed.

Henry P. Dart, Jr., of New Orleans, La. (F. G. Bridges, W. T. Wooldridge, and H. T. Wooldridge, all of Pine Bluff, Ark., and Dart, Kernan & Dart, of New Orleans, La., on the brief), for plaintiffs in error.

Charles T. Coleman, of Little Rock, Ark. (William M. Lewis, of Little Rock, Ark., on the brief), for defendant in error.

Before HOOK, CARLAND, and STONE, Circuit Judges.

STONE, Circuit Judge. Writ of error from a directed verdict for defendant at the close of plaintiffs' evidence in an action for damages arising from breach of contract.

The defendant contended that no binding contract existed, because the minds of the parties had not met upon the terms thereof. The court adopted this view. Plaintiffs insist that this was error for two reasons: (a) That defendant is estopped from taking this position, because it had before litigation given as its sole reason for nonperformance that this contract depended upon making another contract which was never executed; (b) that the minds of the parties met upon all of the essential terms of the contract.

[1-3] (a) The estoppel here urged is equitable. Union Central Life Insurance Company v. Drake, 214 Fed. 536, 547, 131 C. C. A. 82. Here we find no possible way in which defendant could have been benefited or plaintiffs have been damaged by the alleged "change of hold." Here no reason for nonperformance was given until after the entire time for performance had elapsed. It is not a case of refusal to perform for some reason which plaintiffs might have removed, had they known of it, and thus secured performance. Nor are the two grounds of the validity claimed inconsistent. Both were based upon a lack of meeting of minds. The plaintiffs have done the only thing they could do after they ascertained the attitude of defendant; in fact, the only thing they could have done, had it remained silent as to its reasons for nonperformance. They have gone into the market and bought the articles, and are now seeking to recover their loss. We

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think the rule should not be applied under such circumstances. Some of the cases in the federal courts which have dealt with the limits of this rule, most of them in connection with contracts, are Davis v. Wakelee, 156 U. S. 680, 15 Sup. Ct. 555, 39 L. Ed. 578; Railway Co. v. McCarthy, 96 U. S. 258, 24 L. Ed. 693; Galle v. Hamburg, etc., Gesellschaft, 233 Fed. 424, 147 C. C. A. 360; Polson Logging Co. v. Neumeyer, 229 Fed. 705, 144 C. C. A. 115; Union Central Life Ins. Co. v. Drake, 214 Fed. 536, 131 C. C. A. 82; Boston Elev. R. Co. v. Boyton Company, 211 Fed. 812, 128 C. C. A. 338; Taenzer & Co. v. R. Co., 191 Fed. 543, 112 C. C. A. 153; Goodman v. Purnell, 187 Fed. 90, 109 C. C. A. 408; Smith v. Boston Elev. R. Co., 184 Fed. 387, 106 C. C. A. 497, 37 L. R. A. (N. S.) 429; Seminole Sec. Co. v. Ins. Co. (C. C.) 182 Fed. 85; Mesa Market Co. v. Crosby, 174 Fed. 96, 98 C. C. A. 70; Western Union Teleg. Co. v. Thompson, 144 Fed. 578, 75 C. C. A. 334; Kansas Union Insurance Co. v. Burman, 141 Fed. 835, 73 C. C. A. 69; Oakland Sugar Mill Co. v. Wolf Co., 118 Fed. 239, 55 C. C. A. 93; McDonough v. Evans Marble Co., 112 Fed. 634, 50 C. C. A. 403; Brooks v. Laurent, 98 Fed. 647, 39 C. C. A. 201; Davis & Rankin B. & M. Co. v. Dix (C. C.) 64 Fed. 406 and Cornwall v. Davis (C. C.) 38 Fed. 878, 4 L. R. A. 563.

[4] (b) As alleged in the petition and established by plaintiffs' evidence, the circumstances surrounding the making of the contract were as follows: A traveling salesman of the plaintiffs orally negotiated with the defendant, and agreed upon the terms, subject, however, to a confirmation by plaintiffs. Before this confirmation had been received by the defendant, it wrote to plaintiffs' agents its understanding of the contract as follows:

"We beg to confirm our telephone conversation with you to-day, wherein we confirmed to Mente & Co.: '90,000 to 120,000 second-hand, mill run, rough rice bags, at 5½¢ mill. Shipments, latter part of November to January, inclusive. Our option as to shipments during these months. These bags to be free from junk bags.' In making shipments, if there are any junk bags in shipment, you are to allow us the best possible price for this grade of bags."

This letter was forwarded by the agent to the plaintiffs, who responded as follows:

"Your letter 18th to Mr. Max Goldsmith is here, and we confirm same, but we understand these are to be shipped in car lots, equal quantities monthly, November, December, January. Of course you understand we will have to have these shipments in car lots, as we could not stand L/C/L freight. We understand, in making the quantity 90,000 to 120,000, that you are to give us your entire output; the quantities named to be minimum and maximum, depending on your actual output. In other words, no goods are to be sold or furnished to others from your output until you have delivered us the maximum of 120,000, if you mill this quantity."

As the agent of plaintiffs who orally negotiated with defendant had no authority to bind his principal, the arrangement between him and defendant was of no greater legal standing than an offer by defendant to make a contract of those terms. Before that offer had been accepted, defendant replaced it with another contained in its letter above. The only acceptance of that offer is such as contained in the above letter of plaintiffs. A comparison of these two letters

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shows differences as to manner of shipment, rate of shipment, origin of bags to be shipped, and control over output of defendant. The offer was: 90,000 to 120,000 rice bags, to be shipped at option of defendant from latter part of November to February 1st. The acceptance was: Shipment in car lots, equal quantities monthly during November, December, and January, of entire output of defendants up to 120,000 bags; no bags to be sold elsewhere until this contract was performed.

Plaintiffs seek to avoid the apparent difference between the offer and acceptance by testimony that the expressions "90,000 to 120,000" bags meant the entire output of defendants between those figures, and that the custom of the bag trade was to ship in carload lots and in equal monthly quantities. They claimed that such explanations would show the letters harmonious upon all essentials of the contract. The court excluded these offers, upon the theory that the contract must be found, if at all, in the writings, which he took to be clear, unambiguous, and complete. We find it unnecessary to pass upon these rulings upon the evidence. Conceding, but not at all deciding, that plaintiffs had the right to and could have shown all they sought, yet we think there would still be a fatal difference between the offer and acceptance. There would be left the requirement in the acceptance that defendant could not sell bags to any one else until it had furnished 120,000 to plaintiffs in equal monthly shipments during the months of November, December, and January. No such restriction is suggested in the offer. Its materiality is self-evident. In our judgment the minds of the parties never met, and the action of the trial court in directing the verdict was proper.

The judgment is affirmed.

PATTERSON et al. v. DELAWARE & HUDSON CO. et al.

(Circuit Court of Appeals, Third Circuit. May 16, 1918.)

No. 2348.

1. COURTS ⇐308—FEDERAL COURTS—JURISDICTION.

Where the citizenship of one of the necessary defendants was the same as that of the plaintiff, the federal District Court is without jurisdiction, on the ground of diversity of citizenship.

2. COURTS ⇐405(5)—FEDERAL COURT—JURISDICTION—CIRCUIT COURT OF APPEALS.

While an appeal from a decree dismissing a bill for want of jurisdiction, because of lack of diversity of citizenship between all of the parties defendant and plaintiff, should, under Judicial Code, § 238 (Comp. St. 1916, § 1215), be taken directly to the Supreme Court, yet where the bill, as originally filed, showed diversity of citizenship between all of the parties, the Circuit Court of Appeals, no objection having been made, will dispose of an appeal from a decree dismissing the bill after one whose citizenship was the same as that of complainants was made a party defendant by amendment.

3. COURTS ⇐322(5)—FEDERAL QUESTION—AMENDMENT—EFFECT.

Where a bill was amended on complainants' motion, and not under compulsion of an order, the question whether the necessary diversity of citi-

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zenship to give the federal court jurisdiction was stated must be determined from the bill as amended.

4. Courts ⟸310—Federal Courts—Jurisdiction—Diversity of Citizenship—Indispensable Parties.

In a suit to enjoin a railroad company from trespassing upon land which it had formerly occupied as a right of way, federal jurisdiction depending on diversity of citizenship, a lessee of the land to whom the company had granted the right to remove culm is an indispensable party defendant; hence, having been made a party by amendment, the suit must be dismissed, such lessee's citizenship being the same as that of complainants.

Appeal from the District Court of the United States for the Middle District of Pennsylvania; Chas. B. Witmer, Judge.

Suit in equity by Augustus L. Patterson, and others, as executors and trustees under the will of Roswell P. Patterson, against the Delaware & Hudson Company, in which John J. Coyne was made a party defendant by amendment. From a decree dismissing the bill, complainants appeal. Affirmed.

M. J. Martin of Scranton, Pa., and J. Fred Schafter, of Sunbury, Pa., for appellants.

James H. Torrey, Thomas A. Donahoe, and Donahoe & Helriegel, all of Scranton, Pa., for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. On April 16, 1917, the plaintiffs, as executors and trustees under the will of Roswell P. Patterson, filed a bill of complaint asking that the Delaware & Hudson Company be enjoined from trespassing upon certain property of the plaintiffs, and from removing coal, culm, and other material therefrom, accounting for the culm already removed. On April 23 a restraining order was issued, and a rule was granted to show cause why the order should not be continued—in effect, why a preliminary injunction should not be granted. The culm was upon the property described, and was being removed by John J. Coyne under an agreement, made in March, 1917, by which Coyne bought the culm for a lump sum and the company leased the ground and conveyed the right to remove. The jurisdiction of the District Court was invoked solely on the ground of diversity of citizenship; the plaintiffs being citizens of Pennsylvania, and the defendant being a New York corporation. The company moved to dismiss the bill on the ground that Coyne was an indispensable party, because his property rights would be directly affected by the decree. On May 7 the rule for the preliminary injunction and the motion to dismiss were heard together, and testimony was taken by the District Judge. On June 20 the plaintiffs moved to amend by making Coyne a party defendant, and by adding averments concerning Coyne's occupancy of the premises and removal of the culm therefrom. The court allowed the amendment and granted the injunction on terms. Coyne appeared conditionally, and on August 1 filed an answer setting up that he was a citizen of Pennsylvania, claiming the right to

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set up this defense, and moving to dismiss on the ground of the court's lack of jurisdiction. The company also filed an answer to the amended bill, in which a similar motion was made. These motions were sustained, and a decree was afterward entered dismissing the bill on the ground of Coyne's citizenship. The pending appeal is from this decree.

The testimony showed that the plaintiff's testator had been the owner of a farm in the Middle district of Pennsylvania, title to which had formerly been in Leonard Starkweather, who in 1829 had conveyed certain rights therein to the defendant company, then the Delaware & Hudson Canal Company. The conveyance was "for the use, purposes, and conveniences of the railroad"; and, as in 1900 the company had abandoned its railroad (at least to some extent) laid upon the tract conveyed in 1829, the plaintiffs contended that the fee of the land, with the culm deposited thereon by the company, had reverted to their testator or to his heirs, and that the company had no right to make the sale and lease to Coyne. The culm had been deposited on the roadbed while the railroad was in operation, and on this and other grounds the company asserted a right to make the deposit and to exercise ownership thereof.

[1, 2] The merits of the controversy are not before us, and we intimate no opinion thereon; the sole question now being whether the District Court lost jurisdiction after the amendment was allowed and Coyne was made a party. As originally filed, the bill showed jurisdiction of the parties and the subject-matter, and it is equally clear that the court would not have had jurisdiction, if Coyne had been made a defendant in the first instance. 1 Comp. St. 1916, p. 650. In the latter event an appeal from a decree dismissing the bill for lack of jurisdiction could have been taken directly to the Supreme Court (Act March 3, 1891, c. 517, § 5, 26 Stat. 827; Judicial Code [Act March 3, 1911, c. 231], § 238, 36 Stat. 1157 [Comp. St. 1916, § 1215]); and perhaps that method of review would have been exclusive (U. S. v. Larkin, 208 U. S. 333, 28 Sup. Ct. 417, 52 L. Ed. 517). But as this point has not been urged, and as the precise question for decision is, not whether jurisdiction originally existed, but whether jurisdiction has since been lost we have concluded to decide the question instead of dismissing the appeal.

[3, 4] The bill was amended on the plaintiffs' own motion, and not against their objection or under the compulsion of an order, so that the proceeding is to be judged in the form they have chosen. Peninsular Iron Co. v. Stone, 121 U. S. 631, 7 Sup. Ct. 1010, 30 L. Ed. 1020; Merchants' Co. v. Ins. Co., 151 U. S. 384, 14 Sup. Ct. 367, 38 L. Ed. 195. Thus viewed, we cannot assent to the argument that the dispute should be treated as in substance between the plaintiffs and the company to which Coyne is merely an incidental party. On the contrary, he was an indispensable party (1 Fos. Fed. Prac. [5th Ed.] § 120), his rights are as directly involved as the rights of the company, and we do not see how the suit could have proceeded in his absence. He had not only bought the culm and paid for it, but was occupying the land and removing the culm, when the restraining order compelled

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him to forbear. If the plaintiffs' contention were sustained, he could remove no more, and must account for all he had taken, being remitted to his action against the company for such damages as he might be able to recover. Recognizing that he would of necessity be directly affected by an adverse decree, the plaintiffs properly made him a defendant; but they lost thereby the right to continue the action in a federal court. The case does not seem to admit of prolonged discussion. Since Coyne was a real, and not a formal, party, his citizenship could not be disregarded; the status of the parties in this respect may be considered after an amendment, just as it may be considered after they have been rearranged. Lindauer v. Compania, etc. (C. C. A. 8) 247 Fed. 428, — C. C. A. —.

The decree is affirmed.

SOCIÉTÉ DES FILMS MENCHEN v. VITAGRAPH CO. OF AMERICA et al.

(Circuit Court of Appeals, Second Circuit. April 10, 1918.)

No. 206.

1. COPYRIGHTS ⇐82—BILL FOR INFRINGEMENT—SUFFICIENCY.
A bill praying that defendant's copyright for a motion picture photoplay, based on the same incidents as a drama, which did not show in complainants any right to the copyright of the drama, or negative as to defendant's photoplay, the fact that there might be a separate copyrightable property therein, though it told substantially the same story as did the earlier stage play, whose incidents complainants' photoplay followed, is insufficient to state a cause of action based on a violation of copyright.

2. COPYRIGHTS ⇐20—PERSONS ENTITLED—AGENTS.
As the privilege of copyrighting is reserved to authors and proprietors by Act March 4, 1909, § 8 (Comp. St. 1916, § 9524), an agent has no power to copyright anything.

3. COPYRIGHTS ⇐82—INFRINGEMENT—BILL—SUFFICIENCY.
A bill praying that defendant's copyright for motion picture photoplay should be adjudged void, and for an accounting, etc., *held* insufficient to state a cause of action on the theory that defendants were enjoying profits from a motion picture film or story depicted thereon, made by a second company under agreements with complainant, and by that company permitted to be sold and exhibited in United States in violation of such contracts.

4. COPYRIGHTS ⇐36—LOSS OF COMMON-LAW RIGHTS.
Where authors took out a copyright, they lost their common-law rights, and an assignee of their cinematographic rights is not entitled to protection independent of the copyright.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by the Société Des Films Menchen against the Vitagraph Company of America and others. From a decree dismissing the bill, complainant appeals. Affirmed.

In 1909 De Croisset and Leblanc, citizens of France, copyrighted in the United States a drama entitled, "Arsene Lupin." Leblanc is the author of a series of stories, in all of which the same leading character appeared, and known as the "Arsene Lupin Stories." In 1913 Leblanc agreed in writing

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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with Menchen (plaintiff's assignor) that he "transfers to [Menchen] all cinematographic rights that he may have" in a given list of Arsene Lupin stories and "all others to be written by him," but the list does not contain the drama "Arsene Lupin," nor the novel or story on which we may assume it was based.

In 1915 Menchen made written contract with the London Film Company, whereby the latter obtained the "sole and exclusive license to select and produce one of said works (i. e., Arsene Lupin stories) in moving picture films," and exhibit and use the same in divers parts of the world, but not in the United States. Whenever the Film Company made such film, however, they were to furnish Menchen with one exemplar "expressly designed to meet trade conditions in America." Leblanc by a separate writing substantially agreed to Menchen's arrangements with the Film Company. In 1916 De Croisset and Leblanc agreed with Menchen that the "stage play," Arsene Lupin, might be included among the stories aforesaid and used "as the subject for the first film to be produced" under the agreements above referred to, and on the same date the Film Company received written permission from De Croisset et al. to use the said stage play as "the subject for the first film" to be produced under the Film Company's arrangement with Menchen. Later in the same year the Film Company—as is alleged—"by one Cromelin, for the benefit of" the plaintiff, copyrighted in the United States a "motion picture photoplay" called "Arsene Lupin, by Maurice Leblanc," and adapted by one Tucker. In so doing Cromelin is said to have acted as "agent of" the Film Company.

Early in 1917 defendants are alleged to have made a "motion picture photoplay" of their own, described as by one Paul Potter, called "Arsene Lupin," and depicting substantially the sequence of episodes and characters in De Croisset and Leblanc's drama as copyrighted in 1909, and this the defendant Vitagraph Company copyrighted in its own name. The bill, showing diversity of citizenship, prayed injunction against any "dealing with" defendant's play, an accounting, and that the copyright by defendant Vitagraph Company be adjudged null and void.

On motion, under rule 29 (150 Fed. xxxiv, 79 C. C. A. xxxiv), alleging that no cause of action was shown, the bill was dismissed, and plaintiffs appeal.

Rogers & Rogers, of New York City (Gustavus A. Rogers and Saul E. Rogers, both of New York City, of counsel), for appellant.

Seabury, Massey & Lowe, of New York City (W. M. Seabury, of New York City, of counsel), for appellees.

Before ROGERS and HOUGH, Circuit Judges, and LEARNED HAND, District Judge.

HOUGH, Circuit Judge (after stating the facts as above). [1, 2] This action must be based on violation of some copyright, owned by plaintiff, and be brought by virtue of the statute regulating copyrights, or it asserts that defendants are contravening some equitable right of plaintiff and rests jurisdiction on diversity of citizenship. The language of the bill, construed by the contracts appended to and made part thereof, leaves us in considerable doubt as to the pleader's intention.

Viewed as a copyright bill it must rest either on the registration of 1909 as to the drama or "stage play," or that of 1916, by Cromelin, of the motion picture photoplay. In either aspect it falls on the face of the pleading, because as to the first assumption there is no endeav-

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or to show or allege ownership of the copyright of 1909, or to negative as to defendant's production the fact that there may be a separable and several copyrightable property in the photoplay, though it tells substantially the same story as does the earlier stage play. Harper v. Kalem, 169 Fed. 61, 94 C. C. A. 429, affirmed 222 U. S. 55, 32 Sup. Ct. 20, 56 L. Ed. 92, Ann. Cas. 1913A, 1285. In respect of the second supposition, the registration by Cromelin is, as pleaded, void, for under the act no power exists in an "agent" to copyright anything; that privilege is reserved to "authors or proprietors." Act March 4, 1909, c. 320, § 8, 35 Stat. 1077 (U. S. Comp. Stat. § 9524).

[3] The only meaning we can extract from the bill—if it does not fail for lack of ownership of any copyright, nor rest on that statute—is that plaintiff believes and intends to assert that defendants are enjoying profits from a film or the story depicted thereon, made by the London Film Company, and by that concern permitted to be sold and exhibited in the United States in violation of the series of contracts above summarized.

But it is not so pleaded; on the contrary, the bill declares that, months after Cromelin's registration of what Tucker had adapted, defendants made their own film from a scenario by Potter. To be sure, it is plain enough that both these writers derived their ideas from the stage play of 1909; but it is not even alleged that Potter infringed (i. e., substantially copied) Tucker. Much less is it stated that defendants have obtained or pretend to have any rights derived by assignment or otherwise from Cromelin, De Croisset, Leblanc, or the London Film Company, or that any of the foregoing is co-operating with defendants, or deriving profit from what they have done and are doing.

[4] The only other contention possible on the part of appellants is that because they procured from Leblanc and De Croisset the exclusive right to make films depicting the story of "Arsene Lupin," and reserved the United States as their own territory, when assigning that right to London Film Company, therefore they have, independent of all copyright registration by any one, or without such registration, the right to pursue in equity those who by photoplay tell the same story within the reserved territory.

This, of course, assumes that, if De Croisset and Leblanc had never copyrighted Arsene Lupin in this country, they could have brought such an action as this. Whatever might have been possible without seeking copyright protection, it is pleaded that these authors did take out copyright in 1909, and that extinguished their so-called common-law rights. Photo-Drama Co. v. Social, etc., Co., 220 Fed. 448, 137 C. C. A. 42. Therefore nothing but a copyright bill will serve, and as above stated the suit is not sustainable on that ground.

Decree affirmed, with costs.

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ATCHISON, T. & S. F. RY. CO. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 21, 1918.)

No. 3079.

1. MASTER AND SERVANT ⊂⊃17—HOURS OF SERVICE ACT—PENALTIES—EVIDENCE.
The Hours of Service Act imposes a positive and absolute duty on railroads to obey its command, and hence, in an action for penalties for violation, the exclusion of evidence as to changes in the methods to enable the defendant railroad company to meet new conditions created by the statute and secure compliance therewith, was proper.

2. MASTER AND SERVANT ⊂⊃17—HOURS OF SERVICE ACT—PENALTY—DEFENSE.
In an action for penalties for keeping railroad employés on duty beyond the limits prescribed by the Hours of Service Act, it is not a complete defense that unavoidable accidents caused delays for a period of time equal in each case to the excess service, but the company must also show the excess service was the necessary result of the accidents and that it exercised requisite diligence to prevent violations of the act.

3. MASTER AND SERVANT ⊂⊃17—HOURS OF SERVICE ACT—BURDEN OF PROOF.
Though unavoidable accidents occur, it is the duty of a railroad company to do all within its power to limit the hours of service in accordance with the Hours of Service Act, and the company has the burden of showing that any excess service was the result of accident, etc.

4. MASTER AND SERVANT ⊂⊃13—HOURS OF SERVICE ACT—VIOLATION.
Where violations of the Hours of Service Act occurred before the United States entered war, the railroad company cannot escape liability on the theory that the act should, in view of new and unusual conditions, be construed so as to permit operation of railroads to their full capacity.

In Error to the District Court of the United States for the Southern Division of the Southern District of California; Robert S. Bean, Judge.

Action by the United States against the Atchison, Topeka & Santa Fé Railway Company to recover for penalties for violation of the Hours of Service Act (Act March 4, 1907, c. 2939, 34 Stat. 1415 [Comp. St. 1916, §§ 8677-8680]). From the judgment, defendant brings error. Affirmed.

E. W. Camp, Robert Brennan, and Paul Burks, all of Los Angeles, Cal., for plaintiff in error.

Robert O'Connor, U. S. Atty., of Los Angeles, Cal., and Roscoe F. Walter, Sp. Asst. U. S. Atty., and Philip J. Doherty, Sp. Asst. U. S. Atty., both of Washington, D. C.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The court below instructed the jury at the close of the testimony to return a verdict for the United States upon 16 counts in an action to recover penalties for violations of the federal Hours of Service Law. The counts are in three groups: First, as to the crew in charge of a train which ran from Bakersfield to Barstow; second, as to the train crew on a train running from Needles to Barstow; and, third, as to the train crew on a train running from

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Barstow to Needles. In the first group the excess of hours of service was 2 hours and 15 minutes, and in the second and third it was 1 hour. The defense relied upon was that the excess of hours of service was occasioned by unavoidable accidents, causing delays in the movements of the trains. The court below held that, to avoid liability to the penalty prescribed by the statute, the defendant must show that the excess service was required by unforeseen casualties, and could not have been prevented by the high degree of care contemplated by the act, and that according to the testimony the accidents relied upon accounted for a portion only of the service rendered in excess of the specified 16 hours, inasmuch as the ordinary running time between the terminals was but 12 or 12½ hours.

[1] The defendant assigns error to the exclusion of certain testimony which it offered to show what changes in methods, practices, and properties it had made to enable it, in the exercise of reasonable care, prudence, and foresight, to meet the new conditions created by the statute and to secure compliance therewith. This testimony was offered on the theory that a general exercise of diligence on the part of the defendant to avoid future violations of the statute might be shown in evidence as bearing upon the question whether it had or had not violated the law in the particular instances in which violation was charged. We think the evidence was properly excluded as foreign to the issues. Proof of reasonable care and diligence to make provision against violations of the Hours of Service Law in the operation of a railroad is not proof, and does not tend to prove, that the law has not been violated. The law imposes on carriers, not an obligation to exercise care and diligence, but a positive and absolute duty to obey its command. United States v. O.-W. R. & Nav. Co. (D. C.) 213 Fed. 688; United States v. O.-W. R. & Nav. Co. (D. C.) 218 Fed. 925; C., B. & Q. Ry. v. United States, 220 U. S. 559, 31 Sup. Ct. 612, 55 L. Ed. 582.

[2, 3] There were no points between the terminals at which the defendant had men available as substitutes for the train crews, and it contends that the act contemplates the continuance in service of crews whose runs have been delayed by casualties until such crews reach the next terminal or relay point, at which in the exercise of reasonable care they may be relieved, and it cites Atchison, T. & S. F. Ry. Co. v. United States, 244 U. S. 336, 37 Sup. Ct. 635, 61 L. Ed. 1175, in which the court reached the conclusion that in keeping the crew in service beyond San Bernardino, which was a terminal, the company was guilty of a violation of the statute, and it argues that in the present case no crews were kept in service beyond a terminal, and that the law should be given a construction consistent with the practical operation of railroads. In brief, the position of the defendant is that it makes a complete defense when it shows that the unavoidable accidents caused delays for a period of time sufficient in each case to equal the excess service, and that it is not called upon to show what use was made of the remainder of the time, or that the excess service was the necessary result of the accidents which caused the delays. This position cannot be sustained. The evidence is that

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the first crew were on duty 6 hours and 25 minutes beyond the regular running time, whereas the delay caused by what is claimed to have been unavoidable accident was but 2 hours and 25 minutes; that the second and third crews were on duty 5 hours beyond the regular running time, whereas the delays attributable to the accidents were in each case but 1 hour, leaving in each case 4 hours unaccounted for. No attempt was made to explain the delays in the running of the trains as resulting from other causes. The burden was upon the defendant to show that the excess service was the necessary result of the causes which are claimed to have justified it, and that the defendant exercised the requisite diligence to prevent it. United States v. Southern Pac. Co., 220 Fed. 745, 136 C. C. A. 351; Great N. Ry. Co. v. United States, 218 Fed. 302, 134 C. C. A. 98, L. R. A. 1915D, 408; United States v. Kansas City Southern Ry. Co., 202 Fed. 828, 121 C. C. A. 136; United States v. Houston Belt & Terminal Ry. Co., 205 Fed. 344, 125 C. C. A. 481; Denver & R. G. R. Co. v. United States, 233 Fed. 62, 147 C. C. A. 132. And, notwithstanding the delays caused by the accidents, it was still the defendant's duty to do all reasonably within its power "to limit the hours of service in accordance with the requirements of the law." Atchison, T. & S. F. Ry. Co. v. United States, 244 U. S. 336, 37 Sup. Ct. 635, 61 L. Ed. 1175. In Baltimore & O. R. Co. v. United States, 243 Fed. 153, 156 C. C. A. 19, the court held that, if there was delay from an unavoidable accident, "the railroad was entitled to add to the 16 hours all the delay, no more and no less, which thereafter occurred as the result of this cause."

[4] The defendant contends that the new and unusual conditions confronting transportation in war times should be considered, and that no requirement tending to subject the handling of troops, munitions, and supplies to the delays incident to relieving crews between terminals should be exacted, citing Pennsylvania R. Co. v. United States, 246 Fed. 881, — C. C. A. —, in which it was said that in war times the courts of the country in their administration of law should recognize the new and unusual conditions which confront them, and that such construction of the laws should be adopted as would promote a practical operation of railroads to their full limit of ability. In answer to this it is sufficient to point to the fact that the violations of the law charged in the counts in the present case all occurred in October, 1914, long prior to the entry of the United States into war, and long prior to any congestion or derangement of transportation facilities arising from war conditions abroad.

The judgment is affirmed.

PIONEER IRR. CO. v. BOARD OF COM'RS OF YUMA COUNTY, COLO.

(Circuit Court of Appeals, Eighth Circuit. May 13, 1918. Rehearing Denied September 2, 1918.)

No. 4853.

1. WATERS AND WATER COURSES ⟸257(2)—IRRIGATION—RATES.
Irrigation company could not complain if rate fixed by board of county commissioners under the Colorado Constitution and statutes for the use of water was an adequate return for its services and on the value of its property, even if the board erred in its method.

2. WATERS AND WATER COURSES ⟸257(2)—IRRIGATION—RATES.
Where value of irrigation ditch was $19,375, its annual maintenance $2,000, not apportioned as to its users in Nebraska, it could not be said that a rate of $1.83 per acre for 695 acres of Colorado land was not a reasonable return on investment devoted to use of Colorado consumers.

3. WATERS AND WATER COURSES ⟸257(2)—IRRIGATION—RATES—REASONABLENESS.
Denial of irrigation company's allegation of value of water furnished to Colorado users in Yuma county made it impossible to say that rate fixed was not fair, even if company was entitled to payment for value of water furnished, as rate might be sufficient to include that item above return on capital applied to particular use.

Appeal from the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Suit in equity by the Pioneer Irrigation Company against the Board of County Commissioners of Yuma County, Colo. From a decree dismissing the bill (236 Fed. 790), plaintiff appeals. Affirmed.

Edwin H. Park, of Denver, Colo. (Thomas H. Gibson, of Denver, Colo., on the brief), for appellant.

Jo. A. Fowler, of Denver, Colo., for appellee.

Before CARLAND, Circuit Judge, and AMIDON and MUNGER, District Judges.

MUNGER, District Judge. This suit was brought to restrain the enforcement of a rate fixed by the board of county commissioners of Yuma county, Colo., for the use of water furnished by an irrigation company. The court entered a decree dismissing the bill, and the irrigation company, hereafter called plaintiff, appeals.

The suit was submitted upon the bill and answer, and a stipulation of facts. That stipulation and the briefs state that the only question involved is whether the county board in fixing the rates to be charged should have taken into consideration the value of the water delivered to the consumers. The Constitution and statutes of Colorado empower the county commissioners to fix the reasonable maximum rates to be charged for the use of water.

The plaintiff was a corporation that had constructed an irrigation ditch in 1890, and it had procured two decrees in the state court of Colorado fixing the date of diversion, its order of priority, and the amount of water that the company was entitled to divert into

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its ditch, for irrigation purposes, from the natural stream that it tapped. For many years it had operated its ditches and furnished water therefrom to a large class of users, who occupied lands adjacent to its system of ditches, and who paid an annual amount to the company without any other contract than a receipt for the money paid and an agreement to conform to the rules of the company in distribution, measurement, and application of the water.

The plaintiff's ditch is 15½ miles in length, of which 7 miles is located in Colorado and the remainder in Nebraska. In Colorado, there are 791 acres of land that can be irrigated from this ditch; 96 acres of this area are irrigated therefrom under water rights purchased from plaintiff. The county board fixed the rate of $1.83 per acre for those using water, other than the owners of the water rights. The bill alleged that this rate was confiscatory and did not allow plaintiff compensation for the use of the capital invested; but the answer denied these allegations. The bill alleged that the value of the plaintiff's ditch, headgates, and other appurtenances was $26,175, but that the county board arbitrarily deducted $6,800 therefrom; that the expense of maintenance of the ditch was $2,500. The answer also denied these allegations. The bill alleged that the value of the water carried by plaintiff to the owners of these 695 acres of land in Colorado is worth $34,750, and that the plaintiff is entitled to a return of 7 per cent. per annum upon the value of this water. The answer denied that the water carried was of this value. The bill alleges, and the answer admits, that the county board fixed a valuation on plaintiff's ditch and its appurtenances of $19,375, and an allowance of $2,000 for maintenance. The bill further alleges, and the answer admits, that the county board, in fixing the rate, refused to consider the value of the water carried by plaintiff's ditch, or to allow it any compensation for the water furnished.

The stipulation of facts adds nothing material to the admitted facts thus set forth in the pleadings. In this state of the record the plaintiff asserts that it was entitled to an injunction against the enforcement of the rate fixed, because that rate did not include compensation for the value of the water furnished. It is claimed that under the Constitution and statutes of Colorado, as construed by the Supreme Court of that state, the water in such a ditch belongs to the company which has diverted and carried it, and it may sell it and collect a reasonable charge therefor. The defendant claims that the water, under these circumstances, belongs to those patrons of the ditch who apply it to a beneficial use, and therefore the plaintiff may not make a lawful charge for its value.

[1-3] This question is not involved in the issues of the suit and for that reason we express no opinion in regard to it. The plaintiff has nothing of which to complain, if the rate fixed by the board is an adequate return for its services and on the value of its property, even if the county board erred in the method of arriving at the rate. In ascertaining whether the rate of $1.83 per acre for the 695 acres of Colorado land was a fair rate, we have a finding of the value of the ditch structure of $19,375, and an annual expense of

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maintenance of $2,000; but there is no statement of the amount of this value or expense that is apportionable to the users of water in Nebraska or Colorado. Without an allocation of this capital or expense, it cannot be said that the rate of $1.83 per acre for the Colorado lands is not a reasonable return to the company on the amount of its investment devoted to the use of Colorado consumers. Texas & P. Ry. Co. v. Railroad Commission, 192 Fed. 280, 112 C. C. A. 538; Southern Pac. Co. v. Railroad Commission (D. C.) 193 Fed. 699; Louisville & N. R. Co. v. Railroad Commission (D. C.) 208 Fed. 35; Missouri, K & T. Ry. Co. v. Love (C. C.) 177 Fed. 493. The denial of the allegation of the value of the water furnished to the users of water in Colorado makes it impossible to say that the rate fixed is not a fair one, even if the plaintiff is entitled to payment for the value of the water furnished, for the rate fixed may be sufficient to include that item in addition to a return on the capital applied to the particular use.

The decree will therefore be affirmed.

SHIPOWNERS' & MERCHANTS' TUGBOAT CO. v. HAMMOND LUMBER CO.

(Circuit Court of Appeals, Ninth Circuit. May 13, 1918.)

No. 3070.

SHIPPING ⇐209(2)—LIMITATION OF LIABILITY.

Where there was only one claimant, and the appraisement made by the commissioner and approved by the court showed that the interest of the owner in the vessel exceeded the amount of the claim, a petition for limitation of liability will be dismissed; it appearing that the claimant expressly waived any claim for interest which would increase the damages asserted to a sum beyond the value of the vessel.

Appeal from the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Petition by the Shipowners' & Merchants' Tugboat Company, a corporation, for limitation of liability. On motion of the Hammond Lumber Company, a corporation, the petition for limitation was dismissed, and petitioner appeals. Affirmed.

For a history of this litigation, which grows out of the loss of a raft of piling, reference is made to the statement of facts, including the prior decisions referred to, in Hammond Lumber Co. v. U. S. District Court, 240 Fed. 924, 153 C. C. A. 610. Subsequently, in August, 1917, the Lumber Company moved to dismiss the petition for limitation of liability as to it, or for dissolution of the injunction theretofore issued against it and the circuit court of Clatsop county, Or. Bond for $115,000 was filed by the Tugboat Company. The District Court construed the motion as pertaining to the jurisdiction of the court over the subject-matter, and allowed the exceptions and the motion, and dismissed the petition in toto. The Tugboat Company appeals.

The motion to dismiss supplemented the exceptions, and when the exceptions were filed the time had not gone by within which claims might be filed; but when the motion was made such time had expired, and the first ground included in the motion was that no other claims than that of the Lumber Company had been filed for the recovery of damages. In the petition for limitation

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no reference had been made to the fact that in the California limitation proceeding the court had required the filing of bonds in the aggregate sum of $115,000, to bear interest from the date of the disaster to the raft, September 9, 1911. Allegations to this effect were included in the motion and were set up in the answer, which was noticed to be used upon the hearing of the motion. The motion also incorporated, as exhibits to the affidavit of the Lumber Company, the interlocutory decree of default filed July 12, 1912, and the opinion of Judge Dooling sitting in the District Court in California wherein the proceedings as to the Lumber Company were dismissed, but jurisdiction of the proceedings for the protection of the Tugboat Company against any other possible claims were retained; also the decree made by Judge Dooling, in the District Court in California, ordering a dismissal of the proceedings as to the Lumber Company, but expressly providing that the dismissal should in no wise affect the rights of the Tugboat Company, if any there should be, against any other person entitled to file claims, if any there should be; and also a copy of the dismissal of the limitation proceedings pending in the District Court for the Northern District of California, such dismissal having been made on August 2, 1916, after the institution of the limitation proceedings in Oregon. There was also included in the motion to dismiss, as an exhibit to the affidavit of the Lumber Company, that portion of the brief of the Lumber Company, which had been filed in the state court in Oregon, upon which the Tugboat Company based a contention that claim had been made in the state court by the Lumber Company for a total recovery of $111,153.22, with interest from September 9, 1911, at 6 per cent. per annum.

The motion set forth that no claim for any sum in excess of $110,983.13, the amount demanded in the amended complaint filed in the state court, had ever been demanded against the Tugboat Company by the Lumber Company, and attached to the motions as an exhibit was the affidavit of the Lumber Company that it was never its intention to claim or demand the recovery of any sum in excess of $110,983.13. Another ground of the motion was that the Lumber Company, at the suggestion of the Tugboat Company had stipulated in open court in the state court that trial by jury should be waived, and that in pursuance of such stipulation, the cause having been tried by the court, the Tugboat Company had voluntarily submitted its motion in relation to matters in the action pending in the state court for adjudication by the state court, and had waived any right to require the Lumber Company to litigate in any other court or in any other proceeding. There was no opposition in the form of affidavits or testimony offered by the Tugboat Company in opposition to the motion of the Lumber Company. The Tugboat Company moved to strike out the motion of the Lumber Company upon the ground that the motion came too late in the proceeding.

Appellant contends that the court erred in holding: (1) That the claim made by the appellee in the state court did not exceed the value of appellant's interest in the tugs at the close of their respective voyages on which the raft was lost; (2) that the limitation of liability proceedings in the United States court in California were, as against appellee, still pending in that court when the petition for limitation of liability in the United States court for Oregon was filed; (3) that appellant's remedy was by supplemental petition or otherwise to have appellee brought in and made a party to the limitation proceedings previously instituted by appellant in the United States court in California; and (4) in dismissing the petition herein and not proceeding to trial upon the issues made by the petition and appellee's claim and answer thereto.

McCutchen, Olney & Willard and Ira A. Campbell, all of San Francisco, Cal., Snow, Bronaugh & Thompson, of Portland, Or., and E. B. Tongue, of Hillsboro, Or., for appellant.

W. S. Burnett and Wm. Denman, both of San Francisco, Cal., and G. C. Fulton, of Astoria, Or., for appellee.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

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HUNT, Circuit Judge (after stating the facts as above). It appears that the appraisement made by the commissioner and approved by the court in the proceedings in the United States court in California pending between appellant and appellee as parties thereto made appellant's interest in the tugs $115,000. But it is said that afterwards in the state court appellee amended by increasing its claim against the appellant for the value of the raft from $71,249.90 to $110,983.13, and that subsequently in the brief filed by appellee the demand was again increased from $110,983.13 to $111,153.22 and interest thereon at the rate of 6 per cent. per annum from September 9, 1911, the date of the loss, and therefore that appellee's claim was made to exceed $140,000, or $111,153.22, with interest at 6 per cent. from September 9, 1911, to July 21, 1916, the date of filing the petition.

It is clear that the Lumber Company made no claim in excess of $110,983.13. It never demanded more than that sum in its pleadings; and the suggestion, which was made in the brief filed by counsel in its behalf in the state court, that to the sum set forth as the value of the raft interest from September 9, 1911, "should" be added, was properly treated by the District Judge as not a formal demand, but rather as an argumentative way of emphasizing appellee's damages in the premises. The affidavit of those who are connected with the Lumber Company explicitly disavows any claim or intention ever to have claimed recovery against this appellant in excess of $110,983.13, and declares that the claim has always been limited, and was meant to be limited, to such sum and no other. In the face of so plain a disclaimer the Lumber Company must be held to have waived any possible claims it may have ever had to interest. There was, therefore, ample showing for overruling the appellant's contention that the appellee made a claim in the state court in excess of the value of the appellant's interest in the vessels at the close of their respective voyages when the raft was lost. Nothing in Rutenic v. Hamaker, 40 Or. 444, 67 Pac. 196, cited by appellant, conflicts with the presumption that the state court will not award interest in a case where it is not demanded. Sargent v. American Bank & Trust Co., 80 Or. 16, 156 Pac. 431; Hayden v. Astoria, 84 Or. 205, 164 Pac. 729.

The decree appealed from is affirmed.

RATSHESKY et al. v. WHITING.

In re LESLIE & GRIFFITH CO.

(Circuit Court of Appeals, First Circuit. May 22, 1918.)

No. 1185.

BANKRUPTCY ⟸318(4)—CLAIMS ALLOWABLE.

Where a bankrupt made a common-law assignment, which included its rights in a lease containing a condition against assignment, and the lessors accepted from the assignee rent for the month of the assignment, the lessors have no provable claim for damages for breach of the condition, the lessee having been adjudicated a bankrupt, for acceptance of

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rent from the assignee was waiver, if the assignee be deemed to have exercised his option and accepted the lease.

Appeal from the District Court of the United States for the District of Massachusetts; Jas. M. Morton, Judge.

In the matter of the Leslie & Griffith Company, bankrupt. The claim of A. C. Ratshesky and others, trustees, was disallowed by the referee, on the objection of Herbert A. Whiting, trustee in bankruptcy, and claimants appeal from a decree of the District Court (230 Fed. 465), affirming orders of the referee. Affirmed.

Stoneman, Gould & Stoneman, of Boston, Mass. (David Stoneman and Alexander I. Stoneman, both of Boston, Mass., of counsel), for appellants.

Isaac Harris, of Boston, Mass. (Clarence Tichell, of Boston, Mass., on the brief), for appellee.

Before DODGE and BINGHAM, Circuit Judges, and HALE, District Judge.

BINGHAM, Circuit Judge. This is an appeal under section 25a of the Bankruptcy Act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 553 [Comp. St. 1916, § 9609]) from a decree of the District Court disallowing the claim of the petitioners. Questions raised by two other orders appealed from are waived by agreement of the parties, and the sole question is whether the decree of the District Court disallowing the claim was correct.

The essential facts are as follows: January 19, 1912, the petitioners, trustees of the Ratshesky Estate Trust, leased certain premises on Tremont street, Boston, to Alexander Leslie and James R. Griffith, copartners doing business under the name of Leslie & Griffith, for the term of 10 years, beginning January 1, 1914, at a certain stipulated rental per month for the first 5 years and a certain increased rental per month for the last 5. Among the covenants in the lease was the following:

"And the lessees further covenant that they, or those having their estate in the premises, will not assign this lease, nor underlet the whole or any part of the premises, without the written consent of the lessors."

It also contained the following provision:

"Provided, also, and these presents are upon the condition, that if the lessees shall neglect or fail to perform and observe any of the covenants contained in this instrument which on their part are to be performed, * * * or if any assignment or receivership, legal or voluntary, shall be made of their property, for the benefit of creditors, then and in any of said cases the lessors lawfully may, immediately or at any time thereafter, and without further notice or demand, enter into and upon the premises, or any part thereof in the name of the whole, and repossess the same as of their former estate, * * * and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant, and that thereupon this lease shall, if the lessors shall so elect, determine, cease, and be at an end."

November 14, 1912, the lessees, with the written consent of the lessors, assigned the lease to the Leslie & Griffith Company, a corporation,

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which covenanted to pay the rent as it should become due according to the terms of the lease, and to perform all the covenants and stipulations contained therein. The assent of the lessors to the assignment was on the condition that no further assignment of the lease should be made by the Leslie & Griffith Company without the written consent of the lessors. January 24, 1915, the Leslie & Griffith Company executed a general assignment of all its property, real and personal, for the benefit of its creditors, to Herbert A. Whiting. January 26, 1915, an involuntary petition in bankruptcy was filed against the Leslie & Griffith Company. February 1, 1915, Herbert A. Whiting and R. H. D. Emerson were appointed receivers. March 3, 1915, the corporation was adjudged a bankrupt, and on March 16, 1915, said Whiting was appointed trustee. The Leslie & Griffith Company paid the rent during their occupancy in the month of January, 1915; that is, from January 1 to January 26, the date of the assignment for the benefit of creditors. The overdue rent that accrued prior to January 1, 1915, was proved and allowed against the estate. February 1, 1915, Whiting, the common-law assignee, paid the lessors the sum of $416.13, that being the balance of rent due under the lease for the month of January, to wit, from January 25 to February 1; a bill for the same having been rendered to him by the lessors. February 1, 1915, the receivers took possession of the leased property, and thereafter paid the rent down to March 13, 1915, when they vacated the premises. The premises were never occupied by the trustee.

The petitioners claim damages in the sum of $225,500 for breach of the covenant against assignment above set forth, and the breach relied on is the assignment for the benefit of creditors made by the Leslie & Griffith Company, January 25, 1915, prior to the filing of the involuntary petition in bankruptcy.

The respondent contends that the general assignment was not a breach of the lease, such as to entitle the petitioners to prove a claim in bankruptcy for damages, and that, if it was, the petitioners, with knowledge of the assignment, rendered a bill to the assignee for the balance of the rent accruing in the month of January after he took possession, and accepted payment of the same, thus waiving their right to insist upon the breach.

The petitioners contend that the common-law assignment was a breach of the covenant against assignment. If it was a breach of the covenant, it effected an assignment of the lease. But, when confronted with the proposition that the payment and receipt of the rent from the assignee accruing subsequent to the alleged breach was a waiver of the breach, they contend that the common-law assignment was not an assignment of the lease, unless the common-law assignee accepted the lease, and that there was no evidence that he ever accepted it; that a common-law assignee, like a trustee in bankruptcy, is entitled to a reasonable opportunity after taking possession of the property of the assignor to determine whether he will or not accept a lease included with-'n the property assigned.

If an acceptance of the lease by the assignee was essential to constitute an assignment of it, and he never accepted it, it necessarily fol-

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lows that there never was a breach of the covenant against assignment, and, if it was accepted by the assignee, so that there was a breach of the covenant, we think the breach was waived by the unqualified demand and receipt of rent from the assignee that accrued thereafter. This conclusion renders it unnecessary to consider the other questions argued, as it disposes of the case.

The decree of the District Court is affirmed, with costs to the appellee.

THE SUNNYSIDE.

(Circuit Court of Appeals, Second Circuit. April 24, 1918.)

No. 188.

COLLISION ⇐68—ANCHORED AND DRIFTING VESSELS—BOATS WITHOUT ANCHORS.

A collision between a motorboat, in the anchorage grounds in North River, and drifting boats, which had broken from a tow, *held* not due to any fault of the tug, but proximately caused by the fault of two of the boats in not being provided with anchors.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty for collision by R. M. Bates, Jr., owner of the motorboat Rita, against the Cornell Steamboat Company, with the barges Sunnyside, A. C. McClellan, and J. S. Nolan impleaded, William W. Aldrich and others, claimants, and the barge Intrepid impleaded, the Simmons Transportation Company, claimant. Decree for libelant against the Intrepid, Sunnyside, McClellan, and Nolan, and the latter appeal. Modified and affirmed.

Hyland & Zabriskie, of New York City (N. Zabriskie, of New York City, of counsel), for appellant claimant of the Sunnyside.

Macklin, Brown & Purdy, of New York City (William F. Purdy and P. M. Brown, both of New York City, of counsel), for appellant claimants of the McClellan and the Nolan.

Harrington, Bigham & Englar, of New York City (T. C. Jones, of New York City, of counsel), for appellee Bates.

Kirlin, Woolsey & Hickox, of New York City (J. P. Kirlin and Robert S. Erskine, both of New York City, of counsel), for appellee Cornell Steamboat Co.

Haight, Sandford & Smith, of New York City (H. M. Hewitt, of New York City, of counsel), for appellee claimant of the Intrepid.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. October 15, 1910, at about 8:30 a. m., the tug John D. Cordts, belonging to the Steamboat Company, started with a hawser tow consisting of 21 boats from its stakeboat in the North River, bound upstream. The boats were of irregular sizes, and some were loaded and some light. The wind being from the northwest, the light boats were properly put on the port side of the tow to protect

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the loaded boats on the starboard side, and two loaded boats were hung on outside of the line of boats behind the starboard hawser boat; that is, there were no boats in front of them and their fasts led to the boats alongside.

At about 10 p. m., when the tow was opposite Ft. Washington Point and on the Jersey side of the river, the lines of the boat Intrepid, which was astern of the starboard hawser boat, parted and she swung out, taking with her six boats behind her, by breaking their side lines and drifting with them on the ebb tide downstream and under the influence of a moderate northwest breeze diagonally across from the Jersey to the New York side of the river. When they had reached the north end of the anchorage ground for small vessels inside the pier head lines between 158th street and 132d street, the master of the Fortuna threw off his lines from the boat Donovan, and that boat, with the Intrepid, drifted together into the anchorage grounds between the anchored boats and the New York shore, finally landing near 135th street. The boats Fortuna, Nolan, McClellan, Sunnyside, and No. 16 remained together. The Nolan and McClellan had no anchors; the Sunnyside had an anchor, which was not dropped; the Fortuna dropped hers, and shortly after Scow 16 dropped hers, by which anchors the flotilla was held for about an hour. Then, the anchor line of the Fortuna being cut, as it is supposed, by contact with something on the bottom, the flotilla began to drift again, but fetching up from time to time, until at last it drifted over and submerged the motorboat Rita, anchored near 147th street.

The owner of the Rita filed this libel to recover his damages against the Cornell Steamboat Company, which brought in the lighter Intrepid and the boats Sunnyside, McClellan, and Nolan under the Fifty-Ninth rule (29 Sup. Ct. xlvi). The petition was defective in making no allegations of negligence; but, as the claimants of the boats answered and went to trial on the merits, the District Judge properly held they had waived the objection. There was no charge in any pleading that the flotilla was improperly made up and the District Judge found that it was not. One witness testified that an extra direct strain was brought on the starboard hawser of the tug and a lateral strain on the lines of the Intrepid. The tug's hawser did not part, and we are not satisfied that this extra lateral strain was the cause of the parting of the Intrepid's lines.

The court held that the Intrepid's lines, though large enough and so apparently sound as to make the examination of the Steamboat Company a reasonable one, were really unsound at the core, and that this was the proximate cause of the injury. He then stated that the next proximate cause was the failure of the McClellan and Nolan to be provided with anchors, of the Sunnyside to drop hers, and of the Fortuna and No. 16 to drop theirs sooner. Accordingly he directed a decree in favor of the libelant against the Intrepid, Sunnyside, McClellan, and Nolan, which were the only boats proceeded against.

We concur in the finding that the Cornell Steamboat Company in making up the tow exercised ordinary and reasonable care in examining the Intrepid's lines and was not at fault because of their actual

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insufficiency. As the Intrepid did not come in contact with the Rita, she should also be discharged, unless responsible for the collision between the Rita and the other boats. There cannot be two proximate causes of the disaster, and it seems to us quite clear that if the other boats, which did ride over the Rita, had been supplied with anchors and had used them, they would not have drifted, and that their defaults in these respects were the proximate cause of what happened. The M. E. Luckenbach (D. C.) 200 Fed. 630, affirmed 214 Fed. 571, 131 C. C. A. 177. Scow No. 16 and the Fortuna were both provided with anchors and used them, and we do not think they were at fault for not using them sooner. A majority of the court are satisfied that the master of the Sunnyside could not have used his, if he had wanted to do so.

The decree, modified in the foregoing respects, is affirmed, with interest and costs to the libelant against the boats A. C. McClellan and J. S. Nolan. No costs to the claimant of the Intrepid, or to the Cornell Steamboat Company, or to the claimant of the Sunnyside.

ROMEIKE v. ROMEIKE et al.

(Circuit Court of Appeals, Second Circuit. April 24, 1918. On Petition to Require the District Court to Allow Defendants' Application for Costs, June 5, 1918.)

No. 238.

1. TRADE-MARKS AND TRADE-NAMES ⊂=73(1)—UNFAIR COMPETITION.

A man has the right to use his own name in his own business, unless there is proof of fraud or of positive confusion: and hence, where it did not appear that there was any fraud, etc., an incorporated clipping bureau, doing business under the name of Henry Romeike, is not entitled to have defendants, one of whom was named Romeike, and the other Ruebe, enjoined from conducting a clipping bureau under the name of Romeike & Ruebe.

On Petition to Require the District Court to Allow Defendants' Application for Costs.

2. APPEAL AND ERROR ⊂=1207—ALLOWANCE—DISCRETION OF TRIAL COURT.

When the decree of the trial court in an equity case is reversed or modified on appeal, with costs, the costs of the appellate court are meant, unless the mandate otherwise provides; and, the trial court having a discretion as to costs in such cases, the application of the successful party for costs after the mandate has gone down must be addressed to the trial court.

Appeal from the District Court of the United States for the Southern District of New York.

Suit by Henry Romeike against Albert F. Romeike and another. From decree for complainant, defendants appeal. Reversed.

Henry Schoenherr, of New York City, for appellants.

H. D. Nims, of New York City (Clinton Combes, of New York City, of counsel), for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

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WARD, Circuit Judge. This is an appeal from a final decree of the District Court of the United States for the Southern District of New York, enjoining Albert Romeike and Albert Ruebe, co-partners, from using the firm name of Romeike & Ruebe, but permitting them to use the name Ruebe & Romeike.

The proofs make it clear that the late Henry Romeike established in this city in the year 1884 a newspaper clipping business; that is, selling clippings taken from newspapers and magazines published in this and foreign countries. In 1902 he incorporated the business under the name Henry Romeike, owning himself the entire capital stock. This corporation has continued down to the present time with a well-known and high reputation. The defendants, his brother Albert Romeike and one Albert Ruebe, were associated with Henry Romeike in the business for many years. Henry Romeike died June 3, 1903, and the business of the corporation was continued until May, 1916, by Dr. McKernan, Albert Romeike, and Ruebe, as trustees under his will. Ruebe was president of the corporation, Albert Romeike acted in a more subordinate capacity, and both were directors. Henry Romeike left a son Georges, who went into the complainant's employment in June, 1915, became of age February 9, 1916, and is now president of the corporation. In May, 1916, Albert Romeike and Albert Ruebe left the complainant's employment and established a newspaper clipping business, which they are carrying on under the firm name of Romeike & Ruebe.

It was perfectly natural and proper that the defendants, on leaving the complainant's service, should take up a business which they had followed for many years, and should take it up together. There was no evidence whatever of any fraud, imposition, or unfair dealing by them or of any actual confusion. They rested at the end of the complainant's case. The District Judge proceeded on the theory that there must be confusion as matter of law. He held that the significant part of the complainant's corporate name is "Romeike," and that the defendants, although having a right to use their own names in their firm title, must use them so as to cause the least possible confusion. For that reason he granted the injunction in the form above stated.

[1] We are not willing to go so far. A man has a right to use his own name in his own business, unless there is proof of fraud or proof of positive confusion. The material fact is not the use of his own name, but the way he uses it. Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118. Chief Justice Fuller said, in Howe Scale Co. v. Wyckoff, 198 U. S. at page 140, 25 Sup. Ct. at page 614, 49 L. Ed. 972:

> "We hold that, in the absence of contract, fraud, or estoppel, any man may use his own name in all legitimate ways, and as the whole or a part of a corporate name; and, in our view, defendant's name and trade-mark were not intended or likely to deceive, and there was nothing of substance shown in defendant's conduct in their use constituting unfair competition, or calling for the imposition of restrictions lest actionable injury might result, as may confessedly be done in a proper case."

There is no such liability of confusion in the newspaper clipping business as there is in the sale of goods of similar appearance, in simi-

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lar packages, of similar size, for similar purposes, under similar trademarks. In such cases mere comparison may sometimes justify a necessary inference of confusion. The purpose of the newspaper clipping business is service. The position of the complainant is somewhat the same as if a well-known surgeon, or lawyer, or house painter, or carpenter should object to another, having the same surname, carrying on the same occupation under his own name. The Appellate Division of the Supreme Court of New York for the First Department went further in sustaining the use by the same parties of the corporate name Romeike & Co., which they at first adopted. Henry Romeike v. Albert Romeike & Co., 179 App. Div. 712, 167 N. Y. Supp. 235.

The decree is reversed.

On Petition to Require the District Court to Allow Defendants' Application for Costs.

PER CURIAM. [2] In this suit we reversed the decree of the court below in favor of the plaintiff, with costs, and that court, holding it had no discretion upon the subject at all, refused to consider the defendants' application for costs, and simply dismissed the bill. In suits in equity and admiralty, costs being discretionary, when the decree of the court below is reversed or modified by this court, with costs, the costs of this court are meant; the court below having a discretion as to the costs there, unless the mandate otherwise provides.

The petition is therefore denied, and the question referred to the District Court for disposition.

MAYO, IMMIGRATION COM'R, et al. v. UNITED STATES ex rel. LEE WONG HIN.

(Circuit Court of Appeals, Fifth Circuit. April 12, 1918.)

No. 3198.

ALIENS ⊂=21—EXCLUSION OF CHINESE—CONSTRUCTION OF STATUTE.

Immigration Act Feb. 5, 1917, construing the third proviso of section 19 and the second proviso of section 38 together, does not apply to a Chinese person against whom deportation proceedings were pending at the time of its taking effect, unless some offense was thereafter committed which changed his status.

Walker, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Habeas corpus by Lee Wong Hin against John P. Mayo, Commissioner of Immigration, Port of New Orleans, and another. Judgment for relator, and defendants appeal. Affirmed.

See, also, 240 Fed. 368, 153 C. C. A. 294.

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Joseph W. Montgomery, U. S. Atty., of New Orleans, La., for appellants.

Nicolas G. Carbajal, W. J. Waguespack, and Herbert W. Waguespack, all of New Orleans, La., for appellee.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

BATTS, Circuit Judge. Prior to the passage of the Immigration Act of February 5, 1917 (39 Stat. 874, c. 29), section 21 of the former Immigration Law (Act Feb. 20, 1907, c. 1134, 34 Stat. 905 [Comp. St. 1916, § 4270]) having been invoked against Lee Wong Hin, he sued out a writ of habeas corpus, which was dismissed by the District Judge. This decision on appeal was reversed (240 Fed. 368, 153 C. C. A. 294), upon the ground that that Immigration Act had no application to Chinese persons.

Section 38 of the act of 1917 contains a provision to the effect that:

"This act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons * * * except as provided in section 19 hereof."

Section 19 provides for the taking into custody, upon the warrant of the Secretary of Labor, and deportation, of "any alien who shall have entered or who shall be found in the United States in violation of this act, or in violation of any other law of the United States." Section 38 also had a proviso to this effect:

"That nothing contained in this act shall be construed to affect any prosecution, suit, action, or proceedings brought, or any act, thing, or matter, civil or criminal, done or existing at the time of the taking effect of this act, except as mentioned in the third proviso of section 19 hereof; but as to all such prosecutions, suits, actions, proceedings, acts, things, or matters, the laws or parts of laws repealed or amended by this act are hereby continued in force and effect."

The habeas corpus proceeding heretofore referred to was pending at the time of the passage of the act, and the status of relator as an alien within the United States in violation of the Chinese Exclusion Act existed at that time. Under the terms of the proviso last quoted, no part of the act could apply to the relator, except the third proviso to section 19. This proviso is to this effect:

"That the provisions of this section, with the exceptions hereinbefore noted, shall be applicable to the classes of aliens therein mentioned, irrespective of the time of their entry into the United States."

It is difficult to determine just what is meant by the third proviso of section 19; the exception to the last proviso of section 38 is not more clear. To give to the latter the meaning suggested by the government would be to permit the exception to substantially (if not absolutely) destroy the proviso. It may be possible to ascribe a meaning to each clause which would give effect to both. If the third proviso of section 19 be held to make that section applicable to all aliens, without reference to the time of their entry, who do, after the passage of the act, something denounced by the act, and if the last proviso of section 38 be held to preserve the status existing at the time of the

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passage of the act as to all aliens who commit no new offense thereafter, consistency and effect would be given to all the language under consideration. Under this view the "things and matters" "as they existed" with reference to relator "at the time of the taking effect of the act"—that is, his status as an alien in the country in violation of the Chinese Exclusion Law—will be dealt with by the law as it was before the passage of the act.

If the conclusion reached does not accord with the intention of Congress, the result is to be ascribed to the use of provisos and exceptions, rather than affirmative language. Chinese persons are brought under a section of the act composed of many provisions, a number of provisos, and several exceptions to provisos, by an exception to a proviso. The application of the act to matters existing at the time of the taking effect is withdrawn by a proviso, which has an exception based upon a proviso, which has exceptions. It is assumed that the exempting proviso was intended to have some effect, and it is not improbable that we are giving it the effect intended.

The judgment is affirmed.

WALKER, Circuit Judge, dissents.

THE M. MORAN.

(Circuit Court of Appeals, Second Circuit. April 24, 1918.)

No. 227.

1. COLLISION ⇐58—TUGS—SUPERIOR RIGHTS OF.

A tug towing a sailing schooner has no superior rights to a tug in charge of an ordinary tow of barges; the relation of the two being steam to steam, regardless of any superior rights of a sailing vessel.

2. COLLISION ⇐60—SAILING AND STEAM VESSELS—NEGLIGENCE.

Where a sailing schooner, which had cast off from the tug having it in tow began to sail, while another tug in charge of a tow was lengthening hawsers about 500 feet away, the schooner, despite the privilege of a sailing vessel, was not warranted in crossing or approaching the hawser, there being plenty of room on the other side; and so, where a collision resulted from the act of the schooner in making a tack toward the tug, the schooner must be held solely at fault.

Appeal from the District Court of the United States for the Eastern District of New York.

Libel by Timothy O'Connell against the steam tug M. Moran, her engines, etc., claimed by the Moran Towing & Transportation Company. From a decree for libelant, claimant appeals. Reversed and remanded, with directions to dismiss the libel.

On a fair summer afternoon, with the tide ebb and a light south southwest wind (barely enough to give a sailing vessel steerage way), the small schooner Oakwoods went down Buttermilk Channel in tow of a tug. At the same time the tug Moran, with two scows on a steel towing hawser, also passed through the Channel. Not far from the lower end of Governor's Island the Moran stopped to lengthen hawsers, as she was bound to sea. The Oakwoods and her tug were nearer the Brooklyn shore than the Moran and when off the

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bell buoy below Governor's Island she cast off from the tug and began to sail, admittedly on the port tack. Thereafter she came about on the starboard tack, and her port bow then came in collision with the forward starboard corner of the starboard scow in the Moran's tow. Unless hindered by the Moran and her scows, there was nothing in the Oakwoods' path requiring her to go about when she did. The schooner was injured by collision, and brought this suit, alleging as fault that the Moran overtook the schooner and stopped to lengthen hawsers across the bow of the Oakwoods. The trial court found the Moran "at fault for creating the situation out of which the collision arose," and gave decree for libelant. Claimant brought this appeal.

Park & Mattison, of New York City (Samuel Park, of New York City, of counsel), for appellant.

Foley & Martin, of New York City (William J. Martin and George V. A. McCloskey, both of New York City, of counsel), for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] That the course of the Oakwoods while in tow was considerably nearer Brooklyn than that of the Moran is admitted, and that the tug pulling the schooner traveled much faster than the heavy tow of the Moran is proven. The two tugs bore to each other the relation of steam to steam, and while in tow the Oakwoods had no claim whatever to the superior rights of a sailing vessel.

[2] Therefore the crucial question in this case is: Where was the Moran and her tow, and what were they doing, when the Oakwoods cast off and began to sail? On this point there is a flat contradiction in the evidence; the schooner maintaining that the Moran was 1,000 feet astern at the time, and the Moran that the Oakwoods began to sail at a point 400 or 500 feet to the port or Brooklyn side of the tow and while the tug master was in the act of lengthening hawser. We resolve this contest by consideration of some matters either admitted or definitely found by the trial judge.

Confessedly there was a time when the Oakwoods on her port tack was heading for the Moran's hawser; she declares that she came about to avoid fouling that hawser, yet after so doing she admittedly struck the starboard scow with her port bow. This difficult, if not impossible, performance is sought to be accounted for by saying that the scows sheered toward Brooklyn, so as to present the one to starboard to the swinging schooner. If this happened, it could only have occurred by the Oakwoods tacking directly in front of the scows. But the lower court found that the Moran let her steel hawser run out and sink, and the Oakwoods passed entirely over it. We see no reason to doubt this finding, and it follows therefrom that whatever danger the schooner apprehended from the hawser was avoided by the skillful action of the Moran's master, and the Oakwoods had no excuse for going about where she did and failing to beat out her tack.

The direct evidence as to the respective positions of Moran and schooner, when the latter cast off, inclines us to adopt the former's version; but when it is observed that the charge against the Moran is not only of gross, but silly negligence, and that the reason for coming about assigned by the Oakwoods is taken away by the finding of

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the trial court, we find the fact to be that the Oakwoods began to sail, with the Moran lengthening hawsers about 500 feet away. Under such circumstances the schooner must show some justification for crossing or approaching the Moran's hawser. We find none; there was plenty of room for her on the Brooklyn side of the Moran, nor was she bound to go off on a port tack. So far from the Moran creating the situation of danger, we find that she was executing a lawful maneuver when the Oakwoods cast off, and the latter created her own danger by unnecessarily interfering with said maneuver. A sailing vessel's privilege does not extend to being towed close to a tug lengthening hawser, then resuming the privileged role, and complaining because the maneuver she could plainly see interfered with, not what she had to do, but what she preferred doing.

Decree reversed, and case remanded, with directions to dismiss libel, with costs in both courts.

CHICAGO, R. I. & P. RY. CO. v. STATE OF NEBRASKA.

(Circuit Court of Appeals, Eighth Circuit. April 17, 1918.)

No. 4987.

1. REMOVAL OF CAUSES ⊂=41—JURISDICTION OF FEDERAL COURTS—SUIT BY STATE—"CITIZEN."

A state is not a "citizen," and a federal court does not acquire jurisdiction by removal of a suit by a state on the ground of diversity of citizenship.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Citizen.]

2. APPEAL AND ERROR ⊂=185(1)—JURISDICTION OF FEDERAL COURTS—DUTY TO DETERMINE.

On every writ of error or appeal in the federal courts, the first and fundamental question is that of jurisdiction, of which the court itself must take notice, as well the jurisdiction of the court below as its own.

In Error to the District Court of the United States for the District of Nebraska; Thomas C. Munger, Judge.

Action at law by the State of Nebraska against the Chicago, Rock Island & Pacific Railway Company. Judgment for the State, and defendant brings error. Reversed.

E. P. Holmes, of Lincoln, Neb. (Guy C. Chambers, of Lincoln, Neb., on the brief), for plaintiff in error.

Willis E. Reed, Atty. Gen. (George W. Ayres, Sp. Asst. Atty. Gen., on the brief), for the State of Nebraska.

Before SANBORN, Circuit Judge, and TRIEBER and YOUMANS, District Judges.

YOUMANS, District Judge. This suit was originally instituted in the district court of Lancaster county, state of Nebraska. Upon mo-

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tion of plaintiff in error it was removed to the District Court of the United States for Nebraska, Lincoln Division. In the last-named court a jury was waived and the cause was submitted to the court upon the pleadings and an agreed statement of facts. The state recovered judgment. The railway company sued out a writ of error to this court.

[1] The question of jurisdiction was not raised in the court below. There was no motion by the state to remand the case to the state court. The suit was for certain taxes imposed under the laws of Nebraska. A state is not a citizen. Stone v. South Carolina, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962; Postal Telegraph Cable Co. v. Alabama, 155 U. S. 482, 15 Sup. Ct. 192, 39 L. Ed. 231; Arkansas v. Kansas & Texas Coal Co., 183 U. S. 185, 22 Sup. Ct. 47, 46 L. Ed. 144; Title Guaranty Co. v. Allen, 240 U. S. 136, 140, 36 Sup. Ct. 345, 60 L. Ed. 566. Therefore the court below did not have jurisdiction by virtue of diversity of citizenship. The cause of action stated in the complaint did not arise under the Constitution, laws, or treaties of the United States. Therefore there could be no jurisdiction on that ground.

[2] The consent of the parties could not confer jurisdiction. Chicago, Burlington & Quincy Railway Co. v. Willard, 220 U. S. 413, 31 Sup. Ct. 460, 55 L. Ed. 521. In the case of M., C. & L. N. Railway Company v. Swan, 111 U. S. 379, 382, 4 Sup. Ct. 510, 511 (28 L. Ed. 462), Mr. Justice Matthews, speaking for the court, said:

"On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it."

It thus appears that this court cannot disregard the fact of the want of jurisdiction.

The cause is reversed and remanded, with instructions to the District Court to remand it to the state court.

In re MACHINE METAL PRODUCTS CO., Inc.

(Circuit Court of Appeals, Second Circuit. April 24, 1918.)

No. 202.

BANKRUPTCY ⇐314(3)—PROVABLE CLAIMS.

That a bank which lent money to a manufacturing corporation, taking secured notes therefor, made an ultra vires agreement to accept a share of the net profits of the business, from which it received nothing, does not debar it from proving its notes against the corporation in bankruptcy.

Appeal from the District Court of the United States for the Eastern District of New York.

In the matter of the Machine Metal Products Company, Incorporated, bankrupt. From an order allowing claim of the New Netherland Bank of New York, James Gray, trustee, appeals. Affirmed.

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Collin, Wells & Hughes, of New York City (Harry H. Schutte, of Brooklyn, N. Y., of counsel), for appellant.

Sackett, Chapman & Stevens, of New York City (Henry A. Wise, of New York City, of counsel), for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The New Netherland Bank of New York loaned money upon promissory notes secured by two chattel mortgages to the bankrupt. I. N. Levinson and I. Steigerwald were accommodation indorsers. Objection was made by the trustee to the filing of these claims. In an opinion filed, the referee has dismissed the objections of the trustee, and allowed the claim of $91,580. The District Judge sustained the referee, and the trustee appeals.

The bankrupt was a domestic corporation and engaged in manufacturing munitions, when this money was loaned. Levinson was its president, and Steigerwald was the father-in-law of Levinson. Officers of the bank appear to have been interested from the inception of the organization of the bankrupt in the matter of financing the corporation. The bank loaned the money at the rate of 6 per cent. interest upon its promissory notes, with apparently two financially sound indorsers. In a letter, dated April 3, 1916, addressed to the two officers of the bank, the bankrupt agreed, for a nominal consideration, to pay the sum of 20 per cent. of the net profits of all business transacted by the bankrupt for the years 1916 and 1917. This was written on the letter head of the bank. Later it was suggested that the letter be addressed to the bank, and not the officers, and a letter similar in purport was written to the bank agreeing to pay 20 per cent. profit for the years 1916 and 1917 to it.

The trustee now objects to the allowance of the claim, first, upon the ground that the agreement to receive 20 per cent. of the profits is illegal and invalid; and, second, that, since the bank was a participant in the profits of the bankrupt's business, it should not equitably be permitted to share in the assets of the bankrupt's estate on the same terms as creditors having no such interest in the profits, and says that the claim should be allowed only as subsequent to the payment of all general creditors.

When the bank originally loaned money to the bankrupt, it did not enter into a partnership agreement. There was provision for sharing of the profits, but no provision for the sharing of losses, and it could not be held for loss. It accepted evidence of indebtedness (promissory notes), with accommodation indorsers. The testimony indicates that it was reliance upon the financial standing of these indorsers, as much as that of the bankrupt, that influenced the extension of credit. The acceptance of 20 per cent. of the profits for the years 1916 and 1917 by the bank would be illegal. Any attempted copartner relationship by the bank would be ultra vires. But the bank never received any compensation, for there were no profits. The trustee cannot, therefore, set up as a defense an estoppel by way of ultra vires. The money was loaned for the use of the bankrupt, and it has

had the benefit thereof, and is clearly liable therefor. Citizens' Bank v. Appleton, 216 U. S. 196, 30 Sup. Ct. 364, 54 L. Ed. 443.

The order appealed from should be affirmed.

YOUNG v. EVANTS et al.

(Circuit Court of Appeals, Fifth Circuit. April 15, 1918.)

No. 3207.

BANKRUPTCY ⊂=303(3)—SUIT BY TRUSTEE—FRAUDULENT CONVEYANCE.

Evidence *held* to sustain a decree for defendants in a suit by a trustee to set aside a conveyance of real estate by bankrupt and his wife prior to the bankruptcy; it appearing that the property was the separate estate of the wife, and was also at the time of the sale occupied by bankrupt and his wife as a homestead.

Appeal from the District Court of the United States for the Northern District of Texas; George W. Jack, Judge.

Suit in equity by Towne Young, trustee in bankruptcy, against Samuel Shipman Evants, the bankrupt, and others. Decree for defendants, and complainant appeals. Affirmed.

W. J. Rutledge, Jr., of Dallas, Tex., for appellant.

Joseph E. Cockrell and Lawrence C. McBride, both of Dallas, Tex., for appellees.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

BATTS, Circuit Judge. Towne Young, as trustee of S. S. Evants, bankrupt, filed suit, praying for the cancellation of conveyances of certain lots in Dallas, from Evants and wife to Irwin, and from Irwin to Daniel. The property in controversy was conveyed to Heskie L. Evants, wife of the bankrupt; the deed reciting that the consideration was paid and payable by her, and that the property was her separate estate. The property was worth $17,000, and the indebtedness assumed as a part of the purchase price was $13,000. The bankrupt testified:

"My wife, at the time of our marriage, had between $4,000 and $5,000." * * * "At my instance these five Oak Cliff lots were conveyed to Heskie L. Evants, and at that time she claimed as her separate estate the money which I owed her, and which I received from her mother's estate in Mississippi about the time of her marriage. All of the property claimed by her as her separate estate was this indebtedness."

At the time of this conveyance no reason existed why Evants could not discharge the indebtedness to his wife; and under the facts as recited in the deed, and as testified to by Evants, the property, at least to the extent of its value in excess of the indebtedness against it, became the separate property of Mrs. Evants, and could not have passed to the trustee by the bankruptcy. Evants testified with reference to the property:

"From the time it was conveyed to me I lived on the property as my home."

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There is nothing in the record to contradict this statement, and, even if the property had not been the separate estate of Mrs. Evants, the conveyance to Irwin would have been good as against creditors.

It is insisted that the sale to Irwin was simulated. If the property had been community property, or the separate estate of Evants, and the sale to Irwin simulated, and the homestead thereafter abandoned prior to the bankruptcy, and the subsequent sale by Irwin to Daniel with notice or without a valuable consideration, the trustee could recover. The court, however, would have been warranted in finding that the property was the separate property of Mrs. Evants, that it was homestead at the time of the sale to Irwin, that the sale to Irwin was bona fide, and that the conveyance to Daniel was for a valuable consideration and without notice of any fact adversely affecting the title.

The judgment is affirmed.

GENERAL ELECTRIC CO. v. SUNDH ELECTRIC CO.

(Circuit Court of Appeals, Second Circuit. April 10, 1918.)

No. 197.

1. PATENTS ⇐328—VALIDITY—INFRINGEMENT.
 The White patent, No. 969,738, in view of the disclosure of the simultaneous White and Carichoff patent, No. 969,585, which also related to means for cutting out the starting resistance in a motor circuit, *held* invalid, not showing invention, and furthermore not to have been infringed.
2. PATENTS ⇐8—SUBJECT-MATTER OF PATENT—RESULT.
 A result in itself cannot be patented.
3. PATENTS ⇐328—VALIDITY—INFRINGEMENT.
 The McIver patent, No. 874,025, and the White and Carichoff, No. 969,585, both of which relate to means for cutting out the starting resistance in a motor circuit, *held* valid, but of limited range, and not infringed.

Appeal from the District Court of the United States for the Southern District of New York.

Bill by the General Electric Company against the Sundh Electric Company. From the decree in equity, both parties appeal. Reversed and remanded on defendant's appeal, and complainant's appeal dismissed.

Action is on patents to McIver, No. 874,025 (claim 12), to White and Carichoff, No. 969,585 (claims 7, 12 and 14), and to White, No. 969,738 (claims 1 and 19). McIver's application was filed March 8, 1905, and letters issued December 17, 1907. The applications for the other patents in suit were filed together on February 27, 1909, and letters issued on both September 6, 1910. White was an applicant in each case, and in his sole specification he refers to the copendency of White and Carichoff. These patents relate to means for "cutting out" or step by step removal of the starting resistance in a motor circuit. The nomenclature used by the witnesses is not altogether uniform, and we adopt, for purposes of discussion, the usage of plaintiff's chief witness. As here used, "relay" means a pair of supplementary contacts controlling a secondary device, or at least said contacts constitute the essential feature. A "throttle" has for its essential a coil, which carries the motor current and energizes the throttle magnet, which controls the circuit of the contactor magnets.

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All the patents, and defendant's alleged infringing system, deal with control both as to certainty and speed of operation, by "current limit"; that is, a section of resistance is cut out each time the motor current falls to a certain limit, and similarly all use as a part of such control plural throttles, a use which in some form antedates all the parties to this suit.

The McIver invention consisted in associating a separate throttle relay with each contactor switch, to the end that before a contactor closes, because of the closing of the particular throttle controlling it, the throttle controlling the succeeding contactor is opened. When any given throttle and its associated contactor worked as designed (on paper), this patentee's system should operate as if each successive designed change in current was a key to lock out of the motor circuit each successive resistance section. The intended operation or energization of the throttle magnet before the contactor magnet was attained by using a "very small magnet not requiring a great many turns"—"quite in contrast to the large heavy coil used for the contactor." The system never received commercial exploitation, if for no other reason (as we find from the evidence) because the predetermined sequence of operation between associated throttles and contactors could not be depended on, there was "a race" between them, and if the contactors came out ahead the results were bad. McIver shows a direct current system, and nowhere in his specification states that he conceives his design, or thought it to be applicable to alternating current. White and Carichoff employ, as did McIver, the concept of a throttle relay that is lifted preceding the closure of its dominating contactor; but in their device each relay is opened whenever the said contactor opens, by reason of a mechanical connection between the contactor lever and the core of the throttle relay. This positive action is their contribution to the art. They, no more than McIver, provided certainly, and by electrical means, for a time interval between the closing of a contactor and the closing of its associated throttle relay. It was expected that the contactor would act before gravity acted on the relay. Sometimes the expectation was disappointed, with injury. These patentees illustrate and describe a direct current system—declaring however that this is but illustrative, because their invention might be applied "to other forms of dynamo-electric machinery and to other types of control."

White added to the White and Carichoff apparatus, as disclosed, a "supplementary maintaining device for insuring" the throttle relay being held open until the contacts of the associated contactor close, and his means consist in a supplementary coil on the relay magnet, which coil is itself short-circuited on final closure of contactor. This acts against gravity and insures the contactor winning the "race"—to continue the simile of the witnesses. This patentee calls his invention an improvement "in a type of control" covered in the copending and referred-to White and Carichoff application. So far as the claims in suit are concerned, his disclosure is the same, except for the improvement just summarized, and he uses the same language as to the system shown and described being "merely illustrative," etc.

Defendant's "automatic starting panel," made in 1915, is designed for alternating current, and follows the suggestions of a controller made and sold by them as early as 1908, except for the substitution of "current limit" control of resistance elimination for a time limit dashpot arrangement. In so substituting, as found below, McIver was infringed, because current limit control involved a holding coil energized by motor current, associated with each contact or switch, and means "operatively related" to each switch for controlling its relay, until closure of contactor; White and Carichoff were held infringed, because each auxiliary switch (throttle relay) is mechanically connected with its associated contactor, so that when the latter is open the former is positively held open. White's supplementary maintaining device found (as was claimed) an equivalent in the elongated cam surface of defendant's throttle lever, which mechanically keeps the throttle contacts at rest until those of the contactors have engaged..

Patents to McIver and White and Carichoff were declared valid and infringed, but that to White was invalidated, because the substantial invention disclosed could not have been conceived without knowledge of White and

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Carichoff's disclosure, and such knowledge of a private communication was not contemplated by the statute, wherefore White and Carichoff's patent was regarded not strictly as prior art, but as something known in contravention of statute, wherefore patentable invention was denied to White. From a decree accordingly both parties appealed.

W. K. Richardson and A. D. Salinger, both of Boston, Mass., for plaintiff.

W. B. Whitney, of New York City, for defendant.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1, 2] The relation between White and Carichoff's patent and that to White alone cannot be made plainer than by comparatively considering two of the claims in suit, with phrases italicized which constitute the claim definitions of what by plaintiff's own evidence are the contributions of each patent respectively to the sum of human knowledge.[1]

Plaintiffs, on their appeal in respect of White, seek to identify this case with that of simultaneous patents to the same inventor, as in Benjamin, etc., Co. v. Dale Co., 158 Fed. 617, 85 C. C. A. 439. It is said that the two grants in which White's name appears are but parts or fractions, which added together set forth something useful and novel as to which one joint patent might well have been taken out; wherefore the claims in suit should be regarded as were the claims of separate patents in Thomson-Houston, etc., Co. v. Elmira, etc., Co., 71 Fed. 396, 18 C. C. A. 145. On the other hand, it is fully admitted that, the disclosure of White and Carichoff once known, there was nothing patentable in the improvement of White, and it is plain, as stated below, that White must have known and used what he and his partner had done.

In our opinion the rule contended for by plaintiffs would apply if exactly what White did (not all that he claimed) independently of

[1] Claim 12 of White and Carichoff.

"In combination with a power circuit, a plurality of contactors intended for operation in succession to effect certain connections in said power circuit, control circuits for said contactors, auxiliary switches each co-operating with a contactor and arranged to control the control circuit of a succeeding contactor, *a mechanical connection between each contactor and its auxiliary switch whereby when the former is open the latter is positively held open* and when the former is closed the latter is permitted to close, and an electromagnet the energization of which depends upon the current in the power circuit arranged to prevent the closing of said auxiliary switch if the current in the power circuit exceeds a certain value.

Claim 1 of White.

"In combination with a power circuit, a plurality of contactors intended for operation in succession to effect certain connections in said power circuit, auxiliary switches co-operating with certain of said contactors each arranged to control the operation of a succeeding contactor, means for holding each auxiliary switch open while its co-operating contactor is open, and electromagnet co-operating with each auxiliary switch for controlling the closing of said auxiliary switch, *and means for maintaining the auxiliary switch substantially at rest during the closing operation of the co-operating contactor.*

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Carichoff amounted to invention; but by admission it did not, and it cannot be that something not patentable becomes so when devised by one of two inventors, as an improvement to their joint apparatus. Putting it another way, if the whole matter had been put in one joint patent, a claim specifically including White's "means," and only differing from others by such inclusion, would not have patentably varied from such others.

But we further hold that defendants have not infringed White, if that patent be thought valid, and mention this because it bears on our view of the whole series of claims in suit. If by the statement of merely functional limitations in his claim, White claims all means for maintaining the auxiliary switch at rest during the critical instant, his demand is denied. One who, in the newest and least crowded art, claims a means of doing something, only covers what he discloses with reasonable equivalents. To cover all means is to patent a result, which is impossible in terms; and it must indeed be a radically new result of the disclosed means, that cannot be reached by some other path, not falling within the category of "substantially as described." In this instance, since White's supplementary maintaining current is confessedly not per se a patentable improvement, it is impossible to perceive infringement in the use of a mechanical means of reaching the same result. Therefore the appeal of plaintiff is not sustained.

[3] As to the other patents, we do not disagree with the finding below that McIver discloses[2] a theory and plan of inter-related automatically controlling currents that differed from anything earlier shown in the evidence, and that White and Carichoff used that theory in disclosing a controller wherein the mechanical connection between the lever of the contactor and the core of the throttle relay magnet was new. But, when it comes to finding infringement of the suit claims of both patents in defendant's 1915 controller, we are compelled to disagree, because the disclosures which give their true meaning to the claims do not, under the evidence, cover an alternating current device.

We do not intimate that much electrical invention is not applicable to both direct and alternating current apparatus, instances of litigation in which it has been so held are not wanting,[3] but we are of opinion that in this instance the plaintiffs have not borne the burden of affirmatively proving infringement. The inquiry is not as stated by plaintiff whether the "combinations claimed" can be used with direct or alternating circuits, unless it is understood that the claim is good for nothing that is not disclosed or some reasonable equivalent thereof, and that what is reasonable depends on the value or inventive worth

[2] Claim 12 is as follows: "In combination, a series of switches arranged to close in automatic progression, a relay associated with each of a plurality of the switches for controlling the operation of succeeding switches, means operatively related to each of said switches for controlling its relay, and a holding coil associated with each relay and energized by motor current."

[3] Thomson-Houston, etc., Co. v. Western, etc., Co., 70 Fed. 69, 16 C. C. A. 642; cf. Western, etc., Co. v. Sperry Electric Co., 58 Fed. 186, 7 C. C. A. 164.

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of what is disclosed. A claim can usually be couched in such terms, as at once to comply with office rules, and verbally cover a great deal more than the disclosure teaches the contemporary man of skill in the art, by whose capacity as proven, inventive worth is to be gauged. It would not advance matters to go into details of evidence, but our conclusion on the facts is that McIver and White and Carichoff disclose no means of operating by alternating current, and when with the advantage of from 8 to 11 additional years of electrical growth, a witness was called by plaintiff to prove that the transformation was within the ability of the skilled man, it appeared that not only must the circuits be rearranged, and the magnets utterly changed, but that the very style of magnet suitable for alternating current and used by the witness to show how easy it would have been to turn a direct into an alternate current system, had been invented by one of defendant's witnesses, who got a French patent for it in 1908 and one in this country in 1911. It has often been pointed out how invariably a hostile expert finds that a given device will not work; this case is an example of the perhaps unconscious use of knowledge prevalent at date of trial, to interpret the disclosures of years before.

That McIver says nothing indicative of a belief that his apparatus could be adapted to alternating current has been pointed out, and what White and Carichoff say on the subject is quoted above. We think the language of doubtful import, and think it proved that their apparatus was not suited for alternating current without material unsuggested changes. The court below was of opinion that these two patents contained kernels of new valuable inventive thought, and treated them with a liberality that we must regard as unwarranted. McIver is a perfect example of what has so long been called a paper patent. White and Carichoff, without White's supplementary coil, was never made. As disclosed, with direct current, there was no practical applied worth in them, and when it comes to saying that they taught in respect of alternating current history testifies for defendant.

All the suit patents issued to plaintiff, the inventors were admittedly working for plaintiff; yet that well-known manufacturer never utilized the teachings of these patents of theirs for alternating current, but, on the contrary, now compete with defendant's alleged infringement, by means of a controller patented by White in 1912 and not very closely allied to anything else in evidence. Of course, this was within legal right, but the inference is irresistible that, if the inventions gave anything worth knowing about alternating current controllers, such knowledge would have been utilized and the utilization shown in evidence in this case. We think the fact to be that these patents are rather theories of action than anything reducible to practical value from the specifications, and such patents are entitled to but a limited range. They block invention and prevent achievement, if anything more than their specific disclosures are recognized as within their claims.

In valuing these inventions, we have considered the evidence of prior patents and accepted McIver as a clever theory worked out in di-

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rect current on paper and never fruitful in practice, and White and Carichoff as revealing a mechanical device, new enough in its shown use, but which, as inserted in this especial electrical apparatus, almost certainly enabled gravity to get ahead of the current in the throttle coil. If this is all the patentees did, their suggestions must be very directly appropriated to enable them to prevent others from doing. Here there is no direct appropriation, and no more than a dubious reading of too widely drawn claims upon a thing which is electrically wholly different.

The decree is reversed, on the defendant's appeal, and cause remanded, with instructions to dismiss the bill on the ground of noninfringement of McIver and White and Carichoff. The plaintiff's appeal is dismissed, and White's patent held invalid, on the grounds given below. Defendant will recover one bill of costs in this court, and also costs below.

BENJAMIN ELECTRIC MFG. CO. v. NORTHWESTERN ELECTRIC EQUIPMENT CO.

(Circuit Court of Appeals, Second Circuit. April 10, 1918.)

No. 186.

1. PATENTS ⟸48—INVENTION—SMALL SIZE—"MIDGET"—"DWARF."
An electric attachment plug, designated as "midget," or "dwarf," is not patentable because it is small, though its compact size makes it more convenient than larger plugs.

2. PATENTS ⟸328 — INVENTION — INFRINGEMENT — "BASE" — "BUSHING" — "BUTT"—"TIP"—"CARRY."
The Benjamin patent, No. 1,012,970, for an electric attachment plug, comprising a base having an exposed end contact and a recess at its side, an outer contact, consisting of a removable sleeve immediately surrounding and inclosing the base, said sleeve being rotatable independent of the base, etc., *held* to show invention, and to be infringed by defendant's device—the word "base," which has no invariable meaning in mechanics, as well as the term "bushing," adopted in describing the device, being practically equivalent to the expressions "butt" and "tip," used in connection with defendant's device; nor was the invention limited by the word "carry," used in one of the claims, for that is a most general term.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Base; Carry.]

3. PATENTS ⟸35—INVENTION—COMMERCIAL SUCCESS.
Great commercial success, which enables a device to displace existing appliances, is evidence of invention, and a reason for a broad construction of the claims of a patent.

4. PATENTS ⟸36—CONSTRUCTION—BROAD CONSTRUCTION.
Acquiescence, not only assists in finding invention, but justifies breadth of construction of the patent itself.

Appeal from the District Court of the United States for the Southern District of New York.

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Suit by the Benjamin Electric Manufacturing Company against the Northwestern Electric Equipment Company. From a decree for complainant, defendant appeals. Affirmed.

Appeal from decree in equity entered in the District Court for the Southern District of New York. Action is upon claims 3, 6, 12, 25, and 28 of patent 1,012,970, issued December 26, 1911, to R. B. Benjamin, for that form of electric device known as a "swivel attachment plug." The stated objects of invention are to give "ready access to the binding posts," for ease of connection, and to produce a form that "can readily be inserted in a socket without twisting the connecting wires." Of the claims at bar, No. 3 is the most general, and is as follows:

"An attachment plug comprising a base having an exposed end contact and a recess in its side, an outer contact consisting of a removable sleeve immediately surrounding and inclosing the base, said sleeve being rotatable independently of the base to connect the plug in position for use, and a binding post for the sleeve conductor located in the recess and concealed by the sleeve, but being disclosed when the said sleeve is removed."

While No. 25 serves to present sharply one of the principal arguments of defendant, and reads thus:

"An attachment plug comprising a rotatable threaded sleeve, having a handhold, and two body portions, one having a handhold, and the other carrying all of the electrical conducting parts, except the said sleeve."

The definitions of invention in the other claims do not vary enough to justify further quotation.

The Benjamin device entered (about 1909) a market already supplied with swivel plugs of at least three makes. Electrically it contains nothing new; that is, it confessedly carries current, provides insulation, and makes connection with fixed wires, just as do all the plugs (e. g.) commonly used for domestic electric lighting, and forming one end of the "electric light bulb" well known even to housekeepers. Its commercial success, whether measured by sales or acquiescence evidenced by royalty agreements, has been very marked. Its compactness produces a size that has given it the trade name of "dwarf" or "midget"; its cost is less than earlier swivel devices. It is proven that in the seven years, or thereabouts, between its introduction and the date of this suit, it drove all preceding swivel plugs out of the market.

Defendants sell what is known as the "Best" plug, a product of the Best Manufacturing Company, which defends upon the ground that the claims in suit, unless so restrained by the disclosure and prior art as to negative infringement, are invalid.

The trial court found infringement of all the claims before us, and from decree accordingly defendant appeals.

Frederick W. Winter, of Pittsburgh, Pa., and Oscar W. Jeffery and E. Henry Lacombe, both of New York City, for appellant.

Frederick P. Fish, of Boston, Mass., W. Clyde Jones and Arthur B. Seibold, both of Chicago, Ill., and Everett N. Curtis, of Boston, Mass., for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] Doubtless plaintiff's product succeeds, in part at least, because it deserves the name "midget" or "dwarf" as compared with its obsolete predecessors; but it is not patentable because it is small, nor did the patentee make any such suggestion. "Midget" is a catchword, good for trade, but not affecting any legal inquiry. There has been too

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much expenditure of language over the excellences thought to be suggested by its use and iteration.

[2] Appellant has furnished photographs of plaintiff's and defendant's "bases"; i. e., the completely assembled plugs, with "removable" and "independently rotatable" sleeves removed. They are reproduced below.[1]

Benjamin



Best



Here are seen the end contacts, and the binding post for the "outer contact" which is the sleeve. The electrical identity of the plugs is, we think, plain on sight.

Mechanically the "rotatable threaded sleeve having a handhold," which is also common to both devices, is applied in quite different ways, said to entail important consequences. In Benjamin the striated surface of the lower end as shown (through which the insulated wires run) unscrews, permitting the sleeve to be slipped on over the insulated base proper, where it is held by and between a collar abutting against the shoulder of the base as shown, and the end or "bushing," after it is screwed on again. Then the plug is ready to be screwed into the socket; the revoluble threaded sleeve entering and filling the same, so that substantially nothing but the "bushing" shows when the plug is screwed home and the end contact is effected. It is, we think, plain that, by the rotatable sleeve with handhold, the object of not twisting wires is attained; and by the arrangement of parts protected by the sleeve when in use, yet easily gotten at, "ready access to the binding parts" is afforded. Of course, the assembled plug is made of many separate pieces of porcelain, metal, and fiber; but it may fairly be said to dissect into three parts for purposes of inspection and repair—the base, bushing, and sleeve.

In Best, the plug as shown dismembers very differently; it is the end contact screw that (in a sense) holds the sleeve on and the whole apparatus together. If that be removed, the base insulation comes out or off; the terminals being affixed to what looks like the bushing

[1] Benjamin v. Best, from page 2 of defendant appellant's charts.

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of Benjamin. The rotatable sleeve is then slipped over the terminals, the insulation fitted over them and into the sleeve, and the whole bolted together by the reinserted end contact screw. Thus defendant's device separates into four pieces, which counsel denominate butt, tip, sleeve, and contact screw.

Although invention in some minor degree at all events is not denied by defendants, it remains true that the questions presented cannot be resolved without defining with some accuracy certain words as used in specification, claim, and argument, for thereby the nature and meaning of the patent is both ascertained and stated.

"Base" is of these words the most important, and we agree with defendant that it has no invariable meaning in mechanics, and that it is used in the specification before us as describing bodies sometimes of one construction and sometimes of another; but we cannot doubt that, as used in claim 3, the word refers, as it does in ordinary talk about lighting plugs, to that cylindrical insulating part which always contains the contacts and keeps them from short circuiting. This claim in words describes "base" no further than to require an exposed end contact and a side recess for a binding post for the side (sleeve) conductor. It is almost common knowledge that such an insulating base must, to keep wires in position, have shop-fitted to it other parts —adjuncts—and all together are spoken of as the base; i. e., that to or in which the lighting or power device is affixed, and into which the current wires extend. Defendants have themselves used the word in that sense in describing the photographs above reproduced, which show the "bases" of both plugs; i. e., the insulating base and its adjuncts, ready for the rotatable contact shell or sleeve.

"Bushing" as used in the specification, is so called because through its perforated center run the insulated wires. We see no reason why, for the same reason, the lower part (as shown) of the Best plug could not be called by the same name.

"Butt" or "tip," applied to Best as dissected, are words of experts' coinage, and fully describe the two main parts into which the base of that plug is separable; but the making of the words does not seem important.

Assuming the foregoing meanings for the words enumerated, it is thought plain that both the claims quoted read directly upon the Best plug, and so will all the others in suit. While this suggests, it does not prove, infringement; and it remains to ascertain what (in the light of prior art) Benjamin disclosed that was new, and whether Best has only assembled what was old.

That a swivel attachment, for anything that has two wires dangling from it, is desirable, seems so plain that it is with some surprise that but three prior patents [2] are found to have instructed in that particular, and it is admitted that none of them ever produced a commercial embodiment of disclosure. All three reveal the rotatable and detachable sleeve, but none attempts even to put, with usual insulation, the bind-

[2] McGlone, 631,173, Quinn, 670,376, and Van Aller, 740,952—the latest issuing in 1903.

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ing posts inside that sleeve. Quinn does put them there, but with no insulation except air. It would be unprofitable to do more than state our conclusions on these three patents. Quinn is proved utterly unpractical, if not inoperative. The others fairly enough represent on paper exactly what Benjamin drove from the market; i. e., a plug with the electrical joints or fitting places in a housing exterior to what went into the socket—heavy, unsightly, and necessarily expensive.

Two other patentees [3] had in solid plugs taught the possibility of wholly or partly putting binding posts and adjuncts within the area bounded by the screw thread fitting the socket, and Bown at least had done so to diminish size; therefore it is claimed (in substance) not that it lacked invention to combine the suggestions in a particular form of matter, but that any departure from the specific form disclosed must be, even if not obviously identical with prior art, noninfringement nevertheless, because Benjamin disclosed nothing including or underlying what Best has done. Chicago, etc., Ry. v. Sayles, 97 U. S. 554, 24 L. Ed. 1053. Again, we need but state results of evidence in respect of these solid plug patents. Bown's methods of stowing or disposing binding posts and wire within his shell were wholly incompatible with a rotatable sleeve, and Fielding, when put to the test of practice, was unworkable, except under license from Benjamin. Thus we arrive at the usual inquiry: Is the form or substance, or both, of the patented device, copied?

If Benjamin had disclosed only the "preferred unitary base" sufficiently shown in the photograph above, and which is his commercial embodiment of invention, we think form would have been successfully avoided by Best; but as an alternative embodiment the patentee discloses a structure in which the tip or insulating end of plug is separable, so that it disassembles substantially as does defendant's. The substance of Benjamin is the real bone of contention. We feel assured from the evidence that he was the first to disclose and describe a structure in which, when the socket was filled, almost no plug showed outside, which could be inserted and removed without twisting wires, and could be examined for defective wire connections without disturbing shop fit or injuring delicate partitions of insulating material. This is a considerable list of achievements, and needs no dwelling on such words as "dwarf" or "midget," for all these words mean, when considering function, is that the standard socket is a small hole; if by agreement sockets became a foot in diameter, both the styles of plug before us could operate in the same way, and the question of infringement would be the same.

Even when dealing with substance, definition of words is important. Admittedly each plug has "two body portions"—(claim 25) in Benjamin, "base and bushing"; in Best, "tip and butt." Each has a handhold; the former on bushing, the latter on butt. Therefore it is insisted that, because Best's terminals are affixed to the butt that has the handhold, there is a substantial difference to Benjamin, all of whose

[3] Fielding, 752,833, and Bown, 837,182.

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"electrical conducting parts" are carried by the "body portion," that has no handhold. This argument identifies affixing and carrying. The meaning cannot be so summarily limited; the word "carry" is too general, and in accurate speech its meaning is often plastic, even after modification by the words "in," "on," "with," "through," etc. If Best's terminals, as carried by or on his butt, were alone inserted in the socket, the device would not be as good as Quinn's air insulation; and when those terminals are fitted into the insulation and fastened by the end contact screw, it is both good English, and necessary electrical engineering, to say (as plaintiff contends) that Best's "electrical conducting parts" are carried "in" the tip, or what in both plugs performs the essential insulating function of a base.

It is of course true that this view of the patent, the thing made under it and that said to infringe, regards the device of each party as a functioning entity, as an organization, and refuses to think important differences in structural parts, which are only useful in their totality. This was done also below, and is much complained of as a denial of defendant's right to have his device "compared with the terms of the claims" in suit. We perceive no force in the contention; it has been shown that (e. g.) claim 3 reads directly on Best, and, when the organization or functional relation of the components of both devices are studied, that (e. g.) claim 25 also so reads. We know of no proper way to study either an alleged invention or the claims defining it, other than to consider its organization, to regard it as the sum of all its parts, and extract meaning from words of definition accordingly.

The insistence, just noticed, upon differences in construction, not affecting organization or functional result of the completed whole, is, we think, but one way of presenting the crux of this cause; i. e., was the invention of Benjamin anything more than neatly arranging, with attractive compactness, a number of old parts which, when assembled, did exactly what they had been doing for about a generation? This method of statement dwells on the invention as the attempted solution of an electrical problem, whereas the difficulties were mainly mechanical. It is proven that what gave Benjamin success was the form of his insulation, at once effective, compact, and strong, yet capable of inexpensive production by porcelain makers. That Bown and Fielding failed in, and Quinn sought to evade by leaving it out, while McGlone and Van Aller did not touch the matter; they left it (so to speak) outside in the housing that long made swivel plugs unattractive. Benjamin made a change in the elements of an existing structure, and thereby corrected an existing difficulty; i. e., he completely reorganized that part of a plug carrying the contacts in or on itself, by juxtaposing the binding posts. The means for introducing that novelty were perhaps per se neither new or patentable, but the resulting structure was an excellent invention. Miehle, etc., Co. v. Whitlock, etc., Co., 223 Fed. at 650, 139 C. C. A. 201.

[3] Inasmuch, however, as the problem and its solution, in a mechanical sense and to those who look backward, seem very simple, while

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electrically there is no novelty at all, we consider it appropriate to invoke commercial success as evidence of invention, and a reason for broad construction of claims, if that be necessary.

No instance is at present remembered of a more marked or rapid success achieved by a patented article which, to get a market, had to displace existing appliances made by skilled and powerful manufacturers. This is a feat very different from inducing the public to form a new habit, due quite as much to plausible advertising as intrinsic merit, or from obtaining a species of success for a patented adjunct to an existing and meritorious article. Locklin v. Buck, 159 Fed. at 436, 86 C. C. A. 414.

Prompt and extensive use plus displacement of earlier devices is "of itself" persuasive evidence of invention (Minerals Separation v. Hyde, 242 U. S. at 270, 37 Sup. Ct. 82, 61 L. Ed. 286), a form of statement stronger, we think, than has before fallen from that court on this subject.

[4] By admitting some measure of invention, the present defendants seek to avoid or minimize the force of the foregoing; but as said in Boston Woven Hose Co. v. Penna., etc., Co., 164 Fed. 557, 90 C. C. A. 84, acquiescence not only assists in finding invention, but justifies breadth of construction of the patent itself. And to the same effect is our decision in O'Rourke, etc., Co. v. McMullen, 160 Fed. at 933, 88 C. C. A. 115.

We have not doubted invention, but its value is greatly enhanced by proof of public acquiescence. The defendant's device is literally within the claims in suit; it is substantially within Benjamin's achievement, unless the claims are narrowly construed. Being convinced by the evidence that such construction would be unwarranted, the decree below is affirmed, with costs.

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MARTIN GAUGE CO. v. POLLOCK et al.

(District Court, N. D. Illinois, E. D. April 24, 1918.)

No. 906.

1. PATENTS ⊂=129—SUIT FOR INFRINGEMENT—ESTOPPEL TO DENY VALIDITY.
If the assignor of a patent, estopped to deny its validity, procures a third person to furnish money to make and sell an infringing device, or a corporation is organized for that purpose, such third person or corporation is bound by the estoppel.

2. PATENTS ⊂=129—SUIT FOR INFRINGEMENT—EFFECT OF ESTOPPEL TO DENY VALIDITY.
In an infringement suit against an assignor and his privies, who are estopped to deny validity of the patent, the claims are given their prima facie scope, and evidence of the prior art is admissible only to explain any ambiguity in their language.

3. PATENTS ⊂=328—INFRINGEMENT—TIRE PRESSURE GAUGE.
Pollock patent, No. 1,220,272, for an automobile tire pressure gauge, *held* infringed.

4. PATENTS ⊂=129—SUIT FOR INFRINGEMENT—WAIVER OF ESTOPPEL.
Effect of the estoppel of defendants in an infringement suit to deny validity of the patent is not waived by complainant, by introducing other patents as bearing on the question of infringement, where waiver is expressly disclaimed.

In Equity. Suit by the Martin Gauge Company against Albert E. Pollock, the Protex Manufacturing Company, and Charles Friedlander & Co. On final hearing. Decree for complainant.

Lynn A. Williams, Geo. S. Pines, Robert M. See, and Edward Rector, all of Chicago, Ill., for plaintiff.

Frank H. Drury, Jones, Addington, Ames & Seibold, and Walter Hamilton, all of Chicago, Ill., for defendants.

SANBORN, District Judge. Infringement suit on a patent for an automobile tire pressure gauge, invented by the defendant Pollock. On September 18, 1916, Pollock verified his application for the patent in suit, and on the same day made a written assignment thereof to a corporation known as Firex Manufacturing Company, and in the assignment requested that the patent be issued to the corporation as his assignee. The patent application was filed October 2, 1916, and the patent issued to the corporation, as requested, March 27, 1917. On March 29, 1917, the Firex Company assigned the patent to the plaintiff, which brought this suit June 23, 1917.

Plaintiff's gauge is made under Pollock patent, No. 1,220,272, and defendant's under Pollock patent, No. 1,219,865. They may be called the Martin gauge and the Protex gauge. The former was applied for October 2, 1916, and issued March 27, 1917, and the latter applied for February 19, 1917, and issued March 20, 1917. The two are very much alike. They are made of brass tubing, with a short piston at the bottom attached to a long compression spring extending the whole length of the tube. When air from the tire valve is ad-

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mitted to the bottom of the tube, the piston is pushed up against the compression of the spring. In plaintiff's gauge an indicator is also pushed up at the same time, bearing an indicator point running in a longitudinal slot to register with figures on the outside of the tube, in order to indicate the number of pounds of air pressure. In the Protex, the figures are placed on a tubular shell, sliding just inside the outer tubing and outside the spring. This shell slides up with the pressure, and the proper figure shows through a window or slot in the outer tube. This is the only important difference between the gauges. The two forms of indicating device are most palpable equivalents. In one, a pointer moves over a scale; in the other, a series of numbers are made to appear successively at a slot or window. The two forms have always been interchangeably used on spring scales known to every one.

The controversies in this case turn mainly on the relation of the defendant Pollock with the parties on both sides of the case. The plaintiff, Martin Gauge Company, is a legal form under which Charles Cohn and Michael Gidwitz own the Pollock-Martin patent in suit. Another corporation, called the Firex Manufacturing Company, represented the business of making and selling fire extinguishers, which business was brought to them by Pollock, and operated by the three of them for a few months, when it proved unsuccessful. The main business of Cohn and Gidwitz is in connection with a corporation known as the Lanzit Corrugated Box Company. Pollock went to Cohn and Gidwitz with the fire extinguisher, because they were able to furnish the money to start the business.

The claims made by plaintiff are that Pollock, having sold and assigned the Martin patent in suit to the Firex Company, to which plaintiff has succeeded in title, is estopped to deny the validity and prima facie scope of the patent by the rule of this circuit announced in Siemens-Halske El. Co. v. Duncan El. Co., 142 Fed. 157, 73 C. C. A. 375. Then it is further claimed that the estoppel also extends to all the other defendants, because it is alleged the proof shows that they went into the business of infringing the patent after having derived from him their knowledge of the infringing device, and having availed themselves of his knowledge and assistance.

The relations between Pollock and Cohn and Gidwitz, prior to his getting them interested in the tire gauge business, are only important to show the consideration for his transfer of the patent. Pollock having brought them the fire extinguisher business in the spring of 1916, and the Firex Company having been organized to represent that business, in which Pollock held 12 of the 25 shares, and the extinguisher business not proving successful, Pollock brought to their notice, on September 18, 1916, his invention of the tire gauge. Cohn and Gidwitz submitted the matter to a patent lawyer, and were advised by him that a patent taken out on the device would be valid, and would not infringe the Twitchell gauge then on the market. Thereupon it was agreed between Pollock and Cohn and Gidwitz that the latter would furnish the money to make and sell the device, and for taking out a patent, and continue to Pollock the payment of $40 a week

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which he had been receiving in the fire extinguisher business; also, if a new corporation should be formed to represent the gauge business, Pollock was to have a full half of the corporate stock. Pollock on his part agreed to assign the patent application, turn over certain orders for gauges he had taken, and give his services to the gauge business.

The patent was accordingly applied for, and assigned to the Firex Company, and later to plaintiff, as already detailed. Dies for the gauge were procured, a large amount of brass tubing purchased, and some 50,000 orders for gauges taken. As soon as it became known that the new gauge was coming out, the owners of the Twitchell gauge threatened to bring infringement suits. Advice of patent lawyers was again taken, and their advice was the same as before. Pollock brought forward another form of gauge, the Protex gauge as now used by the defendants, and suggested that it would not infringe the Twitchell patent. He also presented a model of the new gauge, but his suggestions were not considered of any value. This new model was the same as that of the defendant's device, now claimed to infringe. No deliveries of gauges were ever made under the orders taken.

The new corporation to represent the gauge business was organized under the name of the Martin Gauge Company, January 9, 1917. It had been agreed that Pollock was to have one-half the capital, but Cohn and Gidwitz insisted that on account of the threats of infringement suits, and expense not contemplated, he should have only one-third, and he assented to this. Each of the parties subscribed for $3,333.33 of the stock (fixed at $10,000), but no certificates were ever issued. Pollock was general manager and sales agent of the gauge business, at a salary of $40 a week, until he stopped work February 17, 1917.

A point has now been reached in the narrative where the relations of Pollock to both sides of this controversy may from the evidence be clearly stated. After the organization of the Martin Gauge Company, early in January, 1917, Pollock became dissatisfied with his position, mainly because he was not getting enough wages. He says he would have been perfectly satisfied with an increase of $10 a week; but he had no legal right to demand an increase. He was manager of the Martin Company, holding a third interest in it, and if he wished to push the sales of gauges he had full power to do so. It is probably true that Cohn and Gidwitz were backward about putting up more money; but the tubing and dies were there, and Pollock had the game in his own hands.

Being dissatisfied, Pollock cast about for some new business connection, and during the last week in January he met the defendant William Friedlander and endeavored to interest him in a plan to purchase the tire gauge and extinguisher business of the Firex and Martin Companies, including the patent in suit. It was finally agreed that this should be done, and an offer was made by Friedlander to Cohn and Gidwitz to pay them what they had put into those matters. This was not accepted, and there was some talk of their asking $60,000; but Pollock did not

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follow up the negotiations, or make any great effort to buy them out. He had another scheme.

In his conferences with William Friedlander late in January, and prior to the middle of February, Pollock told him about the new Protex gauge, of which he had shown Gidwitz and an attorney the model when the question of infringement came up, and it was agreed that, if they did not succeed in buying out Cohn and Gidwitz, they would organize a new company to produce the new gauge, to be sold by Charles Friedlander & Co. (who were dealers in automobile accessories), and that a patent should be taken out on the Protex gauge. Pollock was to be "taken care of" by Friedlander—that is, have a salary of $50 a week. Pollock heard that the patent application on the Martin gauge had been or was soon expected to be allowed. He therefore hurriedly prepared the application on the Protex, had it filed, his attorney went to Washington, and by application to the commissioners had the case made special, thus obtaining an immediate allowance of the application; the patent being issued within 30 days from the time of application filed. This great haste was in order to get the patent allowed quickly, so as to secure Friedlander in making his advances. As soon as the patent was issued, the defendant corporation, Protex Manufacturing Company, was organized with a paid-up capital of $5,000. This corporation expended $8,000 in putting the new Protex gauge on the market. Pollock's connection with Cohn and Gidwitz ceased on February 17, 1917, and on March 3, 1917, Friedlander paid them $371 for a release of all claims and demands they had against Pollock. This release was also intended to cover claims of the Martin Gauge Company.

[1, 2] The inference from this state of facts is perfectly obvious. If the assignor of a patent, estopped to deny its validity, agrees with a third person to furnish money to make and sell a device designed to accomplish the same purpose as, and which is an infringement of, the patented device, such third person thereby becomes bound by the estoppel; and a corporation organized for the purpose of bringing out the new device and putting it on the market, and to which a patent thereon was assigned, is likewise estopped to deny the validity of the patent. All the parties are likewise bound by the rule in the Seventh Circuit, by the prima facie scope of the patent claims, and the prior art is not admissible in evidence in a suit involving infringement, unless there is ambiguity or uncertainty in the language of the description and claims, and then only so far as necessary to explain such ambiguity. Siemens-Halske El. Co. v. Duncan El. Co., supra; Chicago & Alton Ry. Co. v. Pressed Steel Car Co., 243 Fed. 883, 156 C. C. A. 395.

Authorities bearing on the question of who are privies to the estoppel are Continental Wire Fence Co. v. Pendergast (C. C.) 126 Fed. 381; Cross Paper Feeder Co. v. United Ptg. Mach. Co. (D. C.) 220 Fed. 313; Daniel v. Miller (C. C.) 81 Fed. 1000; Mellor v. Carroll (C. C.) 141 Fed. 992; Woodward v. Boston Lasting Mach. Co., 60 Fed. 283, 8 C. C. A. 622; Roessing v. Coal & Coke By-Products Co., 208 Fed. 990, 127 C. C. A. 394; Climax Lock & Ventilator Co. v. Ajax Hardware Co. (C. C.) 192 Fed. 126; Mergenthaler Linotype Co. v. Inter-

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national Typesetting Mach. Co. (D. C.) 229 Fed. 168; Onondaga Indian Wigwam Co. v. Ka-Noo-No Indian Mfg. Co. (C. C.) 182 Fed. 832; Babcock & Wilcox Co. v. Toledo Boiler Works Co., 170 Fed. 81, 95 C. C. A. 363; Macey Co. v. Globe-Wernicke Co., 180 Fed. 401, 103 C. C. A. 547 (Seventh Circuit); Trussed Concrete Steel Co. v. Corrugated Bar Co. (D. C.) 214 Fed. 393.

The new Protex gauge was the head and front of all the negotiations, arrangements, and agreements between the defendants. It was to develop its manufacture and sale that Pollock left the plaintiff, Friedlander put up the money, and the Protex Company was organized. Without it none of these things would have happened. If, therefore, the Protex gauge is an infringement of plaintiff's patent, all the defendants are liable as privies in joint acts of infringement, and all are equally bound by the estoppel of Pollock in assigning the application to the Firex Company, by which it was transferred to plaintiff.

[3] By the rule of the Siemens-Halske Case the claims are to be given their full prima facie scope. As already stated, the main difference between the two devices is the difference in the devices for marking or indicating the amount of pressure. The elements of claim 5, and corresponding elements of the Protex gauge, are as follows:

1. A tubular barrel, closed at the upper end, and an air inlet at the lower end.	1. Tubular shell, with cap, and means to establish communication between shell and tire.
2. A piston reciprocable within the barrel.	2. Piston head and piston rod.
3. A spring between the piston and upper end of the barrel.	3. Coiled spring surrounding rod, between piston and cap.
4. A tubular indicating member within the barrel, engaged by a shifting upwardly with the piston.	4. Indicator number loosely seated on piston head, slidable within the shell, bearing a pressure indicating scale.
5. A longitudinal slot and scale-markings on the barrel, co-operating with the indicating member to show pressure.	5. A small opening through the shell so positioned that the indicated pressure may be read.
6. A spring tongue, causing frictional engagement between the indicating member in the barrel.	6. A portion of the indicating member being sprung outwardly to bear against the interior of the shell to hold the member in indicating position after the gauge is removed from the tire valve.
	7. Means for returning the indicating member at will.

As will readily be seen, the only material differences are in fourth and fifth elements. The figure scale of Protex is on the indicating member, instead of the barrel or shell, and the window is substituted for the longitudinal slot therein. The difference is of no importance. The scale art shows both forms indiscriminately employed. The mode of operation of the two devices is identical; but the result is recorded in a slightly different way, like the difference between writing on a slate and a shingle. Certainly the Protex gauge is within the prima facie scope of claims 5, 6, and 7 of the patent in suit. Claims 1, 2, 3, 4, and 8 call for an indicating arm or point, co-operating with the scale on the barrel to indicate the pressure. The substitute for this in the Protex is the window in the barrel or shell, which serves precisely the

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same purpose as the indicator point. This indicator point also serves the same purpose as the seventh element in the Protex gauge, by which the indicating sleeve may be moved back to operative position at will. I think all the claims of the patent in suit should be held infringed.

If claims 5, 6, and 7 be criticized as inoperative, because they do not indicate any method of sliding back the tubular indicator to restore the gauge to its normal position ready to be applied to the tire valve, and that the indicator point is therefore a necessary operative part or element, the result is the same, since the additional element is supplied to these claims from the description, following the rule of Westinghouse v. Boyden Power Brake Co., 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136.

[4] Plaintiff's counsel introduced in evidence certain patents earlier and later than the patent in suit, in order to throw some light on the question whether defendants' gauge is the equivalent of plaintiff's. This was done with an express disclaimer of any intention to waive the estoppel relied on; but it is now insisted that the introduction of prior art patents by plaintiff waived the estoppel relied on. Waiver is the intentional relinquishment of a known legal or equitable right. Lehigh Valley R. Co. v. Providence Washington Ins. Co., 172 Fed. 364, 97 C. C. A. 62. Here there was no intention to waive the estoppel, but to assist construction on the question of infringement. In Bardon v. Land & River Imp. Co., 157 U. S. 327, 334, 15 Sup. Ct. 650, 39 L. Ed. 719, plaintiff in a suit to quiet title, relying on tax deeds and special limitation laws in their support, in order to sustain contentions not involved in the question of limitation, introduced evidence which incidentally showed that the deeds were invalid for defects which the limitations would cure. It was contended that the introduction of such evidence was a waiver of the limitations, but the court held that, since the evidence was introduced for another purpose, there was no waiver.

The bill of complaint contains allegations to the effect that the Protex patent, which is the foundation of the pressure gauge business of the defendants, belongs in equity to the plaintiff, and there is a prayer for relief to that effect. I think, however, that the proofs do not show any agreement to transfer this invention, or any equity to have it transferred, so that part of the bill fails for want of equity.

There should be a decree for infringement of all claims of the Martin patent, injunction, and accounting for profits and damages, with costs. Although part of the relief prayed for is denied, this was merely incidental to the infringement claimed, and this result should not prevent the recovery of costs.

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ÆOLIAN CO. v. CUNNINGHAM PIANO CO.

(District Court, E. D. Pennsylvania. April 23, 1918.)

No. 1715.

1. PATENTS ⟸37—ELEMENTS OF PATENTABILITY.

Whenever a new thought of real value is brought into combination with some means by which it is given physical expression, the combination is patentable, although the means may by itself show limited novelty, or even be such that by itself it would not be patentable.

2. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—PLAYER PIANO ATTACHMENT.

The Young patent, No. 692,968, for an improvement in player pianos, consisting of a line on the music sheet by which to guide the movement of the controller, claims 1 and 2, disclose novelty and invention, and are valid; also *held* infringed.

In Equity. Suit by the Æolian Company against the Cunningham Piano Company. On final hearing. Decree for complainant.

See, also, 244 Fed. 478.

George D. Beattys, of New York City, and Joseph C. Fraley, of Philadelphia, Pa., for plaintiff.

Edmund B. Whitcomb and Hector T. Fenton, both of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. This controversy concerns claims 1 and 2 of letters patent No. 692,968, dated February 11, 1902, issued to the plaintiff, as assignee of Francis L. Young, the inventor. There is a concord of opinion that claim 1 affords an adequate test of the rights of the parties, so that this only will be discussed.

The invention relates to the class of mechanical instruments variously known as player pianos, pianolas, and by other names of designation. The appeal which they make to purchasers is to those who desire to have the means of producing music at will, although they are without the musical training and skill to play the ordinary piano. To enable the unskilled person to get music out of a piano, certain mechanical appliances are made use of which are themselves brought into action through the movement of certain levers or controllers; musical results being produced by and through this manipulation.

Prior to the invention claimed to have been made by Young, the player of the instrument was guided in his manipulation of these levers by means of instructions which appeared upon the music sheet. As the sheet moved under the eye of the performer, the instruction for his guidance would also be brought before him. The instruction necessarily must be understood by him, its significance grasped at once, and through and by a mental operation interpreted in terms of lever movements. This included the particular lever to be moved, the direction in which it should be moved, and the extent and duration of the movement. It was found that this operation called for a degree of skill in the performer which all who wished to be performers did not possess. A consequence was that intending purchasers of

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these instruments, who listened to the music produced by a skilled performer, found that much of the effect was lost when they attempted to play the same music.

A thought occurred to Young, which is the basis of his claimed invention. The thought was this: A certain line or course of movement could be visualized as followed by every performer. If, therefore, a device was used to describe this line, and if it could be preserved by inscribing it upon the music sheet, then the effects produced during such playing would be represented by that line, and if a device were introduced by which that same line could be followed by an unskilled player, he could reproduce the music which the skilled player had brought out. This thought resulted in the application for and grant of these letters patent. The first thought was materialized through and by a pointer being attached to the levers, so that the point of it would pass over the music sheet and describe what may be called the movement of the music as played.

Through the simple expedient of attaching a pointer to the controller, and extending this over the music sheet, the line described by the manipulation of the controller in skilled hands could be visually followed in its movements over the music sheet. The like simple expedient of attaching a pencil to the underside of the pointer, so as to touch the music sheet throughout the whole movement of the pointer, or of the music sheet under it, would leave a mark or line on the music sheet as the controller was manipulated. By the aid of a like pointer this line could be followed by a second performer. A modicum of skill was called for in following this line. The practical result was this: The services of a famous artist could be secured to play the music. The effects produced by his rendering would be represented by a line thus made upon the music sheet. Music sheets to any number, with such a line upon them, could be supplied to unskilled users of the instruments. By following the line thus marked on the music sheet, all the effects of the most skillful manipulation of the controller could be thus reproduced.

[1] This brings us to the consideration of one of the defenses to the claim of the plaintiff. It is presented in the averment of lack of invention. Bearing upon this a finding is made of a fact which we do not understand to be in dispute. The fact is that the thought which came to Young of having a line which, for want of a better term, we will call the line of expression, visibly traced upon the music sheet by a skilled performer in and by the very act of giving his rendering or interpretation of the music, and of having this visible line followed and retraced by the unskilled performer, was a thought which had occurred to no one before Young. The mere thought could not, of course, be given the protection of a patent. It must first be given expression through and by some physical means, by the operation of which it would be exhibited. Whenever a new thought of real value is thus brought into combination with some means by which the thought is given physical expression, the combination is patentable, although the means may by itself show limited novelty, or even be such as that by itself it would not be patentable. This principle is

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well established, and we do not understand it to be in dispute. A reference to the cited case of Miehle v. Whitelock, 223 Fed. 647, 139 C. C. A. 201, is a sufficient confirmation of it.

[2] The plaintiff has a right to the two findings for which its counsel contend. These findings are that the prior art does not disclose a then existing knowledge of what has been called the "resultant" line, hereinbefore referred to, and, of course, does not disclose any means, such as a pointer, for following the turnings of such a line. The prior art, it is true, does disclose, through indicated marks of instruction (including the Webber line) upon the music sheet, a means of interpreting the music sheet, and a second performer would have the benefit of the same instructions, and in this way, if the skill of the second performer were equal to that of the first, and if each translated the instructions into the same manipulation of the controller, the musical results would be the same. It was, however, the happy thought of Young to resolve this "if" into a certainty by requiring no more of the second performer than that he should so manipulate the controller as that the end of the pointer would follow the indicated line throughout its whole course, as it had been drawn by the first performer.

It is not enough, however, that a claimed invention should possess the patentability above mentioned. An invention may be patentable in this sense, but before an applicant for letters patent can claim the right to their issue, he must not only disclose a patentable invention, but he must claim it, and what he discloses and what he claims must be patentable. If he discloses less or claims less than what he has invented, and which he might have disclosed and claimed, he is limited to that which has thus been disclosed and claimed, notwithstanding the fact that he might have claimed more. Even if he sets forth claims in his application, and these are rejected or voluntarily withdrawn or limited by amendment, he gets by his letters patent only what the letters cover, and his rights under the letters patent are restricted to what has been granted to him, and the grant does not expand to embrace more than is covered by the actual grant, because of the fact that the grant might have been more extensive than was made. All which is disclosed beyond what is granted is given to the public, and the public cannot be denied the use of anything which is not in the grant. Moreover, what is disclosed and what is claimed must have the support of the required oath of the applicant, and no letters patent covering an invention which lacks this supporting oath are valid.

With respect to the broad question first suggested, this observation may be made: The mechanical means by which physical expression of the thought, which came to Young, was given, makes little call upon the inventive faculty. Young's contribution to the art was in his conception of the thought of doing what has been before described, and of giving physical expression to this thought through the mechanical means indicated. He had little, if any, purely mechanical knowledge or skill, and all which was required and all which was applied in making the combination which he claimed was sup-

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plied by the mechanic who was called in to make the actual construction.

The claims of the patent are four in number. Claims 1 and 2, however, are the only ones in issue, and claim 1, as before stated, presents all the questions which arise in the case.

The defense emphasizes these facts: An original application, No. 73,644, was filed August 29, 1901, the two claims of which were allowed on October 29th following the application. This application, however, was abandoned and withdrawn, and is not now the basis of any claim of right of the plaintiff. A second or renewed application, No. 82,393, bearing the file date of November 15, 1901, was then made. This application was amended by the insertion of matters which are deemed by the defendant to be vital to the present controversy, as without these inserted matters the defendant's view is this controversy would not have arisen. Additional claims were also inserted by amendment.

The defendant asserts the invalidity of claim 1 (to which we will confine the discussion) because of a lack of patentable novelty, in view of the prior art. This assertion of invalidity is based upon the thought that the claim covers and comprehends what is called in this record "an expression line and an extended expression control lever." Emphasis is given to this, because of the fact that claims 3 and 4 of the patent are specifically limited to a tempo line and an extended tempo controller. A further defense is made, based upon the assertion that claim 1 is broader than the disclosure of the specification and includes matters beyond such disclosure.

There is also a general denial of infringement, in that the defendant's device is a departure from that of the plaintiff in the principle of its construction and differs from it in its mode of operation. There is a less broad denial of infringement, in that the two devices are counterparts only so far as each follows the prior art, and that if claim 1 is interpreted in the light of the limited disclosure of the specification, and in the light of the limitations imposed as a consequence of the experience of this application in the Patent Office, there is no conflict between the two devices.

Bearing upon the point made by the defense respecting the abandoned application, this explanation is made, and the facts found in accordance therewith. The original application was made on the eve of the departure of the inventor for Europe. The question arose in his mind of whether the application and its claims as filed were broad enough to cover what he had had in his mind to be covered. The point he made was conceded by the patent solicitors, who had charge of the patent, to be well taken. The next question presented was the mode and manner of making the correction. The problem was solved by the withdrawal of the original application, thereby paving the way for the corrected application to take its place. This would seem to have been the best method by which to meet the difficulty. No patent had issued when the error was discovered. To have followed up the application in which the error occurred with the issue of letters patent, and to have then asked for a reissue, would not only have been practically

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useless, but would have introduced an additional difficulty, in that it could not have been asserted that letters patent had issued by "mistake," when in fact the mistake had been discovered before the issue. We are unable to find in either this original application, or in its withdrawal, any of the elements which would make the doctrine of estoppel applicable.

The defense of invalidity, because of no advance upon the prior art, has already, in its main aspect, been sufficiently discussed. The point made is embraced in the expression "follow." The prior art disclosed instructions, including what is known as the Webber line. The line is delineated by a series of dots, which makes of it a broken line. It is none the less, however, a line. It is also true that it is a line of instruction. It can be followed in the sense of being interpreted into a movement. This calls for a mental process like that which is called for by words or other marks of instruction. The "following" of such a line is the following of instruction, and is a different thing from a purely visual following through and by seeing that the end of a pointer is kept over the line throughout its whole course. In this difference resides the advance made by Young.

The defense that claim 1 is comprehensive of matters not disclosed in the specification is not supported by a reading of the application. The thought disclosed by the specification and that covered by the claim is the same.

The question of infringement is disposed of by the observation that the defendant has appropriated and incorporated in his device the essential element of the plaintiff's invention. It is true that the defendant's device includes much, its right to use which is clear, and indeed not in dispute. To distinguish between what it has the right to use and that which it had no right to use is clearly presented by dropping out of the device the feature of a line to be followed by means of a pointer extending over the music sheet. The attack made upon the patent as lacking in the essential supporting oath depends upon the other point made that the claim is an expansion of the disclosure of the specification. If the claim does not go beyond the specification, then there is the required supporting oath. The picture of this invention drawn by counsel for defendant, in which it is depicted as abandoned, is not supported by the facts disclosed by the evidence. The thought which is at the basis of the Young invention is one easily grasped when once suggested. It is so simple the only wonder is that it had not occurred to those who preceded Young. Its simplicity, however, does not argue unpatentability. Its practical value is obvious. The fact, also, that the Young invention has gone for 16 years without attack, and without serious infringement, before the device of the defendant was introduced upon the market, would seem to argue general acquiescence in his claim of exclusive right. Nor do we see that the fact that the plaintiff made use of another patent, which possessed features preferable to some features of the plaintiff's device as patented, justifies the inference of either abandonment or lack of utility in the patented device, or makes of it a mere paper patent.

These broad considerations have had with us a controlling influence.

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If they are dropped out of view, the argument of counsel for defendant forces the mind to the conclusions for which counsel contend. With these broad claims of merit before us, however, the conviction remains that Young "came upon" a happy thought, which makes his claim to the reward of an inventor an appealing one. This calls upon us first to find patentability, if it can be found, and to follow this with a like broad and liberal interpretation of the claims of the patent as allowed. It is without doubt true that plaintiff's footing, from which to make its claim of right, has little, if any, margin of safety.

We, however, find claims 1 and 2 of the patent to be valid and infringed, and a decree embodying these findings may be submitted.

UNITED STATES v. BLAKEMAN.

(District Court, N. D. New York. July 20, 1918.)

1. STATUTES ⇐241(1)—CRIMINAL STATUTES—CONSTRUCTION.
 While a criminal statute should be strictly construed, the construction should not rob it of force and vigor to accomplish the purpose for which it was enacted and intended.

2. ARMY AND NAVY ⇐40—SELECTIVE SERVICE ACT—FALSE NOTARIAL CERTIFICATE.
 Under Selective Service Act, § 6, declaring that any person, who shall make or be a party to any false statement or certificate as to the fitness or liability of himself or any other person for military service, shall, if not subject to military law, be guilty of a misdemeanor, the making of a notarial certificate falsely reciting that doctors, whose statements were filed in support of a claim for exemption from military service, appeared before the notary, falls within the scope of the section, even though the statements by the doctors were not in themselves false.

3. INDICTMENT AND INFORMATION ⇐125(3)—SEPARATE OFFENSES—SINGLE COUNT—SELECTIVE SERVICE ACT.
 Where a notary appended false certificates to statements by several physicians, which were intended to be used in connection with a claim for exemption from military service, the false certification of each statement was a separate offense under the Selective Service Act, and the several offenses could not be charged in a single count of the indictment.

4. INDICTMENT AND INFORMATION ⇐125(2)—COUNTS—OFFENSES.
 Only one offense can be charged in each count of an indictment.

5. ARMY AND NAVY ⇐40—SELECTIVE SERVICE ACT—OFFENSES—INDICTMENT—"FITNESS"—"UNFITNESS."
 Indictment charging making of false notarial certificate as to unfitness and liability of another person for military service, is insufficient to charge offense of making false statement or certificate as to fitness or liability of another person to military service denounced by Selective Service Act, § 6, the words "fitness" and "unfitness" not meaning the same thing, although a statement as to the fitness of one for military service might include facts as to "unfitness."
 [Ed. Note.—For other definitions, see Words and Phrases, First Series, Fitness.]

At Law. Raymond A. Blakeman was indicted under Selective Service Act May 18, 1917, c. 15, § 6, 40 Stat. 76, for the offense of making a false notarial statement as to the unfitness and liability of one for service. On demurrer to indictment. Demurrer sustained.

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D. B. Lucey, U. S. Atty., of Ogdensburg, N. Y., and J. W. Davern, of Plattsburg, N. Y., for the United States.

John W. Searle, of Albany, N. Y., for defendant.

RAY, District Judge. By act of Congress affidavits and acknowledgments for use in all selective draft cases and proceedings may be taken before state officers including notaries public. Section 6 of the Selective Service Law provides, amongst other things:

"And any person who shall make or be a party to the making of any false statement or certificate as to the fitness or liability of himself or any other person for service under the provisions of this act, or regulations made by the President thereunder, or," etc., "shall, if not subject to military law, be guilty of a misdemeanor," etc.

This defendant is not subject to military law within the provision. This indictment charges, in substance, that one Henry Mandes filed with the selective draft board of the city of Rensselaer, N. Y., three statements in support of a claim for exemption from military service, and which statements related to and bore on the physical condition of said Mandes, and were made and signed by three certain doctors. The names of these doctors are not given. The indictment also charges in substance that these statements made by these doctors bore on their face a notarial certificate to the statements of said doctors, made and signed and added thereto by said Raymond A. Blakeman, viz.:

"The said Raymond A. Blakeman did add a notarial certificate to the statements of said doctors which had theretofore been given to one Henry Mandes, which were brought to the said Blakeman and were certified to by him as if he had personally taken the acknowledgment of the said three doctors, when in truth and in fact the said three doctors never appeared before him and never acknowledged to him that the statements made by them were true; the said Henry Mandes thereafter filing with the draft board of the city of Rensselaer these three acknowledged statements in a claim for exemption," etc.

The indictment does not charge that any of the statements of the said doctors contained in said papers were false or untrue, or that said doctors did not actually sign their respective statements. The allegation of falsity is that the notarial certificate added was false, in that it certified in due form that the doctors respectively appeared before the notary and acknowledged the execution of or making the signature to the statements signed by him, when in truth and fact such doctors did not so appear and did not acknowledge the execution of or the genuineness of the signatures to the statements at all, or in any way.

[1, 2] The defendant on the argument of this demurrer urges that the falsity of these statements, respectively in this respect, is immaterial, and does not bring the case within the meaning, or letter, or spirit of the section of the Selective Service Law above quoted. The contention of the defendant is that, while it may be and probably is true that the making of such a false certificate by the notary added to and written on the statement of the doctors, respectively, constitutes a crime under the law of the state of New York, such act does not

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constitute a crime under the federal laws or statutes, and that such false statements and certificate of the notary public added to the doctors' statement forms no part of the statement itself referred to in section 6 of the Selective Service Law, as that relates to the falsity of the statements made by the doctors themselves contained in the statement or certificate, and not to the falsity of the notarial certificate as to the execution of such statement; that the falsity must actually relate to and concern the fitness or liability for service, and these false certificates of the notary added by him relate only to the execution of the paper and its authenticity, and not to the fitness or liability to service.

I cannot yield to or concur in this narrow construction of the statute quoted. I think the statement or certificate must be taken and read as a whole, or as a completed document in so far as material. Clearly the certificate of the notary that these doctors appeared before him and acknowledged the execution of or signature to a statement or to the statements is material, and a material part of the statement as to physical fitness presented and filed. It is a certificate of authenticity, and one which gives the statement credence with the draft board. This is its purpose. These notarial certificates added to the statements induce the draft board to accept such statements as authentic and genuine, and to act thereon in determining the fitness for military service of the persons or person in whose behalf or interest they are made and presented, and in exempting or declining to exempt such person from service. These false statements or certificates, false when taken and read in their entirety and as a completed statement and certificate, were "as to the fitness or liability" of Mandes for service under the Selective Draft Act.

If a person subject to the Selective Service Law, and seeking exemption or deferred classification, prepares an affidavit required by the law or by the draft board to enable such board to pass on the question of his physical condition and fitness, which is in all respects correct and truthful, and then, in order to comply with the requirement that it be sworn to before a proper officer before presentation or use or consideration by the board, himself adds or procures another to add a certificate that it was "subscribed and sworn to this ——— day of July, 1918," and signs same as an officer authorized to take oaths, when it was not in fact sworn to before such officer, or any officer, can it be said the statement, certificate, or affidavit is not a false statement or certificate? That which gives it authenticity and credence with the board and induces it to act and credit the statement is false. It does not seem to me that Congress intended the limitation of meaning and scope contended for. While we are to strictly construe a criminal statute, we should not rob it of force and vigor to accomplish the purpose for which enacted and intended. I cannot sustain this demurrer to this indictment on the ground urged by the defendant's counsel on the argument and above stated, but must, I am convinced, sustain such demurrer on other grounds.

[3, 4] First. It seems to me that three separate crimes or offenses are included or set out in the one count of the indictment, as each of

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the three statements was separately made and separately falsely certified to by the notary. The false certification of each statement constituted a crime, and such false making and certification of each statement should be alleged in a separate and distinct count of the indictment. That there were three statements and three false certificates seems plain from the language of the indictment, viz.:

"The said Harry Mandes thereafter filing with the draft board of the city of Rensselaer these three acknowledged statements in a claim for exemption."

But one offense can be charged in each count of an indictment.

[5] Second. The statute makes it a crime to "make or be a party to the making of any false statement or certificate as to the fitness or liability of himself or any other person for service," etc. This indictment charges as follows:

"The grand jurors * * * upon their oaths do indict and present that Raymond A. Blakeman, late of the city of Rensselaer, county of Rensselaer, New York, did on or about the 4th day of May, 1918, at said city of Rensselaer, state and Northern district of New York, and within the jurisdiction of this court, wrongfully and unlawfully, knowingly and feloniously, make and was a party to the making of a false certificate and statement as to the unfitness and liability of another person for service under the provisions of the so-called Draft Act and the regulations made thereunder, to wit," etc.

The indictment charges a false statement or certificate as to the unfitness or liability, while the statute makes it an offense to make a false statement or certificate "as to the fitness or liability," etc. The offense charged in the indictment is not the one specified in the statute, and the error in using the word "unfitness," instead of "fitness," is not cured by other allegations, as the contents of these statements are not set out in the indictment. The defects can be remedied by a presentation of the case to another grand jury and a new indictment. I do not think it can be held that the words "fitness" and "unfitness" mean the same thing, or that a certificate or statement as to the "unfitness" would include a certificate or statement as to "fitness." The doctors in their statement or certificate might include a statement of every fact as to "unfitness," and exclude, or not include, all information as to "fitness," in a statement of or as to "unfitness." The draft board is entitled to their statement of all facts as to "fitness," which might include the facts as to "unfitness"; but a statement as to "unfitness" clearly does not include the facts as to "fitness."

The demurrer is sustained, and the United States Attorney is authorized and directed to again present the case to the grand jury.

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UNITED STATES v. WATSON-DURAND-KASPER GROCERY CO.

(District Court, D. Kansas. May 17, 1917.)

1. FOOD ⟸12—FOOD AND DRUG ACT—PROSECUTION FOR VIOLATION.
The shipment in interstate commerce of an adulterated food or drug product, which was the subject of a single sale and single shipment, although consisting of numerous packages, constitutes a single offense, under Food and Drug Act June 30, 1906, c. 3915, § 2, 34 Stat. 768 (Comp. St. 1916, § 8718).

2. FOOD ⟸20(1)—FOOD AND DRUG ACT—"ADULTERATION" OF CONFECTIONERY.
Under Food and Drug Act of June 30, 1906, § 7 (Comp. St. 1916, § 8723), which provides that confectionery shall be deemed to be adulterated "if it contain terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health, or any vinous, malt or spirituous liquor or compound or narcotic drug," there are three distinct and separate general modes of adulteration, and an information alleging the shipment in interstate commerce of confectionery, commonly called candy, "consisting in whole or in part of a filthy, decomposed, and putrid vegetable substance, and other ingredient deleterious or detrimental to health" charges an offense in violation of section 2 of the Act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Adulteration.]

Criminal prosecution by the United States against the Watson-Durand-Kasper Grocery Company. Hearing by the court on demurrer and stipulation of facts. Judgment of conviction.

On July 27, 1916, the United States attorney for the district of Kansas, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information against the Watson-Durand-Kasper Grocery Co., a corporation, of Salina, Kan., alleging shipment by said company, in violation of the Food and Drug Act, on or about February 1, 1915 (seven shipments), from the state of Kansas into the state of Colorado, of quantities of candy, variously labeled, which was adulterated. Analyses of samples of the article by the Bureau of Chemistry of the Agricultural Department showed that they were musty and stale, that animal excreta, larvæ, worms, and weevils were present in most of the samples, and microscopic examination showed the presence of organisms and molds. Adulteration of the article in each shipment was alleged in the information, for the reason that it consisted in whole or in part of a filthy, decomposed, and putrid vegetable substance.

On August 26, 1916, the defendant company filed its demurrer to the information. On May 14, 1917, the case came on for hearing, and was submitted to the court on the demurrer to the information and the stipulated facts; the court deeming such submission as amounting to a waiver of the demurrer. After due consideration the defendant was found guilty on May 17, 1917, and sentenced to pay a fine of $20 and costs, as will more fully appear from the opinion of the court.

Fred Robertson, U. S. Atty., of Kansas City, Kan.

David Ritchie and G. A. Spencer, both of Salina, Kan., for defendant.

POLLOCK, District Judge. The government filed an information in this case against defendant, charging it in seven counts with as many

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violations of what is commonly known as the Food and Drug Act of June 30, 1906 (34 Stat. 768), in the shipment from the city of Salina, this state, to the city of Denver, in the state of Colorado, of 250 pails of "confectionery," commonly called candy, consigned to one A. Lang, all as evidenced by two freight bills of the Union Pacific Railway Company, copies of which are attached to the complaint. To this complaint, and each and every count thereof, defendant interposes a general demurrer. The defendant further pleading not guilty, a trial by jury was waived, and the entire controversy submitted on stipulated facts. The case thus comes on for decision.

Two questions are presented for determination, viz.: (1) Conceding the facts pleaded in the several counts of the information sufficient to charge defendant with the commission of one or more public offenses under the terms of the act, and the stipulated facts sufficient to clearly show the guilt of defendant, does the evidence found in the stipulated facts show defendant guilty of more than one offending against the law or amenable to more than a single punishment? (2) It being admitted by the evidence the product offered for interstate shipment, and so shipped by defendant, was "confectionery," commonly called candy, and the charge made, as the information pleaded, being such product was adulterated, in that it contained in whole or in part a "filthy, decomposed, and putrid vegetable substance," does the information, or either count thereof, sufficiently charge defendant with adulteration of "confectionery," in violation of the act? As the case stands submitted on both the demurrer to the information and each count thereof, and on the stipulated facts, and as resort must be had to the facts of the case to get at the true nature of the transaction, I deem it the better practice to treat the demurrer as having been waived by the submission of the case on its merits, or at least to overrule the demurrer and consider the questions presented by a consideration of the case on its merits.

[1] It appears, as was admitted at the trial, defendant company is a wholesale grocery company doing business in the city of Salina, this state. In the conduct of its said business it handles "confectionery," commonly called candy, in wholesale quantities. On or about the 1st day of February, 1915, in the conduct of its said wholesale candy business, there had accumulated in the possession of defendant a very considerable quantity of old, stale, unsalable remnants of candy. The consignee named in the bills of lading, A. Lang, applied to and purchased this candy from defendant, giving instructions to ship the same to him at the city of Denver, Colo. What purpose the buyer had in making the purchase or what use was intended by the purchaser to be made of the candy the evidence does not show. In pursuance of said shipping instructions, defendant delivered the candy in pails to the Union Pacific Railway Company, and did cause the same to be shipped to the purchaser at the city of Denver, Colo. That the purchase and sale thus made in bulk, or at wholesale, by defendant constituted but one transaction, is apparent. While the railway company issued two freight bills covering the entire shipment, yet it is equally clear but a single shipment of the candy was made. In such case may the government

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carve out of the single transaction of sale, purchase, and shipment more than one offense under the terms of the act?

Looking, now, to the provisions of the act, it is seen to be its purpose, by section 1, to prohibit within territory under the jurisdiction of the United States the manufacture or misbranding of foods and drugs. By section 2 of the act to prohibit the shipment or offer for shipment in interstate commerce of adulterated or misbranded food or drug products. Conceding, therefore, the candy complained of in this case was adulterated in violation of the act, yet, as there was but a single sale, purchase, and shipment of the adulterated product, as the entire matter charged grew out of a single transaction and a single shipment, it must follow the plaintiff can carve out of this single transaction but a single offense. Although there were 250 pails of the candy shipped, yet here, as under the provisions of the Twenty-Eight Hour Law (Act June 29, 1906, c. 3594, 34 Stat. 607 [Comp. St. 1916, §§ 8651–8654]), the shipment made or offered by defendant must be taken as the unit, although it may consist of many parcels. No greater reason appears for dividing the shipment in question under the Food and Drug Act, all being comprehended under the general term "confectionery," into different lots or parcels than would appear for making the many different head or cars of stock a separate violation of the Twenty-Eight Hour Law. B. & O. Southwestern R. R. v. United States, 220 U. S. 94, 31 Sup. Ct. 368, 55 L. Ed. 384.

[2] Coming, now, to the remaining question, defendant contends, although the adulterated product charged to have been shipped in interstate commerce is pleaded to have been a food product, as the evidence discloses it to have been "confectionery," commonly called candy, and as the act by its terms defines in what the adulteration of "confectionery" consists, namely, "if it contains terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color, or flavor," and as the adulteration here charged is not by the use of a mineral, but of a vegetable, substance, therefore, applying the rule of ejusdem generis, the act does not, by the addition of the phrase "or other ingredient deleterious or detrimental to health," cover a case in which the substance, deleterious or detrimental to health ingredient, is of a vegetable and not a mineral substance.

From a careful reading of the act I cannot give my assent to this construction for this reason: Conceding candy to fall under the general classification of "confectionery"; further conceding Congress has by the terms of the act specified what constitutes an adulteration of "confectionery," all as by defendant contended, yet I am of the opinion the phrase, "or other ingredient deleterious or detrimental to health," is not limited by or restricted to the preceding phrase, "or other mineral substance or poisonous color or flavor." On the contrary, I am of the opinion it was the intent of the lawmaking power to provide that "confectionery" may be adulterated in violation of the terms of the act in three distinct and separate manners or ways: (1) By causing it to contain "terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor"; (2) by permitting it to contain or include any "other ingredient deleterious or detri-

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mental to health"; or (3) by the use of "any vinous, malt, or spirituous liquor or compound or narcotic drug."

To my mind, this is the clear, unambiguous intent of the lawmaking power as gathered from the language employed in the act specifying the manners in which "confectionery" may be said to have been adulterated. It follows from what has been said judgment must go for plaintiff for a single penalty for the violation of the act.

It is therefore ordered the plaintiff have and recover from the defendant a penalty of $20 and costs of this prosecution.

UNITED STATES v. BOUTIN.

(District Court, N. D. New York. May 11, 1918.)

1. INDICTMENT AND INFORMATION ⇐150—DEMURRER—ADMISSION.
On demurrer to an indictment, the allegations therein should be accepted as true.

2. WAR ⇐4—VIOLATION OF THE ESPIONAGE ACT.
An indictment charging that defendant unlawfully, willfully, and feloniously made and distributed certain pamphlets, made a part of and attached to the indictment, which were false and conveyed false statements and reports, with the intent of interfering with the operation and success of the naval forces of the United States, etc., charges an offense under Espionage Act, § 3.

3. WAR ⇐4—ESPIONAGE ACT—OFFENSES—"MURDER."
A pamphlet denouncing preparedness, and characterizing military service as murder, or attempted murder, which offense is defined by the Penal Code as the unlawful killing of a human being with malice aforethought, *held* to tend to cause insubordination on the part of persons subject to military service, and hence the publication, etc., of such pamphlet is a violation of Espionage Act, § 3.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Murder.]

Andre Boutin was indicted for a violation of Espionage Act June 15, 1917, § 3. On demurrer to the indictment. Demurrer overruled.

This is a demurrer to an indictment found by the grand jury of the county of Onondaga, N. Y., and filed in this court April 11, 1918, and which charges the defendant with a violation of the act entitled "An act to punish acts of interference with the foreign relations, the neutrality and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes," and which act was approved June 15, 1917.

Frank J. Cregg, Asst. U. S. Atty., of Syracuse, N. Y.
George D. Chapman, of Syracuse, N. Y., for defendant.

RAY, District Judge. [1, 2] Section 3 of the so-called Espionage Act (Act June 15, 1917, c. 30), provides that:

"Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies, * * * shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both."

The same section further provides that whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States, shall be punished in the same manner above cited.

The indictment demurred to in the first count thereof charges a violation of the first paragraph of section 3, above referred to, and in part quoted, while the second count of the indictment charges a violation of the second paragraph of the said section. The first count charges that the defendant unlawfully, willfully, and feloniously made and distributed to Willard W. Lewis and to others in the city of Syracuse, N. Y., false reports and false statements in and through a pamphlet called "Pure Common Sense," and from such pamphlet certain paragraphs are quoted in the indictment. It is alleged that the statements quoted were false, and that they were willfully made and conveyed, and that such false statements and reports were made and conveyed with intent to interfere with the operation and success of the military and naval forces of the United States and to promote the success of its enemies. If the statements are false, and were made with the intent charged, and were made and conveyed as charged, then the crime was complete. It is immaterial what the court may think as to whether such statements charged in the indictment were in fact false, as the court cannot act on its own information or opinion, but must act on the allegations of the indictment itself. The first count, therefore, charges an offense against the United States, and the demurrer to the first count must be overruled.

[3] As to the second count of the indictment, it charges that throughout the period of time from April 6, 1917, to the date of the finding and presentation of the indictment, April 11, 1918, the United States has been at war with the imperial German government, and that during said period of time, and on or about the 10th day of April, 1918, at the city of Syracuse, N. Y., in the Northern district of New York, the defendant, Andre Boutin, did unlawfully, willfully, and feloniously attempt to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval service of the United States, at a time when the United States was at war, in and through and by means of articles printed and published and distributed in certain pamphlets called "Pure Common Sense," and that a copy of the said book is attached to and filed with the indictment and made a part thereof. The pamphlet, or book, "Pure Common Sense," is attached to and forms a part of the indictment, and it contains language and statements which, if read and believed, might cause, not only insubordination, but refusal of duty, in the military and naval forces of the United States.

The first part of the pamphlet states in the very beginning, "We need preparedness, not to kill one another, but to live peaceably, happily, and equally." The writer of the pamphlet then goes on to state what should be done, and what ought to be done, and what may be done, to secure happiness and prosperity, and then, branching off from the subject with which he has been dealing, the writer says: "A few words

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to the reader on this cruel war." The writer then goes on to inveigh against war, and states that:

"We must teach the whole world that human beings are not here to knife one another for the sake of personal interest or to carry a point of ambition. We are here for a short visit, and should treat each other like brother and sister, whether we are born on this side or the other side of the iron post, or on the other side of a great body of water. We should all respect and help one another. War is pure ignorance. After a few years we die, and never, never return. It shows on its face that we are worse than the savage. He is the one forced to shoulder the gun, to kill and be killed, and just as long as the fancy class teaches that it is right, that it is patriotic to fight (murder) for your country, just so long will war reign."

This last is a plain statement that it is wrong to teach that it is right and patriotic to fight for your country, and that to teach men that it is patriotic to fight for your country is to teach them that it is right to murder, and that fighing for your country is to murder. The writer then goes on to say that it should be made a crime to manufacture arms of any kind, and that the laborer should be taught to stop making war machines and military supplies, and that then there would be no war; that the people should be taught that they are to blame for making the machines for all wars, and that they are the ones who do the killing. There are many other statements of this character and kind contained in the pamphlet.

It is sufficient to say that the teachings of the pamphlet tend to suppress patriotic feelings, and to cause unrest and insubordination among those who, under the Selective Draft Law, are called into the service, or made subject to military service, and that the teachings of this pamphlet, if read, also tend to incite and cause refusal of duty on the part of those subject to military duty and service under the Selective Draft Law (Act May 18, 1917, c. 15). The teachings of this pamphlet may be repudiated and rejected by a majority of the readers, but that fact makes it none the less pernicious and of a nature calculated to cause or bring about a refusal of duty on the part of those chosen for military duty and subject to military duty under the Selective Draft Act. Such sentiments, inculcated into the minds of those drafted into the service of the United States, tend to destroy military ardor and inclination to cheerfully perform military duty. It is for a jury to say whether or not the statements and teachings of the pamphlet will or will not have that effect, and whether or not the teachings of the pamphlet were intended by the writer thereof to have that effect.

This pamphlet plainly teaches, or attempts to teach, that fighting for your country, to maintain its rights, is the equivalent of murder. By section 273 of the United States Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1143 [Comp. St. 1916, § 10446]) "murder" is defined thus: "Murder is the unlawful killing of a human being with malice aforethought." This document teaches, and was intended to teach, if the writer meant what he said, that the one who is called to the colors and goes into the battle line and does his duty there is guilty of the unlawful killing, or engaged in the unlawful killing or attempt to kill, his fellows with malice aforethought. This is not only a false and a misleading statement, but one well calculated to promote the success of

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the enemies of the United States, and cause or bring about a refusal to perform duty in the military and naval forces of the United States. The teaching of the pamphlet is equivalent to stating that the United States in prosecuting this war against the German Empire, is engaged in the commission of, or attempt to commit, numerous murders, and that all men in the military forces of the United States, who go on the fighting line and do their duty, are engaged in an attempt to commit murder. Does not this tend to cause insubordination and refusal of duty? And may not a jury find that the one who promulgates such a doctrine is attempting to cause refusal of duty in the military and naval forces of the United States?

The demurrer is overruled.

In re LUSCH.

(District Court, E. D. New York. May 6, 1918.)

1. BANKRUPTCY ⟸217(3)—PROCEEDINGS—STAY OF JUDGMENT.
On application to stay proceedings on a claim against the bankrupt pending determination of application for discharge, the bankruptcy court may pass on the character of the claim; but, if it is evidenced by a judgment, the court will not go behind the judgment, and will stay proceedings if the judgment appears to be dischargeable.

2. BANKRUPTCY ⟸217(3)—DISCHARGE—EFFECT.
Where a debt is not dischargeable, a garnishee execution against the debtor will not be interfered with, despite his bankruptcy, and may be enforced after discharge.

3. BANKRUPTCY ⟸217(3)—DEBTS DISCHARGEABLE—STAY.
Where the summons and complaint on which a judgment based on negligence in operating an automobile was obtained showed an ordinary cause of action in tort, the judgment debtor, having become a bankrupt, is entitled to a stay against the judgment, and the creditor cannot avoid the stay by affidavits showing that the bankrupt willfully and maliciously caused the injury for which the judgment was given.

In Bankruptcy. In the matter of the voluntary petition of Reuben M. Lusch. On motion by a judgment creditor to discharge a stay against the judgment which was rendered by the state court. Motion denied.

Louis Boehm, of New York City, for Nathan Marks.
Lester Harrisson, of Brooklyn, for petitioner.

CHATFIELD, District Judge. The bankrupt has obtained, pending application for discharge or further order, a stay against a judgment entered in the Supreme Court of New York for negligence in operating an automobile. The summons and complaint upon which the judgment was obtained show the usual cause of action for tort, but the judgment creditor seeks to vacate the stay upon affidavits charging that the bankrupt willfully and maliciously caused the injury for which the judgment was given, by deliberately running down the judgment creditor, after knocking him down in the street. The judgment creditor cites

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such cases as Tinker v. Colwell, 193 U. S. 473, 24 Sup. Ct. 505, 48 L. Ed. 754, and Peters v. United States ex rel. Kelly, 177 Fed. 885, 101 C. C. A. 99, 24 Am. Bankr. Rep. 206, in which it is held that willful and deliberate injury does not necessarily mean with malice aforethought; while the bankrupt has cited Burnham v. Pidcock, 58 App. Div. 273, 68 N. Y. Supp. 1007, In re Nuttall (D. C.) 201 Fed. 557, 29 Am. Bankr. Rep. 807, and the cases above cited, in which it has been stated that "willful and deliberate injury" means more than gross negligence.

[1-3] This court has the right to pass upon the character of the claim to be stayed, in determining whether a stay should issue pending the determination of the discharge application; but, if the claim is evidenced by a judgment, it will not, in passing upon that question, go behind the judgment as shown by the record of the action in which the judgment resulted. The judgment creditor states that he desires to proceed by garnisheeing the salary of the bankrupt. If a debt is not dischargeable, a garnishee execution would not be interfered with and could be collected, even after discharge. If the debt is dischargeable, the garnishee execution falls, from the date of adjudication. Any person suing upon a cause of action is bound to anticipate that bankruptcy may intervene, and should draw the pleadings, upon which his cause of action is based, so that it will appear not dischargeable, if he wishes any judgment entered in that particular case to be free from the stay of the bankruptcy court while the discharge matter is pending.

It may be that, even after the obtaining of a discharge, a creditor can show that his debt was not dischargeable, and that the judgment has not been affected by the discharge. But, so far as the record under consideration is concerned, the judgment which the bankrupt seeks to stay appears to be dischargeable, and was obtained upon the trial of a cause of action so stated as to appear dischargeable in bankruptcy. The possibility that the creditor might seek to accumulate a fund in the meantime, by means of issuing a garnishee execution, and that this fund should be held until the question of discharge was disposed of, makes it desirable that this sum should not be lost to the creditor.

An ordinary judgment, apparently dischargeable in bankruptcy, cannot be so changed in character by affidavits as to allow the creditor to treat it as based on a different state of facts. Hence, when the garnishee execution is based upon this judgment, the court cannot determine that the judgment represents a debt which arose from a broader cause of action than was set forth in the suit which was the foundation of the judgment.

Motion denied.

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In re H. E. PAGE MOTOR CAR CO.

(District Court, D. Massachusetts. April 4, 1918.)

No. 25794.

1. BANKRUPTCY ⟸81(1)—PROCEEDINGS—COMMENCEMENT—PETITIONING CREDITOR.
Proceedings date from the filing of the petition in bankruptcy, and prima facie at least it is sufficient if petitioner be alleged to be a creditor on that date.

2. BANKRUPTCY ⟸76(1)—ASSIGNEES—RIGHTS OF AS PETITIONING CREDITORS.
Where a petitioner's assignor was a creditor at the time of the debtor's commission of an act of bankruptcy, the assignee may join as a petitioner in bankruptcy having the same rights as his assignor, except in cases where the assignment was taken as a part of an unlawful or oppressive scheme.

3. BANKRUPTCY ⟸81(1)—PETITION—ASSIGNMENT.
Where one of the petitioning creditors received his claim by assignment after commission of the act of bankruptcy, it is unnecessary that a copy of the assignment be annexed to the petition.

In Bankruptcy. In the matter of the bankruptcy of the H. E. Page Motor Car Company. On motion to dismiss. Motion denied.

A. M. Schwarz and S. A. Dearborn, both of Boston, Mass., for petitioning creditors.

Joseph B. Jacobs and Jacobs & Jacobs, all of Boston, Mass., for respondent.

MORTON, District Judge. On December 24, 1917, three creditors filed this involuntary petition in bankruptcy, alleging but one specific act of bankruptcy, viz. a preferential conveyance made by the alleged bankrupt on December 12, 1917. The petition did not show that any one of the three petitioning creditors was a creditor of the respondent at the date of the alleged act of bankruptcy, and it did show as to one of them, Fine, that he held his claim by assignment, without setting out a copy of the instrument of assignment.

On January 14th the respondent moved to dismiss because of the insufficiency of the petition. On February 2d a fourth creditor, whose claim is not assailed, intervened as a petitioner. On February 9th the petition was amended, so as to state that the claim of Fine's assignor had accrued before December 12th (the date of the act of bankruptcy), and a copy of the assignment to him was annexed.

[1] The questions are: (1) Whether the petition was sufficient as filed; and, if not, (2) whether the intervention of the fourth creditor made it good. As to (1) it is not necessary that an involuntary petition show on its face that the petitioners were creditors at the time of the act of bankruptcy alleged. The proceedings date from the filing of the petition, and, prima facie at least, it is sufficient if a petitioner is alleged to be a creditor on that date. In re Lewis F. Perry & Whitney Co. (D. C.) 172 Fed. 752, affirmed 175 Fed. 52, 99 C. C. A. 68; Emerine v. Tarault, 219 Fed. 68, 70, 134 C. C. A. 606 (C. C. A. 6th Cir.); In

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re Kehoe, 36 Am. Bankr. Rep. 891 (C. C. A. 2d Cir.); In re Van Horn, 41 Am. Bankr. Rep. 12 (C. C. A. 3d), directly in point.

[2, 3] Fine's assignor was a creditor at the time of the act of bankruptcy, and, if it had retained its claim, was in no way disqualified, so far as appears, from joining as a petitioner. In this respect the present case is very different from In re Lewis F. Perry & Whitney Co., supra, relied on by the respondent. I am aware of no decisions in which it has been held that an assignee has less rights in this respect than his assignor, except in cases where the assignment was taken as part of an unlawful or oppressive scheme. Leighton v. Kennedy, 129 Fed. 737, 64 C. C. A. 265. There was no requirement of law that a copy of the assignment should be annexed to the petition.

The petition was, in my opinion, good as originally filed. Certainly it was not so obviously insufficient on its face that it would not furnish a foundation for subsequent intervention by the other creditor.

Motion to dismiss denied.

In re JOHNSON.

(District Court, S. D. New York. December 14, 1916.)

No. 20.

SEAMEN ⇐5—WAGES AND EFFECTS OF DECEASED SEAMEN—FEES OF SHIPPING COMMISSIONER.

On turning over to the District Court the wages and effects of a deceased seaman, pursuant to Rev. St. § 4543 (Comp. St. 1916, § 8332), a shipping commissioner is entitled to a fee of $2 and a commission of 1 per cent. on the amount of such wages.

In Admiralty. In the matter of the wages and effects of J. H. Johnson, a deceased seaman, late of the steamship Arapohoe.

MANTON, District Judge. This is an application for obtaining the wages and effects of a deceased merchant seaman. It appears from a certificate of the clerk of this court that $14.75, a balance of the wages of the above-named deceased seaman, is now on deposit in the registry of the court, and the effects of said deceased seaman are now in possession of the shipping commissioner for this district. An allowance is asked by the shipping commissioner of $2.12, and the court is informed that this allowance has not been asked for or received heretofore.

There is ample judicial authority for this allowance in other districts. United States v. Grant (D. C.) 224 Fed. 644; United States v. Hill (C. C.) 25 Fed. 375, 377. Under Rev. St. § 4543 (Comp. St. 1916, § 8332), part of the Shipping Commissioner's Act, the commissioner is required to turn over the money, wages, and effects of deceased seamen, subject to such deductions as may be allowed by

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the court for expenses in respect to any such money and effects. It is plain that, from the language of the statute itself, the shipping commissioner should be allowed the fee of $2 and 1 per cent. in such cases.

The order will be signed as presented, including the fees of the clerk as calculated, and in the future the clerk may provide in similar orders for an allowance to the shipping commissioner in accordance with this memorandum, and his costs may be fixed as they have been in this order, upon this application.

FIRST TRUST & SAVINGS BANK et al. v. BITTER ROOT VALLEY IRR. CO. et al.

(District Court, D. Montana. July 3, 1918.)

No. 71.

1. EQUITY ⇐279—AMENDED ANSWER—REJECTION—DENIAL OF FORMER ADMISSIONS.

In a suit in equity an amended answer, tentatively received during trial, "more in detail," would be rejected to the extent found to deny former admissions.

2. EQUITY ⇐283—AMENDED ANSWER—REJECTION—SURPRISE.

In a suit in equity an amended answer, tentatively received during trial, "more in detail," would be rejected to the extent found to raise new issues operating as a surprise.

3. MORTGAGES ⇐48(1)—GENERAL DESCRIPTION—VALIDITY.

Though a large part of the property description in a mortgage or trust deed of an irrigation company's real and personal property was general only, it was valid.

4. MORTGAGES ⇐310—TRUSTEE—RIGHTS UNDER BANKRUPT'S TRUST DEED.

Where an irrigation company's trust deed to secure bonds, provided that lands and water rights sold by it should be released on its deposit of first lien purchase-money notes and mortgages amounting to $42 per acre, its trustee in bankruptcy, after its default in payment of a bond installment, as to contracts for land sold, but not released, was not entitled to the sale price in excess of $42 per acre, or on payment of that amount to compel releases.

5. BANKRUPTCY ⇐254—RIGHTS OF TRUSTEE.

The trustee of a bankrupt estate succeeds to the bankrupt's rights in the premises, subject to its liabilities, and takes its contracts, and can compel their performance, if he performs them on its part.

6. MORTGAGES ⇐397—FORECLOSURE—DEFAULT IN INSTALLMENTS.

Where an irrigation company's trust deed to secure its bonds was an entire contract, to be performed in installments, all bonds would become due upon a default in an installment.

7. MORTGAGES ⇐533—TRUST DEED—RIGHTS OF PURCHASERS.

Where irrigation company's trust deed to secure its bonds intended its sales of its lands and water rights, and that the proceeds should pay the bonds, the contracts were subject to the trust deed, and they, or the lands subject thereto, might be sold thereunder, in which case the rights of purchasers under their contracts would survive foreclosure, and the purchaser on foreclosure would take the contracts and the lands subject thereto.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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8. BANKRUPTCY ⊂=254—NOTES AND MORTGAGES BELONGING TO THE ESTATE —RIGHTS OF TRUSTEE.

Purchase-money notes and mortgages for lands sold by an irrigation company, but not released from the operation of its trust deed to secure its bonds, in the possession of its trustee in bankruptcy, who was unable to perform its contracts, were valueless, and he was required to return the notes and cancel the mortgages, and to return any collections made by him for application on the bonds.

9. MORTGAGES ⊂=131—AFTER-ACQUIRED PROPERTY—TRUST DEED.

Where an irrigation company mortgaged its realty and personalty, including notes and mortgages and after-acquired property, and lands subject to the trust deed were sold and released as provided therein, and the company, by purchase at foreclosure sales or by conveyance and satisfaction of such notes and mortgages, was revested with title, they were covered by the trust deed.

10. WATERS AND WATER COURSES ⊂=247(2)—IRRIGATION COMPANY—SALE OF WATER AND SERVICE—INJUNCTION.

Under an irrigation company's sales of lands and water rights, amounting to a composite sale of water and service, not dischargeable without the grantees' consent, the grantees could enjoin the company from like grants in excess of the capacity of its water supply and distribution system.

11. WATERS AND WATER COURSES ⊂=247(2)—IRRIGATION COMPANY—MORTGAGE—SALE OF WATER RIGHTS BEYOND CAPACITY—EVIDENCE.

In a suit in equity between the trustee under an irrigation company's trust deed to secure its bonds and the company and purchasers of its lands and water rights, seeking to enjoin a further sale of water rights, evidence *held* not to show that the company had sold rights in excess of its supply and distribution system.

12. WATERS AND WATER COURSES ⊂=256—IRRIGATION COMPANY—SALE OF LANDS AND WATER RIGHTS.

Where an irrigation company contracted to deliver at its head gates, to main or branch canals, which in its judgment were most convenient to convey water through laterals to the users' lands, not in excess of a certain amount, its judgment, if honest and consulting the convenience of users, would control, and otherwise its judgment might be controlled by the courts.

In Equity. Suit by the First Trust & Savings Bank and others against the Bitter Root Valley Irrigation Company and others, with intervention by one McKinnon and another. Decree for complainants.

Winston, Payne, Strawn & Shaw, of Chicago, Ill., and Henry C. Stiff and Philip S. Brown, both of Missoula, Mont., for plaintiffs.

D. S. Wegg, of Chicago, Ill., Geo. T. Baggs, of Stevensville, Mont., and R. F. Gaines, of Butte, Mont., for defendants.

Gunn, Rasch & Hall, of Helena, Mont., Wm. L. Murphy and Wm. Wayne, both of Missoula, Mont., and S. W. Swabey, of Chicago, Ill., for interveners.

BOURQUIN, District Judge. This is trial of the merits of the trust deed foreclosure referred to in Knudsen v. First Trust & Savings Bank, 245 Fed. 81, 157 C. C. A. 377, and First Trust & Savings Bank v. Bitter Root Valley Irr. Co. (D. C.) 237 Fed. 733. It is in two parts, the first of which is between the trust deed trustees, plaintiffs, the grantor in said deed, and its trustee in bankruptcy, defend-

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ants, and intervener McKinnon, claimant of some of the property involved. It has been tried, argued, briefed, rebriefed, decided, reopened of the court's motion, reargued, and rebriefed. All parties admitted lack of preparation for trial, and an important case has been indifferently presented.

[1, 2] An amended answer, tentatively received during trial, "more in detail," is now rejected to the extent found to deny former admissions and to raise new issues operating as a surprise. The trust deed was executed in 1909, by defendant corporation, upon all its real and personal property, with some exceptions, owned and after-acquired, embracing lands, water rights, irrigation system, franchises, contracts of purchase and sale of lands, notes and mortgages, and other property. It was to secure a bond issue of $1,375,500, payable in installments, of which $975,500 are unpaid and due.

The issues of this first part of the trial are sufficiently indicated by what follows. It is now found that a local statute, which seems to have escaped all counsel's notice, authorizes mortgages of after-acquired property, and so the trust deed is valid in respect to such property. It is also found that another local statute, to which no counsel referred save for plaintiffs in the last of their series of briefs, provides corporate mortgages of personal property are governed by the law of real mortgages, save to be accompanied by the good-faith affidavit of chattel mortgage law. The trust deed complies therewith, and so is valid, although not filed nor renewed as a chattel mortgage, contrary to the former decision herein.

[3] A large part of the property description in said deed is general only, but this satisfies the law of real mortgages. See Wilson v. Boyce, 92 U. S. 325, 23 L. Ed. 608.

[4] The trust deed provides that from time to time lands and water rights sold by the irrigation company will be released from the said deed, within 90 days thereafter the company to deposit with the deed trustees first lien purchase-money notes and mortgages for and upon said lands in amount not less than $42 per acre, any excess thereof to be retained by the company and as its property. When the company was adjudicated a voluntary bankrupt on January 3, 1916, it owned contracts for lands sold, but not released from the trust deed, upon which were yet due several hundred thousand dollars and in excess of $42 per acre. It had conveyed some of these lands to its grantees, and received in payment purchase-money notes and mortgages. In its behalf, and that of its estate in bankruptcy, it is contended the trustee of said estate is entitled to all the sale price of all said lands in excess of $42 per acre; that he may either deposit $42 per acre of said notes and mortgages with the trust deed trustees, and compel release of the said deed, or he may in all cases collect all thereof and the sale price, pay said trustees $42 per acre, and retain all the excess for general creditors.

The court sustained this contention in its decision heretofore rendered, but is now constrained to recede. The trust deed contemplated a going concern selling lands, paying bond installments, and keeping all its contracts with the trust deed trustees and purchasers of lands.

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No doubt, as long as the company did so, not only purchasers, but the company itself, could secure—even compel—releases of lands sold, on payment of $42 per acre to the said trustees; the purchasers paying any excess to the company. But it defaulted in payment of the bond installment due January 1, 1916, was and is insolvent, ceased business, was adjudicated bankrupt, and no longer can perform any of its contracts. Certainly it is in no position to compel the trust deed trustees to perform provisions of the said deed for its benefit; it refusing performance of its dependent covenants of said deed for the said trustees' benefit.

[5] The trustee of its estate in bankruptcy succeeds to the company's rights in the premises, but subject to its liabilities. He takes its contracts and can compel their performance, provided he performs them upon the company's part. Here he admits his inability to do so, admits insufficiency of assets to pay the bonds, and for those reasons abandons the mortgaged property to this foreclosure.

[6-8] The trust deed is an entire contract, that could be performed in installments. By reason of default, all bonds became due, and the trustee in bankruptcy is bound now to pay all bonds and secure release of all lands or none. This is familiar law of contracts; even when bankruptcy has supervened. The rights of the purchasers of lands are another matter. These contracts of sale were intended by the trust deed; their proceeds were to pay the bonds; they are of the property subject to said deed; they are being foreclosed on herein; they and the lands subject to them will be sold as the trust deed provides, as an entirety. Accordingly it is clear the rights of the vendees therein survive foreclosure sale, and the purchaser at said sale takes the contracts and lands, the latter subject to the former. In so far as purchase-money notes and mortgages for lands sold, but not released as aforesaid, are in possession of the trustee in bankruptcy, although not subject to the trust deed, in that the latter provides only those are that are "required to be deposited" with the trustees within 90 days after release of lands from the trust deed, they are valueless to the estate in bankruptcy. The trustee in bankruptcy cannot realize upon them.

Unable to perform the company's contracts with the makers of said notes and mortgages, he cannot require them to perform—to pay. Said makers obliged to pay all due upon said contracts to the trustees of the trust deed, or to the purchaser at foreclosure sale, it is the duty of the trustee in bankruptcy to return said notes and to cancel said mortgages. In so far as he has collected thereof, as trustee or as receiver herein, the receipts are due to the receivership and to the bonds. These collections are principal, not income. Obviously, if the trustee had collected all due, it must go to pay the bonds secured by the trust deed and lands.

[9] The doctrine of equitable conversion has no application, being contrary to the intent of the trust deed. Some lands subject to the trust deed were sold and released as in the deed provided. Of some of them the corporation again became owner, in part by purchase at foreclosure sale upon its vendees' purchase-money notes and mort-

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gages, and in part by vendees' conveyances in satisfaction of such notes and mortgages. The corporation, divested of title and ownership, thereafter was revested therewith, and so "hereafter acquired" the lands within that broad and general term in the trust deed, resubjecting the lands to said deed. In so far as they or any other of the corporation's lands were conveyed to intervener McKinnon, it was by way of security only; and he took with notice and subject to the trust deed. The corporation stock, evidence of water rights and supply for lands subject to the trust deed, is appurtenant to the land, of the nature of real property; and subject to the trust deed, though in possession of McKinnon as security, but with notice.

The second part of the suit is between plaintiffs and interveners, purchasers of lands and water rights from the company, and which are of the lands and irrigation system of the trust deed. These interveners seek determination of the extent of their rights and to enjoin further sale of water rights. It appears that at and prior to the execution of the trust deed the company was incorporated to buy, develop, and sell lands and water, and was engaged therein. Its contracts of sale and deeds provide as follows:

"1. The company agrees that it will construct, equip, maintain, and operate an irrigation system, consisting of a main canal and such branch canals, works, and appliances as in its judgment are deemed necessary, for the purpose of supplying, with other lands, the said land hereby conveyed, or so much thereof as is capable of irrigation by gravity flow, with water in the quantity hereinafter provided for.

"2. The company shall, at its own cost and expense, construct and maintain a suitable gate or other device in the bank of the main or branch canals for measuring and delivery of water, at such point as in its judgment is the most convenient for the conveyance of water to said land, and the manner for measuring, regulating, and delivering the supply of water to said purchaser shall be prescribed by the company, and the action of the company therein shall be final as between the parties hereto. The measurements of said water made by the company shall govern in all cases and shall be final and binding. Said gate is to be and remain the property of the company and subject to its control, and after delivery of said water at said gate it shall be conducted therefrom by the purchaser at his own cost and expense and entirely at his own risk; and the purchaser shall, at his own proper cost and expense, subject, however, to the control and supervision of the company, dig, build, maintain, and operate all lateral ditches that are or may become necessary to carry or conduct water from said system, at said point, onto and across his said land. And in case any purchaser or purchasers owning lands intervening the land of the purchaser and the said delivery gate shall fail or neglect to construct a supply ditch across his or their respective lands, then and in that event the purchaser shall have the right to enter upon such intervening land for the purpose of constructing, repairing, and maintaining a supply ditch, and the company shall designate the location of said proposed ditch upon request; it being the intention that supply ditches, other than main and branch canals, shall be constructed and forever maintained by the grantee, of a size sufficient to irrigate lands below the parcel herein described and dependent upon such supply ditch, and that in case of the failure of any purchaser or purchasers to construct and maintain his or their portion of such supply ditch, any other purchaser dependent on the construction and maintenance of such portion may enter upon said land and construct such portion at the cost of the grantee, the location and size thereof having been first determined by the company.

"3. The company shall, at all times, have the right to enter upon the above lands of the purchaser to survey or construct laterals necessary for the

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distribution of water to its purchasers, and the company shall have the right to use any ditch or lateral on the land hereby sold, whether the same be constructed by the purchaser or the company, and may enlarge the same for carrying water over and across the lands to other parties, provided that in so doing it does not interfere with the use of said ditch by said purchaser. No such ditch or lateral shall exceed four feet in width at the bottom.

"4. The purchaser hereby agrees to purchase of the company, and the company hereby agrees to sell to the purchaser, the perpetual use of sufficient water for the irrigation of all that portion of the land hereby sold which may prove to be susceptible of irrigation from said system by gravity flow, and for stock and domestic purposes incident thereto; said water to be supplied by the company between the 15th day of April and the 15th day of October of each year: Provided, however, that the water so used by the purchaser shall not exceed a maximum quantity of two and one-half acre feet for each acre of said land during said period, and provided, further, that not more than one-half an acre foot of water shall be used on each acre of said land during any one calendar month.

"5. The purchaser agrees to pay, on the first Monday of November, of each year, to the company, at Hamilton, in the state of Montana, an annual water maintenance charge of $1.25 per acre for all of said lands capable of being irrigated as aforesaid; but it is agreed and understood that the company shall be entitled to charge, collect, and receive from the purchaser a minimum water maintenance charge of $10 for furnishing said water—it being expressly understood that this provision and agreement is a covenant running with and binding upon such lands, and the purchase price of said water right and annual maintenance shall be a charge and lien upon said land, with the appurtenances thereto, and the same may be enforced and foreclosed in any court of competent jurisdiction, according to the laws of the state of Montana, and, in addition to the right to foreclose such lien, the company may, at its option, in case of the failure of the purchaser to pay said amounts as they respectively mature, including said annual maintenance charge, refuse to furnish water for the irrigation of said lands and for stock and domestic purposes thereon, until such amount in default shall have been paid, and all overdue payments, either on water right, interest thereon, or for maintenance fee, shall draw interest from maturity at the rate of 10 per cent. per annum.

"6. It is agreed that the purchaser shall use the water to be supplied by the company to irrigate the lands hereby sold, and for stock and domestic purposes incident thereto, and for no other purpose whatever, and that said water will not be permitted by the purchaser to be used on any land, except the land hereby sold, nor permitted to run off on contiguous land, nor to spread out in low places on said land, nor in any manner to run to useless waste. The purchaser will, without expense to the company, upon demand of the company, construct necessary ditches to convey any surplus water back to the main canal, or some lateral thereof: Provided said lateral may be reached by gravity flow by a ditch from the lowest point of the above-described land, and provided the same may be conducted into said main canal or some lateral thereof, within 1,500 feet from such lowest point, and failing so to do the company may, at the expense and cost of the purchaser, enter upon said land and construct and maintain such ditch or ditches, and that such expense and cost of constructing and maintaining such ditches shall be and become a lien on the land of the purchaser, and may be foreclosed by the company in the manner provided by law for the foreclosure of liens of mechanics and others.

"7. The company shall have the right to shut off the water from said canal or any of its laterals for the purpose of repairing the same at such time as urgent necessity may require, but during irrigation season shall restore the water as speedily as the nature of the case may permit.

"8. The company shall not be liable for scarcity of water caused by unlawful or unavoidable obstruction, hostile diversion, forcible entry, drought, flood, accident, or casualty; but the company shall use due diligence in pro-

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tecting its canal and irrigation system and keeping the same in proper operation and repair.

"9. It is mutually understood and agreed that the right hereby conveyed and the water to be furnished hereunder shall form a part of the appurtenances to said land, and that the right thereto shall be transferable only with said land and shall run therewith.

"10. The company shall have the right to sell water under the line of the canal herein contemplated to an amount equal to the total carrying capacity of said canal. If for any reason there should be any shortage in the water delivered by said canal during the irrigation season, then the amount of water herein contracted to be sold to the purchaser shall be in such proportion of the aggregate quantity of water in said canal as the amount of water hereby purchased bears to the full amount called for under all water rights sold by the company, and the purchaser shall receive water in that proportion."

The irrigation system, so far as herein involved, consists of a reservoir, a main canal 70 miles long, and branch canals and laterals 140 miles long. In addition are several streams that discharge into the main canal. Of lands irrigable from it, the company has sold 18,210 acres with use of water as aforesaid, and 10,259 acres to 19,657 acres of these and other lands of the company have been supplied by it with water from 1910 to 1917, both inclusive. If these sales had been unqualified, interveners' contention that, when sales equaled the water owned by the company, its interest in the water rights and irrigation system would vest in its grantees the system as a necessary instrumentality to enjoyment of land and water, and in the nature of appurtenant to both, might be conceded.

[10] But the case is otherwise. Of the water only a limited use is granted in perpetuity. The company virtually retains a reversion, the water not used, the excess, seepage, and waste always, and the whole for six months in the year. Of the irrigation system the company grants nothing, other than by its grants of lands and water it impresses said system with the duty of service to the grantees in respect to said lands and water, of the nature of an easement. In brief, the company's grants of water are a composite of water and service, so far a property interest in the water rights and irrigation system that these latter cannot be discharged from their obligation to the grantees without the latter's consent, under any circumstances. Whatever be the precise interest of said grantees, their right is to be protected therein; and to that end the grantor can be enjoined from like grants in excess of the capacity of water supply and of the system to distribute it. See Twin Falls, etc., Co. v. Caldwell, 242 Fed. 193, 155 C. C. A. 17; Amidon v. Harris, 113 Mass. 59.

[11] It does not appear, however, that the company has sold to capacity. Practically without conflict the evidence is that the reservoir capacity is 34,000 acre feet; that the requirements can be more than met to July 15th, and the reservoir still full; that from July 15th to October 15th the run-off into the reservoir is 12,000 acre feet or more; that the canal will carry 300 second feet; that the seepage loss therein is 22 per cent., and some additional loss in branch canals and laterals; that the reservoir can be discharged into the canal 100 per cent., pick-ups offsetting any loss at headgate; that irrigation in the main ceases about September 10th, the demand thereafter being but for hay, or-

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chards, and stock; that after October 1st the water is devoted to but stock (Powell's tables indicate user of about 3.5 acre inches in September, and .6 acre inch in October); that the system has been in operation eight years; that there is no organization to efficiently control and distribute water, no rotation in its use, no method, no measurement, any and all users taking water when it suits them and in quantity desired; that time and experience and method enlarges the duty of water; that some users have failed to secure sufficient water. It needs no close analysis hereof to demonstrate that the water and system in normal years (the test) will suffice for all the company's obligations in respect to more lands than it has sold and more than 25,000 acres.

[12] From July 15th to September 15th the water to the head of the canal is at least 42,000 acre feet. Thereafter, run-off and pick-ups are practically sufficient for requirements. The obligation of the company is to deliver during that period, July 15th to September 15th, all reasonably necessary to reasonably diligent use, but not in excess of one acre foot per acre. This it is to measure and deliver at its headgates in the main or branch canals, where in its judgment is most convenient for conveyance of the water by the user through laterals to the land. Its judgment controls, but it must be honest judgment, consulting, not its convenience, but that of the users of water; and this requires that by main and branch canals the water be delivered so near the land of water users that therefrom the latter can convey it upon their lands with reasonable labor and expense, and without unreasonable loss by seepage. Any failure of the company therein can be remedied, any dishonest judgment controlled, by the courts. That in the past the company constructed laterals and delivered water on the lands is a gratuity, not obligating it to continue. It can stand upon its contract. Therein the purchasers at foreclosure sale will succeed to all the company's rights and obligations. 42,000 acre feet at the canal head ought to afford more than 25,000 acre feet at said headgates, allowing 30 per cent. loss by seepage to those points. The data at hand is insufficient for accuracy, but establishes no right to injunction at this time; and that is all that is decided in respect to capacity, so greater accuracy is not vital.

Interveners may proceed anew whenever necessary to their protection. In reference to the contention that the company has failed to fully perform its contracts, and it or its successor may continue to fail, may find operation of the system unprofitable and abandon it, doubtless in so far as there is a remedy it may be secured in proper proceedings. It cannot change relations nor status nor relief in this suit. The hazard attaches to all contracts for service and easement with maintenance. All who bargain for the like risk such eventualities. If action for damages are inadequate, they might eventually result in execution sale and purchase of water rights and system by water users. Abandoned, they could possess and operate the sytem. As in like cases their principal reliance is that the water rights and system cannot be released from their claims or interest therein, nor diverted from their service, without their consent.

Decree in accordance herewith will be entered.

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BRYAN et al. v. BARRIGER et al.

(District Court, W. D. Kentucky, at Bowling Green. May 31, 1918.)

1. REMOVAL OF CAUSES ⟸111—REMAND—MOTION TO QUASH.
Where a suit, begun in state court and removed to the federal court, is found to be without the jurisdiction of that tribunal, so that it must be remanded, the federal court has no jurisdiction to dispose of motions to quash service of summons.

2. COURTS ⟸365—FEDERAL COURTS—PRECEDENTS.
A decision of the state court, construing the federal Constitution, is not binding on the national court sitting within such state.

3. REMOVAL OF CAUSES ⟸79(2)—TIME OF REMOVAL—WAIVER OF OBJECTIONS.
Though defendant did not actually file his petition for removal at or before the time fixed for answering by the Kentucky Statutes, as required by Judicial Code, § 29 (Comp. St. 1916, § 1011), yet, as plaintiffs' counsel agreed that the petition should be treated as filed, and time for answering had expired, any objection is waived.

4. SPECIFIC PERFORMANCE ⟸106(4)—PARTIES—PROPER PARTIES.
Ordinarily none but those who join in the contract need be made parties to a suit for specific performance; but where land is incumbered, and the contract calls for title free from incumbrances it is within the discretion of the trial court to permit or direct that the lienholders be joined.

5. REMOVAL OF CAUSES ⟸49(2)—SEPARABLE CONTROVERSIES.
Where defendant, a resident of New York, contracted to convey lands located in Kentucky, he cannot, suit having been instituted in the Kentucky state courts, and the holders of incumbrances, who were citizens of that state, made parties defendant, remove the cause to the federal court on the ground of separable controversy, for the incumbrancers were proper parties, and a defendant has no right to say that an action shall be several which a plaintiff elects to make joint.

In Equity. Suit by J. M. Bryan and others against D. S. Barriger and others, begun in the state court and removed to the federal court. On plaintiff's motion to remand, together with the motion of the named defendant to quash the service of summons. Motion to remand granted, and motion to quash dismissed.

Sims, Rodes & Sims, of Bowling Green, Ky., for plaintiffs.
Bruce & Bullitt, of Louisville, Ky., for defendants.

WALTER EVANS, District Judge. [1] The plaintiffs have moved the court to remand this action to the Simpson circuit court, in which it was commenced, upon the grounds, first, that the petition for its removal to this court was filed by defendant Barriger too late to entitle him to take that step; and, second, because, while it may be true that he is a citizen of New York, his codefendants are citizens of Kentucky, and are necessary parties to the action for the relief sought by plaintiffs. The defendant Barriger has moved the court to quash the return of the sheriff on the summons issued on plaintiffs' original petition, and also that on the summons issued on an amended petition thereafter filed, upon the ground that neither of those writs was served on him in person, but that the first of them was served on George C. Harris, alleged then to have been his agent in Kentucky, and the second of them on Eugene Porter, alleged then

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to have been his agent there. All these motions were argued at the same time; but, if it should turn out that we have not acquired jurisdiction of the case, that situation would necessarily prevent any action upon the motions to quash. Hence the need of first ascertaining whether we have acquired jurisdiction of the action by a proper removal thereof from the state court.

[2] Preliminarily, however, it may be well to state that the service on the persons alleged to have been Barriger's agents was based on the provisions of subsection 6 of section 51 of the Kentucky Civil Code of Practice, which provides that:

"In actions against an individual residing in another state, or a partnership, association, or joint-stock company, the members of which reside in another state, engaged in business in this state, the summons may be served on the manager, or agent of, or person in charge of, such business in this state, in the county where the business is carried on, or in the county where the cause of action occurred."

In Moredock v. Kirby (C. C.) 118 Fed. 180, we had occasion to consider whether, in actions not strictly in rem, these provisions were violative of the Constitution of the United States, and reached the conclusion that they were. This conclusion is strongly supported by the opinion of the Circuit Court of Appeals of the Eighth Circuit in Cella Commission Co. v. Bohlinger, 147 Fed. 419, 78 C. C. A. 467, 8 L. R. A. (N. S.) 537. A decision of the Court of Appeals of Kentucky to the contrary is not binding on the federal courts, inasmuch as a construction of the Constitution of the United States was involved.

[3] In considering the motion to remand, we find that the action was commenced by the filing of plaintiffs' petition on October 22, 1917, on which day also a summons was duly issued against the defendants returnable ten days thereafter. On November 16th the plaintiffs filed an amended petition upon which at the same time a summons was issued returnable 10 days thereafter. Under sections 102 and 367a, clause 10, of the Code of Practice, the answer of the defendants, if served with process, was due on the first or else on the third day of the next succeeding term of the court. That term, as counsel agree, began on March 4, 1918. Passing the question of whether the summons had been properly served on Barriger, the record shows that on the 23d day of November, 1917, the clerk, under section 58 of the Code of Practice, entered the following warning order:

"It appearing from the petition that D. S. Barriger is a nonresident of the state of Kentucky, it is ordered that John S. Milliken, a regular practicing attorney at this bar, is hereby appointed to notify the defendant D. S. Barriger of the nature and pendency of this suit, and warn him to answer in 30 days after the entry of this order."

Under section 60 of the Code of Practice Barriger was deemed to have been constructively summoned on the thirtieth day thereafter, and the answer of Barriger was due to be filed on the first or on the third day of the then next term of the Simpson circuit court, which began on Monday, March 4, 1918—that is to say, not later than on March

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6th. On March 4, 1918, the plaintiffs' attorney, G. W. Roark, accepted notice given by Barriger to the effect that on the 9th day of March, 1918, he would tender and move for leave to file the petition for removal. On March 8, 1918, an order was entered in these words:

"Came defendant, by attorney, and filed his petition for removal herein."

This petition was that of D. S. Barriger alone. On the 20th day of March, 1918, the following order was entered:

"It is agreed by the plaintiffs and defendants hereto, by attorneys, that the petition for removal to the federal court, filed herein in open court on March 8, 1918, shall be treated as filed upon the first day of the present March term of the Simpson circuit court."

On the same day an order of the court was entered in this language:

"Came the defendant D. S. Barriger, and tendered a bond for the removal of the above cause to the District Court of the United States for the Western District of Kentucky, with the United States Fidelity & Guaranty Company as surety, and moved the court to examine and approve the same, which is accordingly done."

Section 29 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1095 [Comp. St. 1916, § 1011]) provides in substance that a party entitled to remove a case may make and file a duly verified petition in such suit in the state court "at the time or any time before the defendant is required by the laws of the state or the rule of the state court in which the suit is brought, to answer or plead to the declaration of complaint of the plaintiff for the removal of such suit into the District Court * * * and shall make and file therewith a bond, with good and sufficient surety," for his entering a copy of the record in the District Court within 30 days thereafter.

In Powers v. C. & O. Ry. Co., 169 U. S. 92, 98, 18 Sup. Ct. 264, 266 [42 L. Ed. 673], the Supreme Court said that undoubtedly, when a case is a removable one, the defendant should file his petition for removal at or before the time when he is required by the law or practice of the state to make any defense. However, in that opinion the court had also said:

"But the time of filing a petition for removal is not essential to the jurisdiction; the provision on that subject is, in the words of Mr. Justice Bradley, 'but modal and formal,' and a failure to comply with it may be the subject of waiver or estoppel. Ayers v. Watson, 113 U. S. 594, 597–599 [5 Sup. Ct. 641, 28 L. Ed. 1093]; Northern Pacific Railroad v. Austin, 135 U. S. 315, 318 [10 Sup. Ct. 758, 34 L. Ed. 218]; Martin v. Baltimore & Ohio Railroad, 151 U. S. 673, 688–691 [14 Sup. Ct. 533, 38 L. Ed. 311]; Connell v. Smiley, 156 U. S. 335 [15 Sup. Ct. 353, 39 L. Ed. 443]."

The agreed order and the order filing the bond for removal were entered on the same day, and as we can conceive of no object nor motive for the agreed order other than as one bearing upon the time of petitioning for the removal of the case, we are constrained to the conclusion that we must hold that the plaintiff was thereby estopped from claiming that the petition for removal was not filed in time.

[4, 5] As the record shows, there were three defendants, namely, Barriger, a citizen of New York, and John Tarrants and the Mc-

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Elwain-Meguiar Bank & Trust Company, both citizens of Kentucky. We think we may regard Tarrants as a mere formal party and dismiss him from further consideration. The suit is in equity, and seeks a decree for the specific performance of a contract for the conveyance of certain real estate in Simpson county. The contract, which is in writing, is set forth in plaintiffs' petition, and shows clearly that Barriger agreed to convey to the plaintiffs 227½ acres of land for the price of $60 per acre—one-third payable in cash and the other two-thirds in one and two years thereafter, in equal installments, with interest from date, and for which notes were to be executed. The plaintiffs averred their readiness, willingness, and ability to make the necessary cash payments and to execute the notes for the deferred payments. These payments and notes were to cover the entire consideration, and in case of a previous partition of the land between the three purchasers, as provided for in the contract, notes were to be given by the individual purchasers for the proportionate part of the purchase money which each would owe. The petition, however, avers that the McElwain-Meguiar Bank & Trust Company (which we shall call the Trust Company) has a lien, created by Barriger, upon the land. The contract on which the suit is based made no provision for that contingency, and if very strictly construed it might require the full payment of one-third of the price in cash and also notes to the plaintiffs for the entire balance of the purchase money regardless of the lien—clearly an inequitable result.

Ordinarily none but those who join in the contract need be made parties to a suit for its specific performance. Nevertheless the court can exercise a reasonable discretion in granting relief in such cases (Cocanougher v. Green, 93 Ky. 522, 20 S. W. 542; Willard v. Tayloe, 8 Wall. 557, 19 L. Ed. 501), and, as a contract such as the one sued upon necessarily demands the conveyance of a title free of liens, the court, in order to an intelligent understanding of what will be a proper exercise of its discretion, may permit or require the presence of the lienholder as a party to the action and ascertain the amount of the lien, so as to enable it to adjudge how much reduction should be made on that account in fixing the amount for which the plaintiffs should jointly or severally give notes to the defendant for the unpaid balance of purchase money. That this is what the plaintiffs seek is manifest from their petition.

The defendant who made the contract is a citizen of New York, but the Trust Company, the defendant which has a lien created by Barriger, is, like the plaintiffs, a citizen of Kentucky, and the question upon which our decision of the motion to remand must turn is whether the joinder of that defendant should prevent the removal. In this connection it may be remarked that the petition for removal makes no charge of fraudulent joinder, but claims that the controversy between the plaintiffs and the defendant Barriger is separable from that between the plaintiffs and the Trust Company, and that the Trust Company is not a necessary party to the controversy between the plaintiffs and Barriger. It is quite obvious, however, that plaintiffs have no controversy with the Trust Company, except through the lien created

by Barriger, and which stands in the way of the latter in conveying an unincumbered title to the plaintiffs.

It has become the established construction of removal statutes that:

"A defendant has no right to say that an action shall be several which a plaintiff elects to make joint. Smith v. Rines, 2 Sumn. 338, Fed. Cas. No. 13,100. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way. The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings." Louisville & Nashville R. R. Co. v. Ide, 114 U. S. 52, 56, 5 Sup. Ct. 735, 29 L. Ed. 63.

See, also, many other cases, notably Powers v. Chesapeake & Ohio R. R. Co., 169 U. S. at page 97, 18 Sup. Ct. 264, 42 L. Ed. 673.

In such a situation, and in view of the authorities cited, we must hold that the plaintiffs were entitled to sue in the state court for all the relief they seek, and in their one suit to set up their claim to have the amount of the Trust Company's lien ascertained, and provision made in any decree which might be entered either for the liquidation of that lien or for a reduction of the amount for which notes should be given—either one or both—as equity might demand, and therefore that the Trust Company is a proper, and indeed a necessary, party to the controversy between the plaintiffs and Barriger. At all events, from the standpoint of the removal statute, it seems clear that the plaintiffs had the right to give their suit that perfectly legitimate aspect.

Without going into any further discussion of the question, we have reached the conclusion that the controversy between the plaintiffs and the defendants, as disclosed in the plaintiffs' petition, is not a separable one within the meaning of the statute, and therefore the fact that the Trust Company is a citizen of Kentucky must prevent the removal of the action to this court.

The motion to remand must be sustained, and this result takes it out of our power to pass upon the motion to quash the return on the summons. A decree will be entered accordingly.

HARTFORD FIRE INS. CO. v. KANSAS CITY, M. & O. RY. CO. OF TEXAS et al.

(District Court, N. D. Texas, at Amarillo. June 12, 1918.)

No. 149.

1. REMOVAL OF CAUSES ⇐19(5)—"JURISDICTION"—"ARISING UNDER THE CONSTITUTION OR LAWS OF THE UNITED STATES."

An action for injuries to an interstate shipment of live stock is governed by the various acts regulating commerce, and so is one arising under the Constitution or laws of the United States within Judicial Code, § 28 (Comp. St. 1916, § 1010), providing for removal of such causes, and section 24 (section 991), giving the District Courts jurisdiction of such causes; that is, the right to hear and determine the same.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Jurisdiction; Arising under the Constitution or Laws.]

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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2. Removal of Causes ⇐25(1)—Petition—Reference to Federal Law.
A petition seeking to recover for injuries to a shipment of cattle, alleging that the cattle were shipped from one state to another, though making no specific reference to any federal law, states an action arising thereunder, as the various acts regulating commerce govern.

At Law. Action by the Hartford Fire Insurance Company against the Kansas City, Mexico & Orient Railway Company of Texas and others, begun in state court and removed to the federal court. On motion for remand. Motion denied.

Templeton & Milam, of Ft. Worth, Tex., for the motion.
Turner & Dooley, of Amarillo, Tex., opposed.

ERVIN, District Judge. [1] This suit is brought in a state court for the loss of and injury to shipment of cattle from Ft. Stockton, in the state of Texas, to Casper, in the state of Wyoming. The case was removed to this court on the application of the defendant, on the ground that it is a suit arising under a law of the United States.

Section 28 of the Judicial Code provides that:

"Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States * * * of which the District Courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the District Court of the United States for the proper district." Act March 3, 1911, c. 231, 36 Stat. 1094 (Comp. St. 1916, § 1010).

In order to remove, therefore, two things must concur: First, the suit must arise under the Constitution or a law of the United States; and, second, the federal court must have jurisdiction to try such suit.

Jurisdiction is the right to hear and determine a case, and in the instant case jurisdiction is given by section 24 of the Judicial Code, in the following words:

"The District Courts shall have original jurisdiction as follows: Of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States." Comp. St. 1916, § 991.

What is meant by the words "arising under" the laws of the United States? It is contended here that the case cannot be removed from the state court to the federal court, unless the petition or complaint filed in the state court shows that there is a dispute or controversy as to the proper meaning or construction of a federal law; that this is the meaning of the term "arising under" a federal law; that it is not enough that the federal law controls or regulates the right of recovery. Is it necessary, therefore, for there to be a dispute as to the construction of the statute in order to make a suit "arise" thereunder? It does not seem so to me. It seems to me a suit arises under a law when it is brought to enforce the provisions of or liability thereby given, or is controlled as to the right of recovery by the provisions of such law. To say it does not arise under a law, unless there is a dis-

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pute as to the construction or meaning of the law, seems to me to be a misnomer; for, if it is held that the law does not apply to the facts set up, then such suit cannot arise under it, but must arise under some other law. Thus a case would be removed, not because it arose under a federal law, but to determine whether it did or did not so arise. The statute does not so read.

It seems to me the contention defeats itself, because the right of removal would depend not upon whether the cause of action arose under a federal law, but would depend upon whether there was a dispute as to whether the federal law applied to the facts or did not apply to the facts. This would be an entirely different ground for removal from that named in the act. The act does not say a case may be removed if there be doubt as to whether the federal law controls; but, on the contrary, it is specific that there is a right to remove if the controversy arises under a federal law. If, therefore, the holding should be that the provisions of the law did apply and control, then certainly the suit does arise under it. Therefore it follows that, if its removability is to depend on whether there be a dispute as to the meaning of the law, then where the holding is that its terms do not apply this would also require a decision that the federal court has no jurisdiction, and such suit, though removed, must be dismissed. This result must necessarily follow, because the same term, "arise" under the Constitution or laws of the United States, is used in both the statute conferring jurisdiction and that providing for removal, so that the court would have no jurisdiction to remove unless it would also have jurisdiction to try.

Again: It would be presumed that the term "arising under," where used in various places in the act, would naturally be given the same construction in each place, unless the context was such as to necessarily require a different construction. Section 24 of the Judicial Code, after making the provision above quoted and then providing as to various other causes for jurisdiction, concludes as follows:

"Provided, however, that the foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section."

"Fifth. Of all cases arising under any law providing for internal revenue, or from revenue from imports or tonnage, except those cases arising under any law providing revenue from imports, jurisdiction of which has been conferred upon the Court of Customs Appeals.

"Sixth. Of all cases arising under the postal laws.

"Seventh. Of all suits at law or in equity arising under the patent, the copyright, and the trade-mark laws.

"Eighth. Of all suits and proceedings arising under any law regulating commerce, except those suits and proceedings exclusive jurisdiction of which has been conferred upon the Commerce Court."

In the face of the provisions contained in these paragraphs of section 24, would it be contended that, if a suit should be brought in a state court under the provisions of the federal laws regulating internal revenue, or postal laws, or the patent laws, or the law regulating commerce, the District Court would have no right to remove it or to try it after removal? Yet the same term, "arising under," is used in each of these paragraphs as conferring jurisdiction upon the court. No

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one will deny that the federal court has no jurisdiction to remove a case if it has not jurisdiction to try it after being removed, for such a trial would be a mere nullity.

Now, taking up some of the cases which are cited by the movant as supporting the proposition above stated, let us make a number of quotations from them, and see whether the quotations so made are not in conflict with the contention made. In C., R. I. & P. Ry. Co. v. Martin, 178 U. S. 250, 20 Sup. Ct. 856, 44 L. Ed. 1055, and Carson v. Dunham, 121 U. S. 426, 7 Sup. Ct. 1030, 30 L. Ed. 992, it is said:

"Before, therefore, a Circuit Court can be required to retain a cause under this jurisdiction, it must in some form appear upon the record, by a statement of facts, 'in legal and logical form,' such as is required in good pleading, that the suit is one which really and substantially involves a dispute or controversy as to a right which depends upon the construction or effect of the Constitution, or some law or treaty of the United States."

In State of Tennessee v. Union & Planters' Bank, 152 U. S. 460, 14 Sup. Ct. 656, 38 L. Ed. 511, it is said:

"And under section 2 of that act, which provided that any suit of a civil nature, at law or in equity, brought in any state court, 'and arising under the Constitution or laws of the United States, or treaties made or which shall be made under their authority,' might be removed by either party into the Circuit Court of the United States, it was held sufficient to justify a removal by the defendant that the record at the time of the removal, showed that either party claimed a right under the Constitution or laws of the United States."

In the case of Shulthis v. McDougal, 225 U. S. 569, 32 Sup. Ct. 706, 56 L. Ed. 1205, it is said:

"A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends."

Now, it will be seen that in each of these cases the court states, as a determining factor, that the suit must involve a dispute or controversy respecting the validity or construction or *effect* of such federal law. This is a much broader proposition than that contended for in the motion. There are cases which hold as contended for, but, in the face of the many broader and more reasonable holdings, I shall not follow them.

Seaboard A. L. Ry. Co. v. Duvall, 225 U. S. 477, 32 Sup. Ct. 790, 56 L. Ed. 1171, was a case of a writ of error from the Supreme Court to a state Supreme Court, to review the decision of such court in a suit to recover damages for personal injuries, because of the alleged negligence of the defendant. While the question there and here differ in some respects, I do not think there would be any difference as to when the federal question is involved under the allegations of the complaint or petition. In that case Mr. Justice Lurton, speaking for the court, says:

"The federal question relied upon to sustain the writ of error to this court concerns the construction and application of the Employers' Liability Act of

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April 22, 1908. * * * Neither the complaint nor the answer makes any direct reference to that act; but the complaint did allege that the railroad company was operating a line of railroad between Portsmouth, Va., and Monroe, N. C., and that the plaintiff, while in its employment as baggage master and flagman upon a passenger train running between said points, was negligently injured by a head-on collision. This states a ground of action under that act."

[2] The petition in this case makes no specific reference to any federal law, but does allege that the cattle were shipped from Ft. Stockton, in the state of Texas to Casper, in the state of Wyoming. In view of this holding, and what is said in the Stewart Case, to be referred to later on, I think the allegations of the complaint show a suit arising under a federal law.

It seems to me the whole question is conclusively settled by the very recent case of Southern Pacific Company v. Stewart, 245 U. S. 359, 38 Sup. Ct. 130, 62 L. Ed. 345. In that case the court states the plaintiff's contention, as contained in its complaint or petition, as follows:

"In this case the plaintiff sought to recover more than $3,000, and, in view of the allegations of the complaint, it may be conceded that, the action being for loss or injury to cattle shipped in interstate commerce for transportation by a common carrier, this suit is one which arose under a law of the United States, and might have been removed to a federal court on that ground."

The court then cites a number of cases on this proposition, and continues:

"The Carmack Amendment requires the carrier receiving property for transportation between points in different states to issue a receipt or bill of lading therefor, and makes the carrier liable to the lawful holder thereof for any loss, damage, or injury to such property. While there is no specific allegation in the complaint that such bill of lading or receipt was issued, as the law makes it the duty of the carrier to issue the same, the presumption is that such duty was complied with."

After citing authorities on that proposition, the court then says:

"While it thus appears that the suit might have been removed to the federal court because of the federal nature of the cause of action upon which it was brought, it was nevertheless within the jurisdiction of the state court, and that court might have proceeded to final judgment, had not the defendant seen fit to remove the suit to the federal court."

These statements, as contained in this case, are criticized by the movant as being dictum on the part of the court, because this question was not then before it, and the court had before it the question only of removal because of the diversity of citizenship, and not a removal because of a controversy arising under a law of the United States. Whether dictum or not, the court was manifestly stating its views upon this question, and in my opinion stated them correctly, and I am perfectly willing to rest my conclusion in the case upon such a statement, where it is so admirably made and covers the identical question—not only in principle, but under the facts now before me.

An order will be entered denying the motion to remand.

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JAMES v. AMARILLO CITY LIGHT & WATER CO.

(District Court, N. D. Texas, at Amarillo. June 7, 1918.)

No. 142.

1. REMOVAL OF CAUSES ⟸11—ORIGINAL JURISDICTION OF FEDERAL COURT.
Under Judicial Code, § 24 (Comp. St. 1916, § 991), giving District Courts jurisdiction of civil suits between citizens of different states, etc., and section 51, providing that, where jurisdiction is founded on diversity of citizenship, suit shall only be brought in the district of the residence of plaintiff or defendant, a District Court has jurisdiction of a suit between citizens of different states on removal from a state court, although all of the plaintiffs were not citizens of such district.

2. REMOVAL OF CAUSES ⟸12—RESTRICTION AS TO DISTRICT.
Under Judicial Code, § 28 (Comp. St. 1916, § 1010), providing for removal, and sections 24, 51 (Comp. St. 1916, §§ 991, 1033), relating to the jurisdiction and venue of suits, a suit begun in the state court may be removed, where there is diversity of citizenship between the parties, though all of the plaintiffs were not residents of the district to which it was removed.

At Law. Action by Lena De Boe James against the Amarillo City Light & Water Company, begun in the state court and removed to the federal court. On motion to remand. Motion denied.

A. M. Mood and Veale & Lumpkin, all of Amarillo, Tex., for plaintiff.

Thomas F. Turner, of Amarillo, Tex., for defendant.

ERVIN, District Judge. This case was brought in a state court of Texas by petitioner under a Texas statute providing that an action to recover damages may be brought in case of the death of a party caused by the wrongful act of another; this statute, authorizing one to sue for the benefit of all, but requiring all beneficiaries to be named. The petition shows that some of the beneficiaries in this cause are resident citizens of Texas, while some are resident citizens of Kentucky.

[1] The defendant is a corporation, doing business in the state of Texas, but incorporated under the laws of the state of Delaware. The cause was removed to this court by defendant, and now the plaintiffs move to remand it to the state court because all the parties plaintiff and interested in the subject-matter of this suit are not resident citizens of the state of Texas, and therefore the suit could not have been originally brought in this court.

The District Courts are, by section 24 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1091 [Comp. St. 1916, § 991]), given jurisdiction of "all suits of a civil nature at common law or in equity, * * * where the matter in controversy exceeds * * * three thousand dollars * * * and is between citizens of different states."

Section 51 (Comp. Stat. § 1033), provides that:

"No civil suit shall be brought in any District Court against any person by any original process or proceeding in any other district than that whereof he

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is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of the plaintiff or defendant."

Section 28 (Comp. St. 1916, § 1010) reads as follows:

"Any other suit of a civil nature, at law or in equity, of which the District Courts of the United States are given jurisdiction by this title, and which are now pending, or which may hereafter be brought in any state court, may be removed into the District Court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that state."

The provisions of these sections of the Judicial Code, while separating the jurisdictional part from the venue part and the removal part, do not in effect change the terms of the original act which was thus codified; and the question we have for determination depends on the construction of the act as codified.

The plaintiff relies upon the case of Smith v. Lyon, 133 U. S. 315, 10 Sup. Ct. 303, 33 L. Ed. 635, in which the Supreme Court holds, after citing a number of previous decisions, that where there are more than one plaintiff, and they live in different states, suit cannot be instituted in the federal court in the state of the residence of only one of these plaintiffs. The court calls attention to the fact that the language of the original act which is codified in the sections above referred to, and in which the word "plaintiff" is used, makes no express provision as to where suits shall be brought when there are more parties plaintiff than one, and that, therefore, where the statute says, "where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant," that this means that all plaintiffs must reside in the state in which suit is brought in the federal court, or such suit cannot be maintained.

This does not necessarily decide the question now before the court, because we have not now the question presented of a suit originally instituted in this court. The question here is whether a suit which has been brought in a state court can be removed to the federal court when it could not have been brought here originally. A careful study of the opinion of the Supreme Court in the Lyon Case shows that the court there confused "jurisdiction" and "venue," for the court says:

"It is not readily to be conceived that the Congress of the United States, in a statute mainly designed for the purpose of restricting the jurisdiction of the Circuit Courts of the United States, using language which has been construed in a uniform manner for over 90 years by this court, intended that that language should be given a construction which would enlarge the jurisdiction of those courts, and which would be directly contrary to that heretofore placed upon it by this court."

That this was the meaning the court placed upon the act further appears from the holding in the case of Ex parte Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, where the Supreme Court held (1) that mandamus would lie to compel a lower court to remand a cause which had been removed to such court from a state court; (2) that the District Courts have no jurisdiction to try a suit where neither

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the plaintiff nor defendant reside within the district; and (3) that a cause cannot be removed to a federal court from a state court, unless such suit might have originally been brought in such federal court.

If there had been no further decision by the Supreme Court than the Wisner Case, I would necessarily feel bound by what is said in the Wisner Case, because of the ruling in the Lyon Case and the cases which it followed, that in order to maintain a suit in the federal District Court all plaintiffs must reside in such state, and there is no question that in the instant case all the plaintiffs or parties interested in this proceeding do not reside in the state of Texas. The authority of the Wisner Case, however, has been very much affected by the fact that the same court shortly after the decision of the Wisner Case has expressly repudiated two of the propositions there laid down.

In the case of Ex parte Harding, 219 U. S. 363, 31 Sup. Ct. 324, 55 L. Ed. 252, 37 L. R. A. (N. S.) 392, the Supreme Court expressly reverses the previous ruling in the Wisner Case that mandamus would lie. In the case of Ex parte Moore, 209 U. S. 490, 28 Sup. Ct. 585, 52 L. Ed. 904, 14 Ann. Cas. 1164, and in the case of Western Loan & Savings Co. v. Butte & Boston Mining Co., 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101, the Supreme Court expressly repudiates and reverses the ruling that the District Courts have no jurisdiction to try cases between citizens of different states other than that of the court which is hearing the case. In these two cases the distinction is correctly drawn between the venue part of the act and the jurisdictional part, and it is held that where a suit is brought by a citizen of one state in a state other than that of the residence of either plaintiff or defendant and the defendant appears generally in such cause, that the court has jurisdiction to try the case.

This brings us then to the third proposition laid down in the Wisner Case, namely, whether a suit can be removed to a court in which, because of the venue provision, it could not have originally been brought. This matter has been exhaustively considered by Judge Cochran in the case of L. & N. R. R. Co. v. W. U. T. Co. (D. C.) 218 Fed. 91. In this case Judge Cochran collates the authorities and discusses the question in a masterly manner, and reaches the conclusion that the Wisner Case is unsound on this proposition, and declines to follow it.

The same question has already been ruled on by me in Hohenberg v. Mobile Liners, Inc., 245 Fed. 169. In that case I discussed the proposition, without citing or discussing any authority other than the provisions of the Judicial Code. I knew that there was much confusion and uncertainty in the authorities, and a resulting conflict on the question, and I did not undertake to state or discuss the various holdings, but attempted to analyze the provisions as to jurisdiction and venue and removal as contained in the Judicial Code and draw my conclusions from those provisions.

Going back, now, to the Wisner Case, let us see if that case shows on what the Supreme Court based its then finding that a case could not be removed to a court in which it could not have originally been instituted. After discussing the matter at some length, and citing

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authorities, and after deciding the first two propositions, the court then (203 U. S. on page 460, 27 Sup. Ct. on page 153, 51 L. Ed. on page 268) came to the question which I have stated as the third proposition. It then states that neither of the parties was a citizen of the state of Missouri, in which state the Wisner Case was brought, and that therefore it could not have been brought in the Circuit Court in the first instance. It then proceeds as follows:

"But it is contended that Beardsley was entitled to remove the case to the Circuit Court, and as, by his petition for removal, he waived the objection so far as he was personally concerned that he was not sued in his district, hence that the Circuit Court obtained jurisdiction over the suit. This does not follow, inasmuch as, in view of the intention of Congress by the act of 1887 to contract the jurisdiction of the Circuit Courts, and of the limitations imposed thereby, *jurisdiction* of the suit could not have obtained, even with the consent of both parties." (Italics mine.)

It will be seen that the court bases its conclusion that the suit cannot be removed to a court in which it could not have been originally instituted, upon the other proposition that a court in which a case could not have been originally instituted would have no jurisdiction to try it. It is manifest that, if the court in the Wisner Case was right in its decision that the District Courts would have no jurisdiction to try a case unless the suit could have been originally brought there, the other conclusion was correct, for the trial would be a nullity. We have seen, however, that this proposition has been expressly repudiated in two later cases, and this holding in the Wisner Case therein expressly reversed. Therefore, if the Supreme Court in the Wisner Case based its holding, that there was no right of removal, upon the proposition that the District Court had no jurisdiction to try the case, then this holding would not be adhered to after they changed their mind on the question of jurisdiction. There can be no question that the court in the Wisner Case intended to hold that the District Court had no jurisdiction to try, where neither party resided in the state of such court, because in the Moore Case Chief Justice Fuller, who wrote the opinion in the Wisner Case, expressly dissents on that proposition. The only question, therefore, left, is whether the conclusion that the case was not removable depended upon the other proposition of want of jurisdiction in the District Court. I am satisfied that any one reading the Wisner Case carefully, and noting the way Chief Justice Fuller discusses the proposition which I have quoted above, must reach the same conclusion I have done.

It has frequently been said by the Supreme Court that when the reason for a rule ceases, the rule ceases. I think the opinion in the Moore Case puts the same construction on the Wisner Case that I have done. A careful consideration of the Moore Case shows that in the opening statement Justice Brewer, writing for the court, quotes the holding from the Wisner Case, as follows:

"It was held in Ex parte Wisner, 203 U. S. 449 [27 Sup. Ct. 150, 51 L. Ed. 264], that '* * * an action commenced in a state court by a citizen of another state, against a nonresident defendant, who is a citizen of a state other than that of the plaintiff, cannot be removed by the defendant into the Circuit Court of the United States.' On the authority of this case it is con-

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tended by petitioner that, as in this action none of the parties were citizens of the state of Missouri, it could not be removed by the defendant into the Circuit Court of the United States, and that, upon the failure of the United States Circuit Court to remand the case to the state court in which it was originally brought, mandamus from this court is an appropriate remedy."

This, it will be seen, was the question the Supreme Court were considering in the Moore Case, and after discussing at some length the doctrine of waiver by parties of their right to object to the trial of a case in a court in which under the venue provision of the act, it might not have been originally brought, the court reaches the conclusion that, where the parties did waive by any act their right to object to the trial of such case, the court has jurisdiction to try and determine such cause. While the body of the opinion and the argument used in it is addressed principally to the question of jurisdiction, and the conclusion is reached that where there is a diversity of citizenship there is jurisdiction, even though the case might not have been brought originally therein, still it must be seen from the opening statement that the court considered it was deciding the question of the right of removal to a court in which the suit might not originally have been brought. The court therefore, finding jurisdiction, declined to grant the writ of mandamus which had been prayed for, because, as it states, the parties had waived their right to object.

It will be noticed that this case was decided before the Case of Harding, 219 U. S. 363, 31 Sup. Ct. 324, 55 L. Ed. 252, 37 L. R. A. (N. S.) 392, where the court repudiates the power of the Supreme Court to direct the remandment under writ of mandamus. At the time, therefore, the court passed upon the Moore Case, it was still acting on the assumption that on a writ of mandamus it had the right to determine the question. To my mind, therefore, there is no way of escaping the conclusion that in the Moore Case the Supreme Court decided and determined that, if no objection was made by the party entitled to make such objection, there was a right to remove a case into the federal court, in which it could not have originally been instituted, and that such court had jurisdiction to try the case when so removed. The court in the discussion says that, if there was no jurisdiction originally granted by Congress, the parties themselves could not confer jurisdiction by consent, and hence many cases would be declared a nullity, where such cases had been tried in the federal courts without objection.

It therefore necessarily follows that a federal court in which a suit cannot originally be brought has the jurisdiction to try a case where there is the necessary diversity of citizenship, if the case is removed into such court.

[2] We are now brought to the conclusion that this court would have jurisdiction to try the instant case, and the only question left is whether the plaintiff, who brought the case in the state court, has any right to object to its trial in this court, because of the fact that the plaintiff could not originally have brought suit in this court against the objection of the defendant.

After the decision of these Cases of Moore and Western Loan & Savings Company, no one would question the right of this court to

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try the instant case, if plaintiff had originally filed his petition in this court and the defendant had pleaded thereto. We therefore see that the right of this court to try the case if originally brought here would depend exclusively upon the question as to whether the defendant made objection.

Now, let us examine the provisions as to the removal of causes from state courts, and see if there is anything in the statute which gives the plaintiff at any time the right to object to a removal where the court has jurisdiction to try the case. There is no change in the terms of the original act as codified, and I therefore refer only to the provisions as contained in the Judicial Code. It is true that in a number of cases the right of the plaintiff to object has been discussed, but I respectfully submit that a careful examination of the question will show that the plaintiff has no right to object, and that, where this apparent right was discussed by the court, they do not carefully examine the language of the act in this connection.

In the Case of Schollenberger, 96 U. S. 369, 24 L. Ed. 853, Mr. Chief Justice Waite, speaking for the court, said:

"The act of Congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, and it is one which he may waive. If the citizenship of the parties is sufficient, a defendant may consent to be sued anywhere he pleases, and certainly jurisdiction will not be ousted because he has consented."

Section 28 provides:

"Any other suit of a civil nature, at law or in equity, of which the District Courts of the United States are given jurisdiction by this title, and which are now pending or which may hereafter be brought in any state court, may be removed into the District Court of the United States for the proper district, by the defendant or defendants therein, being nonresidents of that state."

It will be noticed that the provision as to removal is not on its face in any manner limited to removal to a district in which the suit might originally have been brought. It gives the right to remove such suit of which the District Courts of the United States are given jurisdiction, and this is the only limitation placed by the removal statute upon the right to remove. The only condition is that the defendant or defendants shall be nonresidents of the state in which the suit is brought.

Now, it seems to me that, where the federal court is given jurisdiction of a suit which is instituted in the state court, and petition for removal is filed by a nonresident of such state, the fact of nonresidence and jurisdiction being shown by the petition, this is all that is required by the removal statute to transfer such cause from the state to the federal court. A careful reading of the provisions above quoted leads me to conclude:

First. That the jurisdiction is given the District Court by section 24 where the controversy is between citizens of different states.

Second. That the plaintiff has the right in the first instance, when he and the defendant are citizens of different states, to institute it by any original process or proceeding in the District Court of the

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United States in the district of the residence of either the plaintiff or the defendant.

Third. When the plaintiff has exercised his election to sue in the court of a state of which the defendant is a nonresident, that such defendant is given the right under section 28 to remove such suit to the District Court of the United States for such district.

These provisions have never denied to the plaintiff in the first instance the right to sue in the state court, but they have given him the right to elect to sue in either the state or in the federal court; but, while leaving to plaintiff such election in the first instance to sue in the state court, it then gives to defendant, being a nonresident of such state, the right to remove such suit to the federal court. It then follows that, if such right is given to the defendant, plaintiff cannot complain of its exercise by the defendant any more than defendant could have complained of plaintiff instituting such suit in the District Court in the first instance. If this is a proper construction of the act as written, I do not see where the court is concerned with the question as to whether Congress intended to constrict or to enlarge the jurisdiction of the court.

Conceding that the purpose of the act of 1888 was to limit the jurisdiction of the United States courts by increasing the amount necessary to give such courts jurisdiction, and was also to limit the right of removal which existed under the act of 1875, so as to give such right only to the defendant, being a nonresident of the state, still the right given to such defendant by the act of 1888 must be determined by the language used in the act of 1888, where such language is clear and positive. The purpose of this act cannot be controlled or modified, beyond the purpose clearly expressed therein, by the general purpose of the act to limit the jurisdiction. If the act of 1888, therefore, gives to the defendant, being a nonresident of the state, the right to remove a suit to the federal court of the district in which the suit is brought in the state court, then no general purpose or limitation should control this expressed right so given to the defendant; but there is no such general purpose expressed. It clearly expresses the particular purpose intended in two particulars only, viz.: (1) By increasing the amount necessary to give jurisdiction; (2) by limiting the right of removal to the defendant.

Under the act of 1875 either party had the right to remove, while under the act of 1888 the right of removal is given only to the defendant, with the added condition that he be a nonresident of the state; still, when this condition exists, and the jurisdiction of the court exists, the right of removal so given to the defendant by this act cannot be limited any further than the express terms of the act go. The fact that the act of 1888 takes away from the plaintiff, who has brought his suit in the state court, the right to remove such suit to the federal court, certainly cannot affect the right given by the act to the defendant. Certainly the language of section 28, giving the right of removal in the following words:

"Any other suit, of a civil nature, at law or in equity, of which the District Courts of the United States are given jurisdiction by this title, and

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which are now pending or which may hereafter be brought in any state court, may be removed into the District Court of the United States for the proper district, by the defendant or defendants therein, being non-residents of that state"

—is clear and unequivocal. It gives the right of removal absolutely to the defendant when the named condition exists, and gives no veto on such right to plaintiff.

Plaintiff having been given, by the provisions of section 51, his election to sue in the state or federal court, the defendant by this language is given the absolute right of removal, and there is not one word or intimation anywhere in the act that, where the proper jurisdiction exists in the federal court, and the proper conditions exist for the invocation by defendant of this jurisdiction, such exercise by defendant of his right so given is to be controlled or negatived in any manner by the plaintiff. If plaintiff and defendant are residents of different states, and plaintiff brings his suit in the District Court of a third state, defendant could appear and waive his objection, or could object on the ground of venue, and the court would on this ground dismiss the suit, whether plaintiff objected or not. If plaintiff brings suit in a state court in his district, defendant, being a nonresident of such state, can remove such suit because of section 28, whether plaintiff objects or does not object. On what ground can he object? Must he not point to some provision of the original act, or the codification of it, giving him the right to object, and, if there be no such provision, on what can he base an objection? If it had been intended by the provisions of this act to allow the plaintiff to negative the effort on the part of defendant to remove the suit, certainly some word or some intimation would have been put in the act to show this right on the part of the plaintiff. The fact that we find no word or intimation anywhere in the act giving the plaintiff the right to veto any effort on the part of defendant to remove the suit is conclusive, to my mind, that Congress did not intend to give plaintiff any such right. To deny to defendant the right so given to remove the suit is to deny to him a right clearly and expressly given in unequivocal language, and, if the courts can deny him this right, then they can deny him any other right which may be given him by Congress.

Construing the provisions of the act as a whole, and giving them what seems to me to be the clear intent of Congress, I find that jurisdiction is given to the federal courts, where there is diversity of citizenship; that on this state of facts plaintiff is given in the first instance the election to sue either in the district of his residence or in the district of the residence of the defendant. If plaintiff elects to sue in the district of his own residence, defendant, being a nonresident, has the absolute right to remove the suit to the federal court of such district.

The provisions of section 51, limiting the bringing of the suit in the first instance, are limitations to bind the plaintiff, and do not bind the defendant. The provisions of section 51 expressly so state, and do not in any manner undertake to regulate or control or limit the right given by section 28 to defendant. If plaintiff, being a resident of one state,

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and defendant of another, bring his suit in a federal court of a third state, defendant can, by appearing generally, waive the objection as to venue, and such court has jurisdiction to try such suit. If, therefore, plaintiff brings his suit in a state court, defendant is given by section 28 the right to remove it to this same court, and it has just as much jurisdiction to try such case as if plaintiff had originally brought it there.

Finding, therefore, that the Wisner Case bases its holding as to non-removability upon its further finding of want of jurisdiction, and that the court has since reconsidered that question, I am constrained to decline to follow the Wisner Case. An order will be entered, denying the motion to remand.

AMUSEMENT SYNDICATE CO. v. EL PASO LAND IMPROVEMENT CO.

(District Court, W. D. Texas, El Paso Division. May 22, 1918.)

No. 104.

1. COURTS ⊜489(1)—JURISDICTION—EXCLUSIVE JURISDICTION.
 Where a suit for injunction to compel removal of balconies, etc., begun in state court, called for an adjudication of title and the right of possession to land that tribunal is entitled to hold jurisdiction to the exclusion of the federal court in which a second suit involving substantially the same parties, causes, etc., was filed; the rule being different from the ordinary action in personam.

2. COURTS ⊜508(1)—FEDERAL COURTS—INJUNCTION TO STATE COURT—STATUTE.
 Rev. St. § 720 (Comp. St. 1916, § 1242), declaring that an injunction shall not be granted by any federal court to stay proceedings in any state court, except in cases where it may be authorized by laws relating to bankruptcy, applies to the entire proceedings in a state court.

3. COURTS ⊜508(1)—FEDERAL COURTS—INJUNCTION TO STATE COURT—STATUTE.
 Rev. St. § 720 (Comp. St. 1916, § 1242), forbidding federal court to issue injunctions staying proceedings in state courts, unless authorized by laws relating to bankruptcy, applies to injunctions directed to parties engaged in proceedings in the state court.

4. COURTS ⊜508(1)—FEDERAL COURT—INJUNCTION TO STATE COURT—STATUTE.
 Rev. St. § 720 (Comp. St. 1916, § 1242), forbidding federal courts from staying proceedings in state courts by injunction, save where authorized by laws relating to bankruptcy, was intended to give the force of positive law to the rules of comity between such tribunals and to preserve the independence of each.

5. COURTS ⊜508(1)—FEDERAL COURT—INJUNCTION TO STATE COURT—STATUTE.
 Rev. St. § 720 (Comp. St. 1916, § 1242), forbidding federal courts from enjoining proceedings in the state court, unless authorized by laws relating to bankruptcy, extends not only to orders of the federal court, directly restraining proceedings of the state court, but to all orders of the federal court which necessarily have that effect.

6. COURTS ⊜508(2)—FEDERAL COURT—INJUNCTION TO STATE COURT—STATUTE.
 Where, in a suit by a trustee holding the legal title to land to compel defendant to remove structures, the state court issued an injunction restraining the trustee from interfering with such structures, the federal

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court cannot on a suit by the beneficiary of the trust, issue an injunction compelling defendant to remove, for that would violate Rev. St. § 720 (Comp. St. 1916, § 1242), forbidding federal courts from staying proceeding in a state court by injunction.

7. COURTS ⟸508(1)—COMITY.
Upon broad principles of equity, a chancery court should decline to entertain a suit to nullify, or which in its effect would nullify, an order of an independent court of concurrent jurisdiction, involving the same parties and subject-matter.

8. COURTS ⟸506—STAY OF ACTION—PENDENCY OF SUIT IN COURT OF CONCURRENT JURISDICTION.
Where the state court had already acquired jurisdiction of a suit by a trustee holding the legal title to land to compel defendant to remove structures thereon, and had enjoined the trustee from interfering with such structures a suit begun by the beneficiary of the trust in the federal court to compel removal will be stayed until termination of the suit in the state court.

In Equity. Bill by the Amusement Syndicate Company against the El Paso Land Improvement Company. On motion to stay trial until final determination of a suit in the state court. Motion granted.

On February 18, 1913, L. M. Crawford, as trustee, filed in the state district court of El Paso county, Tex., his petition against the El Paso Land Improvement Company, praying for a mandatory writ of injunction requiring the defendant in that cause to remove certain rooms, balconies, etc., from a portion of block 2, Mills' Map, of the city of El Paso, Tex. On March 4, 1913, the defendant in that cause answered said petition and also filed its cross-action against the said Crawford, trustee. On July 1, 1916, the defendant filed in the state court its amended answer and cross-action in said suit, and in this amended cross-action alleged that the ground upon which the rooms, balconies, etc., stood belonged to it; that L. M. Crawford, as trustee, had, by a contract of date January 12, 1907, contracted to convey said land to defendant for a certain consideration, and that said consideration had been paid, and the Improvement Company in its cross-action prayed for specific performance of that contract; and also prayed that L. M. Crawford, trustee, be enjoined from in any way interfering with the improvements on said land until the final determination of said state court case. On September 5, 1916, the state court granted a temporary injunction in said cause, enjoining L. M. Crawford, trustee, from removing or in any way interfering with the rooms, balconies, etc., above mentioned, pending the determination of the suit pending in the state court, which injunction is still in force and effect. L. M. Crawford, as trustee, answered said cross-action in the state court, by amended and supplemental pleas, and as trustee has litigated and is yet litigating in the state court the matters involved in his petition and in said cross-action. On January 10, 1917, the Amusement Syndicate Company filed its petition in this court; said petition being substantially the same as the original, amended, and supplemental petitions, filed by L. M. Crawford, trustee, in the state court, except the petition filed in this court is filed by the Amusement Syndicate Company, while the pleadings in the state court were filed by L. M. Crawford, trustee. However, in the suit in the state court, L. M. Crawford, trustee, contested the cross-action of the El Paso Land Improvement Company, and in said state court suit pleaded and defended as trustee for the Amusement Syndicate Company, and made for that company, as trustee therefor, the same defenses that the company could have made, had it been a party thereto.

The land in block 2, Mills' Map of El Paso, above mentioned, on January 12, 1917, stood in the name of L. M. Crawford, trustee, according to the pleadings in the state court suit; the deed to him not disclosing for whom he held such land as trustee, but being a conveyance to "L. M. Crawford,

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trustee," and to his "successors and assigns." The title to said land, and to the rooms, balconies, etc., herein mentioned, is involved in the suit in the state court, and Crawford is litigating that title for and on behalf of the Amusement Syndicate Company in the state court. The state court had jurisdiction of the subject-matter of the controversy and of L. M. Crawford, trustee, long prior to the filing of the petition in this court. Crawford, trustee, has been enjoined (in 1916) by the state court from removing or in any way interfering with the improvements above mentioned until the state court case shall have been finally determined. By the petition filed in this court the Amusement Syndicate Company seeks to have this court by its writ of injunction compel the defendant El Paso Land Improvement Company to do that which the Improvement Company has enjoined L. M. Crawford, trustee (alleged by the plaintiff to be its trustee), from doing. The defendant has filed in this court a motion to postpone trial of this cause until final determination of the state court suit, basing said motion upon a showing that the parties and subject-matter of the suit in the state court and in this court are substantially the same, and that the state court first had jurisdiction, and that the property will be necessary for an effective decree of the state court in the suit there pending.

Jones, Jones, Hardie & Grambling, of El Paso, Tex., for complainant.

J. F. Woodson and T. A. Falvey, both of El Paso, Tex., for defendant.

SMITH, District Judge (after stating the facts as above). The question raised by motion of the defendant is whether or not, by reason of conflict of jurisdiction between this court and the state court, this case should be postponed until after a final decision therein in the state court.

[1] The suit was first brought in the state court. The parties, the issues, the subject-matter, and the relief sought are substantially the same in both courts. Neither has taken actual possession of the res which is the subject of the litigation. Upon this state of facts it is well settled that the court first acquiring jurisdiction—the state court in this case—retains exclusive jurisdiction of the case until its final determination. This would seem to be the rule even in cases where the court last acquiring jurisdiction had actually taken possession of the res. Empire Trust Co. v. Brooks, 232 Fed. 641, 146 C. C. A. 567; Palmer v. Texas, 212 U. S. 118, 29 Sup. Ct. 230, 53 L. Ed. 435; Farmers' Loan Co. v. Lake Street Ry. Co., 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667; Adams v. Mercantile Co., 66 Fed. 617, 15 C. C. A. 1; Jackson v. Parkersburg & O. V. Electric Ry. Co. (D. C.) 233 Fed. 784; Knudsen v. First Trust & Savings Bank, 245 Fed. 81, 157 C. C. A. 377; In re Lasserot, 240 Fed. 325, 153 C. C. A. 251; O'Neil v. Welch, 245 Fed. 261, 157 C. C. A. 453.

This is not an action purely and simply in personam, as, for instance, an action for debt, in which both courts could properly proceed to judgment without conflict one with the other; but in both courts it involves specific property as its subject-matter. In both courts it calls for an adjudication of title and of the right of possession. In the state court the plaintiff prays for a mandatory injunction, the effect of which would be to dispossess the defendant, and the defendant asks and has already obtained a temporary injunction for the maintenance of its

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own possession. Like extraordinary powers of this court are sought to be invoked by the respective parties. If these proceedings have not brought the specific property involved—the res—into the actual possession of the state court, they have at least given that court dominion and control over it. It is true that injunction acts only in personam: but it is also true that possession of specific property may be, and often is, effected by and through injunctive process. These considerations I think clearly distinguish this case from one strictly in personam where only a personal judgment is in view, and brings it within the rule that as between two courts of concurrent jurisdiction the one which gets the case first holds it to the exclusion of the other. Westfeldt v. North Carolina Mining Co., 166 Fed. 710, 92 C. C. A. 378; Farmers' Loan & Trust Co. v. Railroad, 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667.

This rule is founded upon comity and is essential to the orderly administration of justice, and to prevent unseemly conflict between courts. The wisdom and necessity of this rule is well illustrated in the instant case. The state court by writ of temporary injunction has restrained the plaintiff from going upon the property in controversy and from interfering with certain improvements thereon, pending the final determination of the case. The complainant in this court, substantially the same as the party plaintiff in the state court, is asking this court to issue a mandatory injunction against the defendant, requiring it to remove said improvements—to do the very thing complainant is enjoined from doing.

If this case should now be tried in this court, and the mandatory injunction granted as prayed for by complainant, a serious conflict of proceedings between the two courts would occur. These considerations, I think, are sufficient to authorize and require the court to sustain the defendant's motion to postpone this case until the final determination of the case in the state court.

[2-6] However, I do not think it necessary to rest the decision of this matter entirely upon the rule which has been announced. Section 720, U. S. Revised Statutes (section 1242, U. S. Compiled Statutes 1916), declares:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The prohibitions of this statute extend to the entire proceedings in the state court. Security Trust Co. v. Union Trust Co. (C. C.) 134 Fed. 301; Union Pacific Trust Co. v. Flynn (C. C.) 180 Fed. 565. And it applies to injunctions directed to parties engaged in proceedings in the state court. Cœur d'Alene Ry. & Nav. Co. v. Spalding, 93 Fed. 280, 35 C. C. A. 295. And it was intended to give the force of positive law to the rule of comity, to preserve the essential and necessary comity between the federal and state courts and to maintain the independence of each. Dillon v. Kansas City S. B. Ry. Co. (C. C.) 43 Fed. 109. And the prohibitions of the statute extend, not only to orders of the federal court directly restraining proceedings

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of the state court, but also to all orders of the federal court which necessarily have that effect. Western Union Telegraph Co. v. Louisville & N. Ry. Co., 218 Fed. 628, 134 C. C. A. 386 and cases therein cited.

The case last cited was a proceeding in state court to condemn right to construct a telegraph line along a railroad right of way. Injunction was granted by a federal court, restraining the telegraph company from entering on the right of way; on appeal this was held violative of said statute. Illustrative of the proper construction and applicability of said statute the following cases may be cited:

In the case of First National Bank v. Hughes (C. C.) 6 Fed. 737, the state court issued a compulsory order to compel a national bank to disclose the names of its depositors, and it was held that the federal court could not stay the proceedings by injunction.

In the case of Domestic & Foreign Missionary Society v. Hinman (C. C.) 13 Fed. 161, it was held that the federal court could not issue an injunction to restrain a party from claiming, using, occupying, incumbering, disposing of, or interfering, or in any manner intermeddling, with property which the state court had directed its officers to place in his hands.

In Green v. Porter (C. C.) 123 Fed. 351, where a party obtained from a state court an injunction forbidding the plaintiff in a patent infringement suit in the federal court to assign or release his claim, a counter injunction sought by plaintiff in the federal court was refused, on account of the comity existing between federal and state courts, and the confusion which would result from conflicting decrees.

In Dillon v. Kansas City S. B. Ry. Co. (C. C.) 43 Fed. 109, it was held that under U. S. Rev. Stat. § 720, which forbids federal courts from staying proceedings in state courts, except in bankruptcy matters, a federal court will not, pending a condemnation suit in a state court, enjoin the petitioner from entering upon the land to be condemned.

In People's Gaslight & Coke Co. v. Chicago (C. C.) 192 Fed. 398, the city had previously instituted a suit in a state court to enforce an ordinance fixing the price of gas, after which the complainant instituted its suit in the federal court to restrain the enforcement of the ordinance on the ground that its enforcement would deprive complainant of its property without due process of law, and it was held that complainant's suit was not in personam, and hence the state court having first acquired jurisdiction, and having full power to adjudicate the rights of the parties, complainant was not entitled to injunction, such injunction being prohibited by section 720, U. S. Rev. Stats.

In Orton v. Smith, 59 U. S. (18 How.) 263, 15 L. Ed. 393, it was held that the federal court would not take jurisdiction of a bill of peace for an injunction to quiet the title of an estate, where the title was already in litigation in a court of concurrent jurisdiction.

It seems clear that the question here for decision falls clearly within the prohibitions of said statute, as construed by the decisions which have been cited. One of the objects of this suit, really the main object, is to secure the issuance of a mandatory injunction requiring the defendant, the El Paso Land Improvement Company, to remove cer-

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tain improvements—"obstructions"—from the real estate in controversy. The state court has previously issued a writ of injunction, prohibiting the plaintiff in that court from removing or tearing down any of said improvements, and from interfering therewith, and from altering or destroying the same, or any portion thereof, until the final determination of the case in that court. That injunction is still in force and effect.

The plaintiff in the state court, Crawford, claims the real estate in controversy as the trustee of the Amusement Syndicate Company, the complainant herein, who in this court claims the ownership of said real estate as cestui que trust, through its said trustee, Crawford. They represent identically the same interest, and therefore the party plaintiff in the state court is substantially the party complainant in this court, and vice versa.

The prime object of this suit, or at least its necessary effect, is therefore to restrain by counter injunction a valid injunction issued by the state court—a court of competent and concurrent jurisdiction; and it is my opinion that this cannot be done without contravening the statute.

[7, 8] Again, aside from said statute, I do not think this bill ought to be entertained. Upon broad general principles of equity, a chancery court should decline to entertain a suit to nullify, or which in its effect would nullify, the valid order of another court of concurrent jurisdiction in a case between the same parties and involving the same subject-matter. In the case of Louisville & N. Ry. Co. v. Western Union Tel. Co., 233 Fed. 82, 147 C. C. A. 152, the Circuit Court of Appeals of this circuit affirmed an order dismissing a bill of this character, and in doing so Judge Walker in delivering the opinion of the court said:

"The supplemental bill filed by the appellant prayed for an injunction restraining and enjoining the defendant, the appellee here, from maintaining and operating upon the rights of way of the appellant the poles, wires, and other telegraphic appliances which the appellee had constructed, maintained, and operated upon said rights of way under a contract with the appellant which it was alleged expired on August 17, 1912. By writs of injunction issued under orders made in a suit between appellant and appellee in the United States District Court for the Western District of Kentucky, certified copies of which were made exhibits to the appellee's answer to the supplemental bill, the appellant was enjoined and restrained from taking possession of or interrupting the appellee in the use of any of its poles, wires, or other apparatus situated upon the right of way of the defendant, which was referred to in the original and supplemental bills in this case, and by the terms of the last of said orders the injunction issued thereunder was to be operative until the further order of the court from which it issued. We think it is apparent that the necessary effect of granting the relief which the supplemental bill prayed would be to enable the appellant to do, under the protection of the orders of one court, what it has been forbidden to do by a valid order of another court, which is in full force and effect. A bill, the object of which is to bring about such a result, is not maintainable."

It may be that the bill here before the court should be dismissed; but, as that question has not been submitted nor argued, it will not now be passed upon.

I am, however, clearly of opinion that the motion to postpone should be granted; and it is accordingly so ordered.

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In re SHATZ.

(District Court, E. D. Pennsylvania. June 4, 1918.)

No. 5637.

1. BANKRUPTCY ⊂=325—CLAIMS—INDEBTEDNESS AS INDORSER.
Holder of a note indorsed by a bankrupt, not due at the time of bankruptcy, but which became due before proof of claim, and on which in the meantime a payment was received from the maker, can prove only for the amount due thereon at maturity.

2. BANKRUPTCY ⊂=355—DISTRIBUTION OF ASSETS—"SECURED CREDITOR."
A "secured creditor" is one who directly holds as security for his debt property which would otherwise swell the assets of the bankrupt estate, or indirectly holds like property through having the debt obligation of another person who himself holds such property.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Secured Creditor.]

In Bankruptcy. In the matter of Lewis A. Shatz, bankrupt. On review of order of referee allowing claim of Metropolitan Bank. Modified.

Alfred Aarons, of Philadelphia, Pa., for petitioner.
J. Howard Reber, of Philadelphia, Pa., for claimant.

DICKINSON, District Judge. On or about November 1, 1915, the Metropolitan Bank discounted a four months note for $10,000. As holder of this note the bank filed amended proofs of claim in the sum of $10,000. The note was made by the 35 per cent. Automobile Supply Company, with the bankrupt as accommodation indorser. The maker of the note had with the bank a deposit of $2,229.28, which the bank appropriated and applied toward the payment of the note. The maker of the note was also adjudicated a bankrupt, and from its estate the bank received dividends of $700, and of $500 from its trustee. The dates of these respective payments are later stated. There has yet been no final distribution in the bankrupt estate of the maker of the note. The proofs of claim were filed on March 26, 1917. Shortly after the discount of the note, to wit, on November 18, 1915, a petition in bankruptcy was filed against the indorser, and on November 19, 1915, the maker made a general assignment for the benefit of its creditors. On this latter date the bank, in some way, succeeded in appropriating towards the payment of the note the balance standing to the credit of the maker, as before stated. A petition in bankruptcy was filed against the maker on November 23, 1915, and it was adjudicated a bankrupt on December 20th following.

The pertinent dates referred to may be presented in one view as follows: November 1, 1915, discount of note for $10,000; November 18, 1915, petition in bankruptcy filed against the indorser; November 19, 1915, assignment by the maker for the benefit of his creditors, and appropriation by the bank of the deposit balance of the maker of the note toward its payment; November 23, 1915, petition in bankruptcy against the maker; March 1, 1916, maturity of the $10,000 note;

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dividends out of the estate of the maker of the note, aggregating $1,200, received by the bank; March 26, 1917, proof of claim (as amended) for $10,000 by the bank on the note.

The objections made to the allowance of the claim of the bank are based upon the payments above referred to, and that the bank may be in receipt of further dividends from the estate of the maker. The claim of the bank is that it is entitled to receive dividends from the estate of the maker, and is also entitled to receive dividends from the estate of the indorser up to the full amount of its claim. The dates of the payment of the dividends do not definitely appear, but the fact is assumed that they were declared and paid between the date of the maturity of the note and the proof of claim by the bank against the estate of the indorser. The referee allowed the bank a dividend based upon $10,000, the full face of the note.

[1] The petition for review is based upon the proposition that the claim should have been allowed only for $6,570.72, being the $10,000 less the amounts, as above mentioned, received on account. The first impression of the general merits of the claim made by the bank and the position of the petitioner is determined, or at least largely influenced, by the point of view from which the practical results are viewed. The maker and the indorser having each made themselves liable to the bank for the repayment of the sum of $10,000. from the viewpoint of the bank it is thought right that the bank should be permitted to press its claim against each up to the point of its receipt of all that is justly payable to it. From the standpoint of the indorser, there is not only an injustice, but an absurdity, in the position that the bank could have by any possibility a claim against the indorser greater than its claim against the maker.

The referee, in making his finding, has followed the line of reasoning pointed out in Board of County Com'rs v. Hurley, 169 Fed. 92, 94 C. C. A. 362. This line is that the claim of creditors to share in a bankrupt estate is not based upon a claim of debt, but upon a claim of ownership of assets, their share in which is measured by the amount which their debtor owed to them at the time of the filing of the petition in bankruptcy against him, and the relation of the amount of this indebtedness to the total amount of claims proven in the bankrupt estate. The share of assets thus determined is fixed as of the date of the petition in bankruptcy. We may observe, in passing, that the amount of the claim provable in the Hurley Case against the estate of the surety had been reduced, if at all, by dividends received by the claimant after the filing of the petition in bankruptcy against the surety, and after the obligation held by the creditor had matured.

The scope of the ruling in the Hurley Case is indicated in the case of In re Simon (D. C.) 197 Fed. 105. There claims were sought to be proven against the bankrupt estate of an indorser. The question was whether the claims could be proven for the amount of the original indebtedness, or for the balance after amounts paid by the makers subsequent to the filing of the petition in bankruptcy against the surety had been deducted. The referee allowed the claims only for such balances. This ruling was reversed by the court, and the claims al-

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lowed for the original sums due. Here, it is to be again observed, the sum proven was the sum due at the time of the filing of the petition in bankruptcy against the surety.

The doctrine in the Hurley Case was again applied in Re New York Commercial Co., 233 Fed. 906, 147 C. C. A. 580. There the claims were permitted to be proven for the original sum of the indebtedness on the express ground that the reduction of the debt was subsequent to the bankruptcy of the one against whose estate the claim was sought to be proven and after the liability had become fixed. The abstract proposition laid down by the court in the cited case is that the claimant had a right to participate in the estate of each of the two bankrupts, and a right to prove against each for the full debt, and could assert this right against each, unaffected by the fact that there was also a like right against the other, subject only to the limitation of the receipt of the total amount which was due him. Here again, however, both the specific allowance and the limitation of the abstract proposition indicate that the sum for which claims could be proven against each estate was limited to the sum which was due by the bankrupt in that estate at the time of the filing of the petition in bankruptcy in that estate.

As the claim of the bank against the indorser on November 18, 1915, the date of the filing of the petition in bankruptcy, is measured by $10,000 (less the discount until the maturity date of March 1, 1916, which reduction has been treated as a negligible sum), the referee was logically led to his finding that the bank could prove its claim in the sum of $10,000. The finding, however, ignores the other fact of a less sum being due when the note matured.

The petitioner contests the correctness of the finding made by the referee on several grounds, which we will consider in a somewhat different order from that in which discussed by counsel.

One is that the line of cases which the referee followed is out of accord with the decision of the Supreme Court of the United States in Merrill v. Bank, 173 U. S. 131, 19 Sup. Ct. 360, 43 L. Ed. 640. The discussion of the principles of law involved in that case had reference to the distribution of the assets of an insolvent national bank. A creditor was allowed a dividend upon the face amount of his claim as it stood at the time the bank went into insolvency, notwithstanding the fact that the creditor held collateral security and had received payment on account of his claim after the insolvency had been declared, but before award to him of his dividend, subject, of course, to the limitation that he was entitled to no dividends after payment of his claim in full. The opinion of the court formulates a statement of the different schemes of distribution recognized. The courts of different jurisdictions are sometimes directed in the choice made among these several schemes by statutory requirements. There is, in some instances, a concord in the acceptance of the principle of distribution, as, for instance, that the share of the creditor is determined by what is due him at the time he acquired an interest in the assets which are the subject of the distribution; but there is a difference in the fixing of this time. The Pennsylvania rule is that the time is

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that of the act of transfer through and by which the creditor gets his equitable claim to the assets, and the principle is recognized and followed that the creditor receives dividends, not qua creditor, but qua owner; the size of the debt being merely the measure of the ownership share.

The principle underlying the scheme of distribution followed in the Merrill Case is that known as the "chancery rule." The opposing principle, that a creditor holding property as security and having also a debt obligation was required to exhaust his security, and after crediting the sum thus realized to claim only for the remainder of the debt, or as the cost of his right to claim a dividend upon the whole sum due him, he was required to surrender and put into the fund for distribution the security which he held, is known as the "bankruptcy rule." It is so known, not by virtue of any special provisions of bankruptcy statutes, but because of the "peculiar" jurisdiction and practice of courts of bankruptcy. The distinction, however, was universally recognized between cases in which the creditor held property, otherwise a part of the bankruptcy estate, as security for his debt, and the cases in which he held property, not the property of the bankruptcy estate, or in which he held no property, but two or more debt obligations for the same debt, with the right to make demand against different estates. If he held the property of his bankrupt, the bankruptcy rule applied, and he must surrender, or claim only for the unsecured balance of his account. In the other cases, however, he could assert his claim for its full face value against the different assets, subject to the limitation that he was not entitled to an overpayment.

Much may be said—in fact, has already been many times said—in respect to the abstract equity of the one plan of distribution or the other, in the contrasting of their respective claims to merit. The choice made is probably controlled wholly by the viewpoint. The essential thing is to have an established rule and to apply it. As distribution is being here made by a court of bankruptcy in a bankruptcy proceeding, the paramount consideration is the provisions of the bankruptcy statute.

[2] The definition of a "secured creditor" is a creditor who directly holds as security for his debt property which would otherwise swell the assets of the bankrupt estate, or indirectly holds like property through having the debt obligation of another person who himself holds such property. The thought of there being security held by the creditor in the form of property is carried all through the provisions of the statute, and the right of the creditor to enforce the individual obligation of another person to pay the debt of the bankrupt is recognized in the provision permitting such other person to prove, in the name of the creditor, the claim against the bankrupt's estate, if the creditor does not elect to do so on his own account.

With the distinctions above indicated kept in mind, we see no conflict between the rulings in the Merrill and Hurley Cases. The point made that the Merrill Case rules that distribution of the assets of an insolvent national bank was to be made in accordance with the so-

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called chancery rule, and not in accordance with the so-called bankruptcy rule, is a point well taken; but the corollary proposition cited by counsel for the petitioner, that the so-called bankruptcy rule was not followed by the referee, is a proposition the truth of which is not demonstrated.

The further objection, that the Hurley Case is not in accord with the ruling of the courts of this circuit and district, is so well met in the opinion of the referee that we see no occasion to further follow this branch of the discussion.

The other objection made, that the bank at the time of the filing of the petition was not a creditor of the bankrupt estate of the indorser, is an objection not sustained by the cases cited to us in the argument submitted. On the contrary, the case of In re Gerson (D. C.) 5 Am. Bankr. Rep. 89, 105 Fed. 891, sustains the right of the creditor to prove such a claim.

There are two main thoughts involved in bankruptcies. The one which has become the dominant thought, although at first not so, is the purpose of an equable distribution of the assets of the estate among all creditors. The other is the release of unfortunate debtors from the obligation of debt. It is true, in a very obvious practical sense, that a man who has taken upon himself the liability of the indorser of unmatured negotiable paper does not before maturity owe the holder of that paper anything as yet. There is, however, the obligation to pay. It is true that the obligation is not absolute, in the sense of being unconditional; but it is nevertheless an obligation which may ripen into an absolute debt. The obligation is contingent, in the respect that it becomes a debt or no debt according to subsequent happenings. It is sufficient for all present purposes to state the proposition that the holder of this kind of an obligation of the bankrupt may make proof of the obligation, and take his stand as a creditor, if he eventually becomes such.

This brings us to what in our view is the crucial point in this case. What is the obligation which the bank in this case held? It was, among other things, the obligation of the indorser bankrupt to pay this $10,000 note if (among other ifs) it was dishonored in whole or in part at maturity, or, in other words, to pay it if the maker did not. The holder of such paper has the right to prove the obligation of the bankrupt indorser; but whether this obligation results in a debt is dependent upon whether it develops into a debt, and this cannot be determined until the maturity of the obligation. If, for illustration, the note is not protested for nonpayment, and no notice of its dishonor is given to the indorser, or if any of the other happenings upon which his obligation to pay rests did not come to pass, the obligation does not become a debt. What, therefore, was the obligation of this indorser at the time of the maturity of the note? Was it to pay the bank $10,000, or was it to pay $7,770.72? If there had been no bankruptcy intervening, it is clear that the bank could have demanded of the indorser only the lesser sum above mentioned, because the maker of the note had in part met his obligation by the payment of $2,229.28, and the obligation of the indorser was to pay only to the extent to which the maker failed

in payment. What is there in either the filing of a petition in bankruptcy against either the indorser or the maker, or both of them, to enlarge the obligation of the indorser beyond what it would have been otherwise? We have been unable to find any other answer to the question than that the obligation of debt is unaffected by either or both bankruptcies.

We are in full accord with the very clear and satisfying reasoning of the referee, and accept the conclusions to which that reasoning leads; but the question remains whether the referee has not misapplied the principles of law which he has so well and clearly stated by overlooking the fact that one of the payments which was made on this note was a payment made before maturity by the maker in satisfaction pro tanto of his obligation to pay, and that in consequence the obligation of the indorser to pay, if the maker did not, is reduced to that extent. In this view of the rights of the parties, the claim of the bank should have been reduced by all payments made before the maturity of the note. We understand the fact to be that the $1,200 received in dividends was received after the dishonor of the note, and that the only payment which goes in reduction of the probable claim of the bank is the $2,229.28 above mentioned.

Inasmuch, however, as there is no specific finding which we have been able to discover in the record of when the dividends were received, the petition for a review is granted, and the order made by the referee is reversed, in order to enable him to make the modification above outlined, and with directions to allow the claim of the bank at the sum due upon the note on March 1, 1916, when it became payable.

BOSTON, CAPE COD & NEW YORK CANAL CO. v. T. A. SCOTT CO., Inc. SAME v. WHITE OAK TRANSP. CO. WHITE OAK TRANSP. CO. v. BOSTON, CAPE COD & NEW YORK CANAL CO.

(District Court, D. Massachusetts. April 10, 1918.)

Nos. 1517, 1518, 1555.

1. EVIDENCE ⇐66—PRESUMPTIONS—NAVIGATION—CAPE COD CANAL.
The Cape Cod Canal is a well-known waterway on that part of the coast, and competent navigators may be assumed to be familiar with its general characteristics.

2. CANALS ⇐29—OWNERS OF CANAL—LIABILITY.
The company owning the Cape Cod Canal does not guarantee the safety of vessels using the canal, and its obligations are not to misrepresent what it offers, and to use reasonable care for the safety of vessels which avail themselves of the canal.

3. CANALS ⇐29—CANAL COMPANY—PILOTS.
Where company owning the Cape Cod Canal notified the shipping trade that it would not furnish pilots and tugs as it had in the past, such company is not responsible for any negligence on the part of a pilot and tug employed by a steamer to assist it in navigating the canal, even though it was required by the canal company to take a pilot.

4. CANALS ⇐29—ACCIDENTS—LIABILITY OF COMPANY.
Where a steamer in charge of a licensed pilot grounded while proceeding through the Cape Cod Canal at a point past shoal waters, *held*, that the

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canal company was not liable on the theory of insufficient depth in the canal.

5. SALVAGE ⊂=22—NEGLIGENCE OF SALVOR.
Where the work of salving a vessel which stranded on one of the banks of the Cape Cod Canal would have been greatly delayed, had ground tackle been prepared to hold the vessel to the bank when she should become free, *held*, that the salvor, having safely released the vessel and turned it over to a canal pilot of recognized ability, who accepted the charge and undertook to proceed through the canal, was not liable.

6. CANALS ⊂=29—CANAL COMPANY—LIABILITY.
The second stranding of a steamer while attempting to proceed through Cape Cod Canal *held* not the result of any defect in the canal for which the canal company was liable.

7. CANALS ⊂=23—INJURIES TO—LIABILITY.
Where a vessel of the whaleback type, which was able to maneuver as well as ordinary steamers of that kind, was expressly invited to proceed through the Cape Code Canal, the canal company cannot recover against the owner for damages due to the blocking of the canal by the vessel, etc., which sunk after stranding against the sides.

8. MASTER AND SERVANT ⊂=315—INDEPENDENT CONTRACTOR—LIABILITY.
Where the owner of a steamer which had stranded on the side of a canal engaged an independent contractor to release the craft, and the steamer again stranded and sank shortly after being released, owner is not liable to canal company on ground it was negligent in allowing steamer to come afloat in an unsafe condition for navigating the canal.

9. CANALS ⊂=23—NEGLIGENCE—WHAT CONSTITUTES.
Where a vessel which had already stranded once on the side of the Cape Code Canal was suddenly freed, and a duly licensed pilot, who was on board, attempted to continue navigating through the canal, *held*, that the master could not be deemed at fault in not preventing the pilot from attempting to navigate the vessel through the canal, so as to render the owner liable, the vessel having subsequently sunk; it appearing the master acted in an emergency and was not familiar with the canal.

In Admiralty. Libel by the White Oak Transportation Company against the Boston, Cape Cod & New York Canal Company together with libels by the Canal Company against the Transportation Company, and a libel and intervening petition against the T. A. Scott Company, Incorporated. The several libels and intervening petition dismissed.

Case No. 1517:
Currier, Young & Pillsbury, of Boston, Mass., for libelant.
Samuel Park, of New York City, for respondent.

Case No. 1518:
Currier, Young & Pillsbury, of Boston, Mass., for libelant.
Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for respondent and garnishees.

Case No. 1555:
Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for libelant.
Currier, Young & Pillsbury, of Boston, Mass., for respondent.
Warner, Stackpole & Bradley, of Boston, Mass., for intervening petitioner Northern Coal Co.

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MORTON, District Judge. This litigation arises out of the two strandings of the steamer Bay Port in the Cape Cod Canal. The determination of the causes of those accidents and the responsibility for them will, in effect, dispose of most of the questions presented by the somewhat involved pleadings in the three cases.

The Bay Port was a whaleback steamer, 265 feet long, carrying about 2,400 tons of coal. On the evidence now before the court she appears to have been a staunch vessel, properly manned, supplied, and equipped. No failure of her mechanism entered into either accident. She steered as well as the ordinary whaleback steamer; but vessels of that type do not handle as sharply, nor as well, as those of the usual deep-sea model. She was deeply laden, but not so as to interfere with her ability to maneuver.

[1, 2] The canal is one of the well-known waterways on this part of the coast. Competent navigators may be assumed to be familiar with its general characteristics. It is a narrow channel, of no great depth, in which at times heavy tidal currents exist. The Canal Company does not guarantee the safety of vessels using the canal; its obligations are, not to misrepresent what it offers, and to use reasonable care for the safety of vessels which accept its offer and avail themselves of the canal.

[3] On December 13, 1916, the Bay Port appeared at the Buzzard's Bay entrance to the canal and requested passage through. She was required by the Canal Company to take a pilot for the canal; and Capt. Rochester, who held a United States license for it, went down to her. The owner of the Bay Port—and I understand that the owners of the cargo adopt the same position—expressly disclaims any charges of negligence against the pilots and tugs in respect to either accident. So that it is perhaps unnecessary to determine the exact relation between pilots Rochester and W. Lewis and the Canal Company, and between the tugs that assisted the Bay Port and the Canal Company. I may say, however, that in view of the public and general announcement of the Canal Company early in September, 1916, by circulars to the shipping trade, that thereafter the pilots and tugs would not be in its employ, and of the arrangements then made, I do not think that, at the time of the accident, either the pilots or the tugs were so far agents or servants of the Canal Company as to make it responsible for their negligence. They had previously been so, and that relation had largely increased the liability of the company for accidents in the canal. Undoubtedly the new arrangement of September, 1916, was made for the purpose of avoiding a continuation of that liability. But, even so, it was a change which the Canal Company had a right to make, provided it did so in an open and public manner, and did not mislead vessels into a belief that the old arrangement still continued. Rochester is to be regarded as an independent pilot employed by the Bay Port on her own account to assist her through this somewhat difficult waterway.

The Canal Company signaled that the canal was open for vessels bound east, and by Rochester's orders the Bay Port got under way and proceeded into the canal. It was about half tide, and there was

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a strong head current of three or four knots an hour running west in the canal. The steamer took the assistance of the tug Dalzelline, which went ahead on a short hawser.

The tug and steamer progressed satisfactorily through the first two bridges into the long stretch between the Bourne and Sagamore bridges. At a point about two miles east of the Bourne bridge, the Bay Port swerved (or sheered) slightly toward the north bank. This sheer does not seems to have been of much consequence. Captain Hammett testifies in reference to it:

"Q. Was the sheer to port of any consequence? A. Not very much—very slight. Q. Was it of any consequence at all? A. What say? Q. Was it of any consequence? A. Why, a little; you could call it of consequence or not, just as you like. Q. I want your idea. A. I say I don't know. It was very little; I couldn't say whether it was two feet or four feet; it was a little sheer. Q. Little sheer? A. Yes, sir."

After the swing was checked the steamer straightened out and went on a short distance nearer the north bank, and parallel with it. Her helmsman testifies:

"I know she was some little distance out—out of the center; * * * towards the port bank, and running along parallel with it. * * * She would not swing away from it; * * * clung to the bank."

An effort was made to bring her back to the center of the channel, and the helm was put to port for that purpose. She seems not to have minded it readily, and the amount of helm was increased. Then the Bay Port suddenly left the north bank, and started on a sharp sheer across the canal. The situation was immediately recognized as an emergency; her helm was reversed and put hard astarboard, her engines were backed, and the tug tried to pull her straight. The result of these efforts was that she straightened out, but not before she was so close to the south bank that her bow stranded on it, about her length, or a length and a half, from where the sheer started; and she lay there nearly parallel with the canal. The tide was falling, and the efforts immediately made to pull her off proved unsuccessful. This constitutes the first of the two accidents which figure in the case. The Canal Company suffered no appreciable damage from it.

[4] In order to discuss the steamer's charges of fault against the Canal Company for this accident, a more detailed description of the canal at this point is required. The Canal Company represented to the public that the canal had 25 feet of water at mean low tide. This representation was known to Capt. Hammett of the Bay Port. The canal had been dug to that depth, but the action of currents and other forces constantly tended to create shoals in it. One of these shoals the Bay Port had passed over shortly before taking her sheer to the north bank. It had about 19¼ feet of water at mean low tide, on the shallowest spot, and at the time in question—the tide being about half up—about 2½ feet more; i. e., from 21 to 22 feet. The draft of the Bay Port was about 18 feet 2 inches, so that there were 3 or 4 feet of water under her on the shoal. It terminated about 1,000 feet from where the Bay Port hit the south bank, and for the

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intervening distance there was more than 25 feet of water at mean low tide.

A short distance west of where the Bay Port struck there was, on the north bank of the canal, a slight projection, the remains of the final dam which separated the two ends of the canal during construction. This projection, or "knuckle," as it has been called, did not extend into the channel of the canal, nor far enough out from the bank to constitute in itself any menace to navigation. On a westerly tide it set up a surface current which slanted towards the south bank. It seems probable that, after the Bay Port had begun to turn away from the north bank, she was caught by this current, as well as by the general current in the canal, and that the cross-current was one of the forces which prevented her from being controlled in time to avoid stranding.

The evidence for the Bay Port is that, unless a vessel like her has from 3 to 5 feet of water under her bottom, she is likely to "smell the ground," as it is called, which interferes with her steering, and may cause her to sheer. The Transportation Company contends that this is what occurred when the Bay Port crossed the shoal above referred to, and was the reason why she swerved towards the north bank; that from that point she was in effect out of control; and that the shoal was, therefore, the proximate cause of the stranding.

It does not seem to me, however, that the facts support this contention. The eastern edge of the shoal was, as above stated, almost 1,000 feet from where the Bay Port struck. She passed safely over it, and its effect on her steering did not extend beyond the time when the sheer to the north bank—assuming that the shoal caused that sheer, which is by no means certain—was checked. Thereafter she "clung to the bank," as her helmsman puts it. Neither he, nor her pilot, nor her captain, all of whom have testified at length in these proceedings, appears to have regarded her situation as dangerous while she was doing so. Her speed was not slowed, nor was the tug called upon for help. The causes of the stranding seem to have been the large amount of port helm, which, by the pilot's orders, had been given the steamer to bring her away from the bank, the suddenness with which she finally minded her helm, the unexpectedly large swing which she took, and the general current and cross-current in the canal, all of which, acting together, made it impossible to control her in time to prevent her from striking. The "knuckle" and the current occasioned by it were well known to the canal pilots and were customarily allowed for in navigating at that point. Vessels constantly passed it safely. It does not seem to me that the condition of the canal there was such as to warrant a finding of negligence against the Canal Company for permitting the Bay Port to use the canal. The Canal Company was not at fault for the first stranding, which appears to me to have been due, either to pure accident, or to faulty navigation by the pilot.

[5, 6] As to the second stranding: The T. A. Scott Company was asked to come to the assistance of the stranded Bay Port and promptly did so, beginning work that evening. Its men stopped the small hole in her hull, made when she struck the bank, and had begun to remove

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her cargo, when she suddenly and unexpectedly floated at about half tide, shortly after 10 o'clock on the following morning. Her captain and crew had remained on board and were on her at the time. W. Lewis, a canal pilot of recognized ability, was also on her. Just why he was there is not clear; apparently it was to complete the job, which Rochester had undertaken the previous day, of piloting the steamer through the canal. He and her captain at once hurried to her bridge, and her crew to their stations. There was a strong current flowing east, the direction in which the steamer was going. No arrangements had been made to hold her to the bank, and, as soon as she left it, she was seized by the current and swept along at a speed of three or four miles per hour. Three tugs were around her with steam up, and the Bay Port also had steam on her own boilers. She was, by reason of the water which she had taken in, down by the head. The day before she had drawn less at the bow than at her stern; she now drew, according to Capt. Hammett, about 18 inches more at the bow, and she had a list to port.

These changes in her trim certainly did not improve her steering qualities; probably they appreciably impaired them. Capt. Hammett testified:

"Q. And did she steer as well as she had the day before, or was she logier? A. She might have been a little logier; I couldn't say as to that. Q. A little logier? A. Might have been a little logier, but steered all right. Q. Did you have any difficulty in steering her during the first half mile or so? A. No, sir; none."

As the steamer did not take on steerageway until she had floated a considerable distance, it would appear, on her own testimony, that she began to steer badly almost as soon as she began to steer at all. On the testimony of Pilot Lewis, she ran from the very beginning "a very zigzag course." He says:

"We stopped her engines and let her drift as much as we could, because we couldn't do nothing with her; she was drifting from one side to the other."

Capt. Lecompte, who commanded the tug Dalzelline, that was ahead of the Bay Port on a hawser at this time, testifies:

"She commenced swinging, you know, backward and forward; she would take sheers, you know. We had a short hawser, and we held her straight two or three times before she did land."

It is charged as a fault against the Scott Company, in the libel and intervening petition against it, that it failed to make adequate preparations to hold the steamer safely, if she should come off. The evidence that it could not have done so by ground tackle, without greatly delaying salvage work, which would have been inadvisable, is so clear and convincing that discussion of the point seems unnecessary. As soon as she floated, Pilot Lewis, with her master's assent, assumed control of her, and the Scott Company had nothing to do with the orders he gave. Its salvage work was for the time being suspended; the steamer went forward on her own account, not under control of the Scott Company as part of the salvage operations.

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The courses open when the Bay Port floated were, either to hold her in the channel where she came off, by tugs, or to drop her down to some dolphins and tie her there for the time being—both of which, it seems clear, could have been done—or to take her on through the canal. The question had been discussed by Capt. Hammett, Capt. Joseph Lewis (of the Scott Company), and Pilot Lewis. The Canal Company wanted to get her out of the canal as soon as possible, and its superintendent had so told Pilot Lewis.

It was generally understood among all parties interested that, when the Bay Port came off, she should, if possible, be taken through to Sandwich at the eastern end of the canal. Capt. Hammett testified on this point:

"Q. Was anything said as to tying up at Sandwich, do you remember? A. I don't know as there was. I think that that was generally understood; that that was where she was to go if she floated; that she was to tie up at Sandwich. Q. Well understood by whom? A. Why, generally understood. I think that was talked over; that if she floated, why, I would take her down and tie her up at Sandwich. Q. When was that talked? A. I think it was talked—might have been the night before, or that day, I can't say; I just remember some conversation in regard to that matter, in that line. Q. With whom? A. Why, with Capt. Lewis and the pilot, and I guess myself; I don't know but Mr. Gardner (of the Scott Company). The talk was all general; I couldn't specify exactly just when or who was there. * * * Q. Did that seem to you to be the proper thing to do? A. I think so; yes, sir. Q. In the event of her floating, she was to be tied up at Sandwich? A. I think so, yes, sir; that was the general impression."

The sudden and unexpected floating of the steamer and her being caught by the current in the narrow channel created a serious emergency. Capt. Joseph Lewis, who was at the time on the lighter Salvor, alongside the Bay Port, called to Pilot Lewis on the steamer's bridge, "She is yours," or words to that effect, to which Pilot Lewis assented. From that time until after the accident, the Scott Company, as before stated, had nothing more to do with the steamer, and exercised no control over her. Pilot Lewis assumed command of her. By his orders, one of the tugs (the Dalzelline) took a short hawser ahead; another pushed the steamer's stern straight with the canal, and then took away the lighter; the third tug, apparently without orders, swung out into the current, and started after the steamer, with the idea of getting a line on her stern. The order was given to start the steamer's engines full speed ahead, in order to obtain steerageway. Meanwhile the Bay Port was drifting along the canal, going in this manner perhaps a third of a mile. Then by the action of her own engines, and of the tug ahead, she obtained steerageway through the water and took on a speed over the ground of about six miles per hour.

Some dolphins where she might have been tied up were passed without any effort to place her there. Shortly afterward, the tug Hazelton came up behind the Bay Port and offered a line to her quarter. The men on the Bay Port were so much occupied that nobody took it. The Bay Port, continuing on, sheered toward and narrowly missed the dredge Trilby at work in the canal. This sheer was broken by the tug and the steamer's helm. A short distance further on, the Bay Port again sheered toward the south bank, and again the sheer was broken.

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She then sheered toward the north bank, and, in spite of all efforts to check her, stranded heavily there. Her stern swung across the canal and struck the south bank; the bow came clear, moved a short distance downstream, and again grounded. She sank almost immediately from injuries to her hull, and became a total loss; the wreck being destroyed some weeks later.

About 2,000 feet west of where the Bay Port finally landed, she passed over a shallow spot, much like that above described in connection with the first stranding. There was everywhere on it, except close to the sides of the channel, 20 feet of water at mean low tide, and at the time of the accident, the tide being about half up, about 3 feet more; i. e., about 23 feet. It is contended by the owner of the Bay Port that the shoal caused her to sheer and was the proximate cause of the accident, and that the Canal Company is therefore liable. This shoal was farther from the place of the final accident than the first shoal was from the first accident. Throughout the intervening distance there was at least 25 feet of water at mean low tide. Two separate sheers were taken and broken after passing the shoal before the steamer finally struck. It seems to me that, even if the shoal be regarded as a negligent obstruction in the canal, it was not the cause of the accident.

From what has been said, it follows that the charges of negligence against the Canal Company by the Transportation Company have not been sustained, and that the libel against it must be dismissed. No charges are made here by any party against the pilots; their conduct need not be further scrutinized. The Scott Company was not negligent in failing to hold the vessel to the bank. When she floated, it immediately surrendered her to her master and pilot, who accepted her without objection; thereafter it exercised no control over her movements. No sufficient reason appears for holding it at fault in any respect. The libel and the intervening petition against it must be dismissed.

[7] As to the libel of the Canal Company against the Transportation Company: The first three charges of fault in this libel allege (in substance) negligence on the part of the owner of the Bay Port in taking her into the canal at all, on the ground that she did not steer well enough to attempt the passage of such a place with safety. It does not appear, however, that the ability of the Bay Port to maneuver was inferior to that of the ordinary steamer of her size and type. It was a fairly common type, the characteristics of which were known to the Canal Company. The Transportation Company had been solicited by the Canal Company to send its steamers, including the Bay Port, through the canal. It can hardly be held negligent for accepting the invitation of the libelant. These charges are not sustained.

[8, 9] It is further charged that the Transportation Company was negligent for suffering the steamer to become afloat in an unsafe condition for navigation in the canal. The salvage work was, however, in charge of an independent contractor, the T. A. Scott Company. The Transportation Company exercised no control over it. After

the Bay Port came off the bank, she could have been held in the stream by the tugs till slack water, or she could have been tied to the dolphins. Her floating off was not the proximate cause of the accident. The Canal Company's libel does not charge negligence in the management of the steamer while she was in the pilot's charge after she came off the bank, and no such contention has been made by it. It is further argued by the Canal Company—under what charge in the libel is not clear—that Capt. Hammett was at fault for not preventing Pilot Lewis from attempting to take the Bay Port through the canal after she floated. This question is not free from doubt. The day before, under much safer conditions both of current and of trim, the Bay Port had been unable to go through safely. It is evident that a great mistake was made in supposing that it was safe to renew the attempt under the conditions existing when she came off the bank. It is, however, to be remembered that the decision to go on was made under the pressure of an unexpected emergency (caused by the floating of the steamer so long before high water that the tide was still running at full strength), and that it followed out the plan of action which had received the assent of all parties in interest, including the Canal Company, although nobody foresaw the situation which actually presented itself. Capt. Hammett was unfamiliar with the canal. He had been through it only a few times, and never with a loaded vessel. He was not pilot for it, and had no intimate knowledge of the dangers which navigation there involved. He was without experience in handling vessels in the canal. The question presented was not one of ordinary navigation, but of navigation under very uncommon conditions and with reference to a peculiar waterway. Pilot Lewis was in many ways better qualified than Capt. Hammett to decide what to do.

The failure to tie up at the dolphins which were passed before the accident seems hard to justify on the evidence before the court. They were reached after the first crisis of the emergency had gone by, and there had been time to consider what should be done. With the help of the tugs and her own engines the Bay Port could easily have been placed at them. While there, she would, however, have substantially obstructed the canal; and I have no doubt that, in failing so to deal with her, Pilot Lewis had in mind Capt. Geer's instructions to get out of the canal, if possible. It does not appear that Capt. Hammett knew about the dolphins before reaching them; and he testifies that even now he could not say whether it would have been safe to tie the Bay Port to them, or not—a statement which I believe. Considering all the circumstances, I think Capt. Hammett was not negligent for not preventing Pilot Lewis from attempting to take the ship through to Sandwich.

The charge of fault against the Transportation Company for not sooner removing the wreck has not been argued, and on the evidence before the court it does not appear that the Transportation Company was negligent in that respect. The libel of the Canal Company against the Transportation Company must also be dismissed.

In view of the possibility of appeal, there ought, perhaps, to be

a decision upon the question presented by the request for limitation of liability contained in the answer of the Transportation Company. This matter was expressly reserved and has not been heard. Upon a request by either party, filed with the clerk within 10 days, the case will be set down for further hearing upon this issue. If no such request is made, the question will be decided on the evidence as it now stands.

Decrees accordingly.

In re BROWN et al.

(District Court, W. D. Washington, S. D. May 24, 1918.)

No. 2408.

1. BANKRUPTCY ⟸68—APPLICATION OF ACT—"FARMING"—"TILLAGE OF THE SOIL."

Stock raising and dairying in connection with and incidental to tillage of the soil are in common parlance a part of farming, and therefore, though the word "farming," used in the Bankruptcy Act, is broader than "tillage of the soil," stock raising, etc., in order to be included therein, must be incidental to tillage of the soil.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Farming.]

2. BANKRUPTCY ⟸68—PERSONS SUBJECT TO ACT—FARMING—TILLAGE OF THE SOIL.

Evidence *held* insufficient to show that the bankrupts were chiefly engaged in farming or tillage of the soil; it appearing that the greater proportion of the bankrupts' business was in the manufacture and resale of farm products, which they purchased and marketed as finished products.

In Bankruptcy. In the matter of the bankruptcy of A. L. Brown and the community composed of A. L. Brown and Emma Brown, his wife. On motion of the petitioning and certain other creditors for confirmation of the master's report, and exceptions to the report by the alleged bankrupts and another. Report confirmed.

Walter M. Harvey, of Tacoma, Wash., for petitioning creditors.

Bausman & Oldham, of Seattle, Wash., for intervener Seattle Nat. Bank.

Kerr, McCord & Carey, of Seattle, Wash., for intervener National Bank of Commerce.

Peters & Powell, of Seattle, Wash., for intervener Dexter-Horton Bank.

Herr, Bayley & Croson, of Seattle, Wash., for alleged bankrupts.

CUSHMAN, District Judge. The motion of the petitioning and certain of the other creditors for confirmation of the master's report and exceptions to the report by the alleged bankrupts and the Dexter-Horton National Bank, a creditor, are for determination. The controlling question is whether the finding of the master that the alleged bankrupts were not chiefly engaged in farming or the tillage of the soil is correct. Upon this question the master reports as follows:

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"By agreement of counsel the issues were narrowed down to the question of whether or not the alleged bankrupt, A. L. Brown, was chiefly engaged in farming at the time the alleged act of bankruptcy took place, and testimony was taken to that end. The alleged bankrupt, A. L. Brown, was a resident of Seattle and engaged in the practice of law there at and prior to 1914, and in that year bought the nucleus of what is now called the A. L. Brown farm, which contains about 2,100 acres, 1,300 acres of which is now under cultivation. This farm was stocked with a large dairy herd, and with horses, hogs, and chickens, and the land used for pasturage for the stock and for the growing of stock feed during all the time from his purchase up to the date of the alleged act of bankruptcy. Large amounts of money were invested in stocking the farm and in reclaiming a large part of the acreage by diking, building between eight and nine miles of diking thereon. The record does not disclose what amounts were so invested. During all of this time the Browns had their home on this farm, but maintained apartments in Seattle, where they spent much of their time; also, during all this time, A. L. Brown was president of the Amos Brown estate, which was his father's estate incorporated, with himself, his mother, and sisters holding all the shares, he holding a one-eighth interest; said estate having about $2,000,000 worth of property in Seattle, with about $350,000 worth of improvements thereon. The secretary of the Amos Brown estate looked after the details of its business, but the alleged bankrupt, A. L. Brown, handled all the important matters, and handled its important financial affairs. The alleged bankrupt, A. L. Brown, borrowed large amounts of money from the banks for the Amos Brown estate, and loaned himself large sums from the said estate; he now owing the said estate something like $500,000, though it does not clearly appear what he does owe the estate. As president of the Amos Brown estate he was allowed a salary of $3,000 per year, which was paid him until about three years ago, and since then his salary has only been credited to him on his account with the estate. He spent much of his time during 1917 in Seattle looking after the interests of the Amos Brown estate, as well as in soliciting orders for his A. L. Brown farm products, for which purpose he maintained office accommodations and a clerk. He borrowed large sums of money personally and in connection with the Amos Brown estate, which did not go into the farming; at least Mr. Brown, as a witness, was not willing to say it did. The several sums testified to were as follows:

Frank Donnelly	$19,900.00
Christofferson	20,000.00
Ostrander	20,000.00
Canadian Bank of Commerce	37,500.00
Protective Investment Company	50,000.00
People's Savings Bank	22,000.00
Seattle National Bank	72,000.00
Union Savings & Trust Company	83,500.00
Frank Boguke	3,000.00
Cresswell	18,000.00
Bostwick	13,000.00
Capital City Bank	8,000.00
Bullock	35,000.00
Canadian Bank of Commerce	15,500.00
Corwin	7,000.00

"On cross-examination, Mr. Brown qualified his testimony given on direct examination by stating that most of these loans went to the Amos Brown estate, but does not state that any of it went to the farm industries. He borrowed the money for the Amos Brown estate, and then borrowed a great deal of it from the estate. The alleged bankrupt invested about $50,000 or $60,000 in the packing plant, which was a part of the $125,000 loan made from Wells, Dickey & Co., of Minneapolis, and altogether expended about $85,000 on the packing plant, creamery, and dairy and poultry plant, all of which was borrowed, and not yet paid. In 1915, he sought to develop the trade of 'producer to consumer' under the 'parcel post' system, which he al-

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lowed to stop when the army post was established here. In negotiating his loans from the National Bank of Commerce, he stated to the officer that he was branching out into the parcel post business, that he was selling to the consumer and also buying from his neighbors, buying a certain amount of stock from his neighbors, and the loan was for that business. In negotiating loans with the Seattle National Bank, he stated that he was putting on a sale of his stock, his blooded cattle; that he expected to derive from that sale $40,000 or $50,000, when he would repay the loan. He further stated to the bank president, Mr. Struve, that he realized that in order to make money he must make it from his packing plant; that he was not making any money out of his stock, and he was going to dispose of it. He states that he borrowed the money and erected his packing plant to take advantage of the parcel post business that he hoped to develop, and that his packing plant was an up-to-date plant, but small; that he had government inspection, which he secured because he could not get his products into certain markets without inspection. He continued the parcel post business up to the coming of the army post cantonment. He quit the parcel post business, because the government changed the train service, which the government had theretofore established for his benefit at an expense to the government of about $3,000. He states that he was endeavoring to build up a trade on the A. L. Brown farm products as produced on his farm, and that in 1917 he bought about 25 per cent. of the animals put through the packing house; that this outside buying was brought about by the demand from the army cantonment. The government demanded his products in large quantities, and he had to procure it elsewhere. At the beginning of 1917 he had on the farm about 600 head of cattle, about 2,000 hogs, and 8,000 or 9,000 poultry. He sold at auction about 100 head of stock, slaughtered 101 beeves, 1,300 hogs, 117 veal, and about 40,000 poultry, of which he bought one beef, 350 or 400 hogs, and about two-thirds of the poultry.

"The alleged bankrupt kept no books of account or other records to show the operations of the farming, except that the moneys borrowed from the Amos Brown estate were kept in the books of that estate, and except that on about the latter part of 1916 or the beginning of 1917 the alleged bankrupt, A. L. Brown, inaugurated an elaborate system of bookkeeping, for the purpose, as he states, of keeping track of the different industries on the farm, to show which was making money and which was losing, and the relative advantages of the several departments, but that said books do not show, and were not intended to show, anything except the operations of the farm and the operations of the several plants or industries thereon. In other words, the books do not show the financial condition of the farming industries. Mr. Hill, who testifies as an expert and as having made an examination of the books, shows that the gross income from the farm and its several industries amounted to about $222,000 from all sources, and the gross income from the farm at about $95,000, and in that connection witness Hill states that the feed bought amounted to $37,648, and the feed raised on the farm was $17,600; that the cost of operating the farm was about $22,000, and the gross expense of operation $250,000, and that the total labor cost was $46,391, of which the farm labor cost was $16,000; and he further shows that the hogs produced a gross amount of $32,000, of which $12,000 was bought from the outside, and that they bought poultry to the amount of $19,900, and raised poultry to the amount of $5,500, and about $3,000 worth of cream, all in the year 1917. Further testifying, Mr. Hill gave a summary, stating that the finished product sold amounted to $121,158 during the year 1917, and that the moneys spent were as follows:

Labor	$46,000
Feed	37,000
Hogs	12,000
Cream	2,900
Power	3,800
Shipping	2,900
Improvements	28,000
Interest	7,350

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"This makes a total of $129,950. Mr. Hill further states that on the 1st of January, 1918, the alleged bankrupt, A. L. Brown, was owing a total of more than $1,000,000, and on reference to the books he testified that the accounts payable, as shown on the ledger, indicated $49,258. Mr. Hill, when recalled, testified that of the stuff that passed through the packing house, about $39,200 worth, there was $27,000 worth raised on the farm, and the balance, about $17,000 worth, purchased, and that there was about $6,000 worth of stuff on hand, as per inventory at the beginning of the year, and estimates that the percentage of the stuff bought for the packing house was from 38 per cent. to 40 per cent. of the products passing through the packing house.

"Referring to witness Hill's testimony, the witness refers to the loss on the place during the year 1917, and states that the dairy lost $13,700, the horses lost $3,309, the poultry lost $2,900, the battery lost $1,900, and the packing house lost $4,084, making a total loss on operations of approximately $21,000. So far as the record shows, the operation of the farm, with all of its industries, for the year 1917, was run at a loss, and there is nothing to indicate that at any time it made a profit. The operation of the creamery and the packing house at least were subject to the state industrial insurance law, and, at the solicitation of the alleged bankrupt, a government inspector was put into the packing house to furnish inspection of its products, so that the alleged bankrupt might enter his products in the market, and which entitled him to put his goods on the market anywhere in the United States and Canada.

"It is strenuously contended by the petitioning creditors and interveners that this A. L. Brown farm is a manufacturing plant, and that the farm down there is incidental, and not the chief industry, but that the creamery, packing house, and poultry establishment constitute the chief industry or business of the alleged bankrupt; while, on the other hand, the alleged bankrupt and the answering creditor, Dexter-Horton National Bank, as strenuously contend that it is all comprehended within the term 'farming,' and that the whole plant is a farm and the operations thereon farming. Curiously enough, each side in this matter cite in their arguments the same cases to support their contentions. This question is a question of fact as to whether or not the bankrupt was a farmer chiefly, or something else. Collier on Bankruptcy, under this heading, claims that the words or terms 'farming' and 'tillage of the soil' are not synonymous, or one a definition of the other. In Bank of Dearborn v. Matney, in the District Court for the Western District of Missouri (12 Am. Bankruptcy Repts. 482, 132 Fed. 75), Judge Phillips takes the same view, and holds that the word 'farming' is more comprehensive than the words 'tillage of the soil,' but, in a later case from the Circuit Court of Appeals, Eighth Circuit, in Hart-Parr Co. v. Adam Barkley et al., 36 Am. Bankruptcy Reports, 540, 231 Fed. 913 [146 C. C. A. 109], the court holds that the words 'farming' and 'tillage of the soil,' as used in section 4b of the Bankruptcy Act [Act July 1, 1898, c. 541, 30 Stat. 547 (Comp. St. 1916, § 9588)], express the same thought; that is, the word 'farming' and the words 'tillage of the soil' mean the same thing. If, in law, the two terms are identical, I take it that the word 'farming' is limited to the scope of the term 'tillage of the soil,' and I would take the term 'tillage of the soil' to comprehend the production of crops, including the production of fat stock, or any kind of stock on a farm; but it does not occur to me that it would extend to the operations carried on upon the A. L. Brown farm in the creamery, the packing house, and the poultry department. The poultry department was not conducted as the growing and selling of poultry, but it was, during the year 1917, used in the fattening and marketing of the poultry. The most of the poultry that was used was bought, most of the feed that was fed to it was purchased, and it was dressed and marketed. A large portion of it was produced on the farm, but a major portion of it was bought from the surrounding country.

"It seems that the income from the farm and all these industries came through these institutions; nothing of any consequence was sold direct from the farm, but most everything was put through one of these institutions and marketed. The alleged bankrupt spoke of his farm as a plant, and seemed to look to his plant as a thing independent of his farm as an indus-

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try, and in his system of books and accounts treated each one separately, and charged the products that went from the one to the other back and forth, and has shown by his letter to his creditors and to his assignees (Exhibit F) that he regarded it as a manufacturing plant, and believed that by reorganization, with the assistance of his creditors, that he could make it pay out the indebtedness, showing that he regarded it as a manufacturing plant and his chief industry. He was in the market to market a finished product, most of which, however, was produced on his farm, though manufactured and prepared for market in his creamery, packing house, or poultry establishment. Marketing a finished product from the farm is not inconsistent with farming or tillage of the soil, but in this instance it seems to me that the line is crossed from chiefly farming when the production reaches the packing house in this case. There it was necessary to do and have all of the things, appliances, and conveniences that an ordinary packing house has, including a government inspector, to enable him to get into the market first-hand, and he seems to have borrowed all of the money to construct this packing house and equip it, to enable him to so enter the market. In that he came in competition with other packing establishments.

"However, I think the major part of his business was in the management of the Amos Brown estate, of which he was the president, and in which he owned a one-eighth interest, an estate estimated of the value of about $2,000,000. Through that estate, and individually, he borrowed large sums of money. While he says that he spent but little time in that matter, yet it seems to me that it required an exercise of much thought and attention, in order to handle the financial transactions of that scope. This estate he handled, and controlled and contributed much of his time to, up to about the time of the assignment which is charged here as an act of bankruptcy, and from which he derived a salary of $3,000 a year, which was paid to him up to about three years ago, and which appears to have been credited to his account since then by the estate. He borrowed large sums of money from this estate, and which caused the Amos Brown estate to be put into the hands of a receiver about the time of the said assignment, and his assignees are, as I understand it, the receivers of the Amos Brown estate, and that the receivership was made necessary by the large sums of money due from the alleged bankrupt to the Amos Brown estate. The indebtedness incurred by the alleged bankrupt has not been due to or made necessary by his farming operations, although the farming, so far as the record shows, has never been successful, but that the indebtedness has been incurred in the improvements and buying of stock, the erection and operation of his plant, as he calls it, the dairy and creamery, the packing house, the poultry department, and in the interest of the Amos Brown estate.

"Taking this case all together, I am of opinion that it does not fall within the term 'principally engaged in farming or tillage of the soil.' While this farm is a large farm, and produces a large quantity of feed for stock and supports a large quantity of stock, yet the chief business actually carried on upon the farm is converting products of the farm into the manufactured article ready for the retail trade, and not only that, but coupled with his activities in the management of the Amos Brown estate and other matters, the alleged bankrupt is not entitled to the exemption accredited to one 'engaged chiefly in farming or tillage of the soil.'"

Specific exceptions have been taken to a number of the matters stated by the master in the foregoing report. While in part these objections may be well taken, yet upon the whole testimony the controlling finding that the bankrupts were not engaged chiefly in farming or the tillage of the soil appears amply supported. The farm mentioned is about 50 miles from Seattle. The packing house plant, creamery, dairy, and poultry plant, which latter appears to include, not only the raising of poultry, but the fattening, killing, and the final preparation of the dressed poultry for market, were all located upon the farm.

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Leaving out of account the alleged bankrupt A. L. Brown's statements and admissions, including that in the circular letter to the creditors, that for a long time he had bought from the outside about 95 per cent. of the farm products sold, and assuming, without finding, that the master was wrong in determining that the larger part of the bankrupt's business was in the management of the Amos Brown estate, and looking solely at the operations conducted on the farm at Nisqually, the master's finding is the only one that can be reached upon the testimony.

[1, 2] Stock raising and dairying, in connection with and incidental to tillage of the soil, are in common parlance a part of farming. Therefore the word "farming" is broader than "tillage of the soil." In so far as the Bankruptcy Act is concerned, the dairying and the stock and poultry raising, slaughtering, and preparing for market can only be incidental to the "tillage of the soil," in order to be included in the expression "farming."

While many things are properly to be considered in determining the question of the business in which the alleged bankrupts were engaged, and that in which they were chiefly engaged, yet a fair measure and index of the operations at Nisqually and their relative importance, presumably in close proportion to the time, attention, and effort required, is afforded by the master's finding as to the stock and feed raised on the farm as compared with that bought outside, the cost of the labor employed in the tillage and that of the packing plant, creamery, dairy, and poultry plant. This statement and finding of the master, which is strictly in accordance with the evidence and covers the year 1917, is as follows:

"Mr. Hill, who testifies as an expert and as having made an examination of the books, shows that the gross income from the farm and its several industries amounted to about $222,000 from all sources, and the gross income from the farm at about $95,900, and in that connection witness Hill states that the feed bought amounted to $37,648, and the feed raised on the farm was $17,600; that the cost of operating the farm was about $22,000, and the gross expense of operation $250,000, and that the total labor cost was $46,391, of which the farm labor cost was $16,000; and he further shows that the hogs produced a gross amount of $32,000, of which $12,000 was bought from the outside, and that they bought poultry to the amount of $19,900, and raised poultry to the amount of $5,500, and about $3,000 worth of cream, all in the year 1917."

This clearly and concisely shows that the tillage of the soil was incidental and subordinate to the other operations conducted by the alleged bankrupts at their farm.

The report of the master will be confirmed. The exceptions are overruled and denied.

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GARRETT & CO., Inc., v. SWEET VALLEY WINE CO.

(District Court, N. D. Ohio, W. D. May 11, 1918.)

No. 79.

1. TRADE-MARKS AND TRADE-NAMES ⊂=70(3)—UNFAIR COMPETITION—WHAT CONSTITUTES.
 Where complainant advertised and built up extensive trade in a sweet wine known as "Virginia Dare," *held*, that the defendant's sale of a similar wine under the name "Virginia Belle" was unfair and that, in the absence of other considerations, defendant should be enjoined from selling its wine under the name "Virginia."
2. TRADE-MARKS AND TRADE-NAMES ⊂=70(3)—UNFAIR COMPETITION.
 Though the use of the name "Virginia" as part of a trade-mark for alcoholic beverages, such as whiskies, is established, that fact does not warrant defendant's unfair use of the word to dispose of its sweet wine as complainant's product, known as "Virginia Dare."
3. JUDGMENT ⊂=91—CONSENT DECREE—CONSTRUCTION.
 A consent decree should be construed as if it were a contract.
4. EVIDENCE ⊂=386(1)—PAROL EVIDENCE—JUDICIAL PROCEEDINGS.
 Where a consent decree was unambiguous, evidence of negotiations leading up to it is inadmissible.
5. TRADE-MARKS AND TRADE-NAMES ⊂=97—UNFAIR COMPETITION—CONSENT DECREE.
 A consent decree in a suit for unfair competition *held* to preclude defendant from selling, in competition with complainant's wine, known as "Virginia Dare," its own wine, under the name of "Virginia," where the use of the word "Virginia" was bound to be unfair.

In Equity. Suit by Garrett & Co., Incorporated, against the Sweet Valley Wine Company. On supplemental petition. Decree for complainant.

Alexander L. Smith, of Toledo, Ohio, and Gerrard Glenn, of New York City (Smith, Beckwith & Ohlinger, of Toledo, Ohio, and Shattuck, Glenn, Huse & Ganter, of New York City, on the brief), for plaintiff.

Williams & Steineman, of Sandusky, Ohio, and Owen, Owen & Crampton and Chas. W. Owen, all of Toledo, Ohio, for defendant.

KILLITS, District Judge. This matter is before the court on a supplemental petition in the cause commenced on the 15th of August, 1913, and its consideration depends largely upon the construction of a consent decree entered on the original complaint in January, 1914. The action is one for unfair competition, and the issue as presented by the supplemental petition is peculiarly affected by the experiences which have resulted from the rivalry in business between the parties since the original petition was filed and by the history of the case here.

[1] The predecessors of complainant, about 18 years ago, put on the market and advertised extensively a light-colored sweet wine, whose base was the juice of Scuppernong grapes, using the arbitrary trade-name of "Virginia Dare," taking for that purpose the name of the legendary first child born, on Roanoke Sound, of the first English colony in America. Ten or twelve years ago the defendant, manufacturing wine within this district, put on the market, under the name of "Virginia Belle," in competition with complainant's wine, a beverage of

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similar color and character. The reason given for the choice of this name for defendant's wine is so fanciful that, considered in connection with other facts hereafter to be discussed, it has little persuasive power. Although the grapes whose juice forms the foundation of defendant's wine are grown in North Carolina, the court is attempted to be persuaded that the geographical name "Virginia" was chosen because the location in North Carolina wherein the grapes are grown was part of the general territory vaguely designated "Virginia" by Sir Walter Raleigh, and was included in this very general geographical definition until later courtiers included it within the territory named after the first Charles, nearly 300 years ago. Having heard the testimony on this subject twice, and also considering it in connection with other matters, we are forced to and do conclude that the name was chosen arbitrarily and in purposeful competition with complainant's business in the "Virginia Dare" wine. The choice of a trade-name with the word "Virginia" as a most prominent characteristic is undoubtedly arbitrary in each instance before the court.

"Virginia Belle" wine is marketed at a less price than that exacted for complainant's product, and the only explanation which the testimony affords why the defendant can undersell the complainant so materially as to make profitable a substitution to consumers is the fact that the complainant advertises "Virginia Dare" very extensively, whereas the expenditures in that behalf by the defendant are extremely meager. The evidence brought before the court in two hearings leaves no room for doubt that the names are not only confusing to the inattentive consumer, but that the situation affords an opportunity, which is actually enjoyed by the defendant, to market "Virginia Belle" wine on the strength of complainant's advertising, the difference in price operating as a strong inducement to substitution, the facts showing that in a large section of the consuming public desiring a wine of this general character, but designating what they wanted by the more characteristic title of "Virginia," are found easy subjects for deception.

The evidence shows a displacement of complainant's customers in favor of defendant's product, with the only explanation that the latter may be easily substituted for the former, at a greater profit to the dealer, and there is little opportunity for any other conclusion than that complainant's extreme advertising accounts for the increase of defendant's business, which increase is extraordinary, considering the comparatively insignificant publicity for its wine which defendant buys through advertising methods. At the start, defendant marketed substantially the same wine under the two names "Virginia Belle" and "Puritan Belle," at the choice of the trade. At first by far the greater proportion was taken under the name "Puritan Belle," but year by year the other designation increased in popularity, until at the present time its rival is far in the rear. It seems to the court that this circumstance is very significant. There is no reason why, as a matter of taste or attractiveness, other than the name, one brand should prevail over the other. In short, upon the facts now before the court, were there no other considerations, there would be little

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hesitation in permitting complainant to take a decree definitely restraining defendant from using the word "Virginia," in connection with "Virginia Belle" or otherwise, upon its wine of this character, on the authority of De Voe Snuff Co. v. Wolff, 206 Fed. 420, 124 C. C. A. 302, which case, although an action for infringement of trademark directly, seems to us to be completely authoritative here.

[2] It is contended upon the part of the defendant that the use of the name "Virginia" as part of a trade-name for alcoholic beverages is established in common usage, but the illustrations furnish valid grounds to discriminate the situation before the court. Two of the illustrations of wines, namely, "Norton's Virginia Seedling" and "Ives' Virginia Seedling," are purely descriptive, and are not arbitrary trade-names at all. They designate a beverage as one made from grapes bearing such names respectively. These wines, also, are in an entirely different class; one not sold to consumers whose palates crave the sweet wine in controversy here, nor marketed in bottles of the same character. Excepting two other wines put up by the defendant using the word "Virginia" in combination, subsequent to the employment by complainant of their trade-name, but one other instance of such marketing of sweet wine is given, and that is shown to have a local market only, and the use has not been acquiesced in by complainant, and as to which it is guilty of no laches. We are also cited to the use of this term in connection with a large variety of whisky trade-names; but, in the judgment of the court, the distinction between whiskies and wines is so great that these illustrations are of no persuasiveness. A man desiring a sweet light-colored wine, such as the Scuppernong grape makes, would not be deceived if he were furnished a sour wine or whisky, even if the label should emphasize the word "Virginia."

The issue raised by the original petition was over the form and appearance of the label bearing the name "Virginia Belle," and the consent by defendant to a decree enjoining the use of its then label operated as an admission that, respecting such label, the competition with complainant's business was unfair. Thereafter a motion in contempt, based upon the use of a revised label, still employing the trade-name "Virginia Belle," was prosecuted, and the question before this court, decided in 1916, was whether that label was a merely colorable departure from the label used and abandoned as a result of the consent decree. This court found for complainant, and held the defendant in contempt, and fined it $500, to be paid to complainant in reimbursement for its expenses; the court calling special attention to the fact that the color scheme was so analogous to that of complainant's label as to be confusing. Thereupon the defendant commenced to use the same label design as in the second instance, changing the color scheme only, which use provoked the present supplemental petition. On hearing, it was shown that this color scheme has again been changed, and, finally, the design has been rearranged, although some semblance to the original particulars of design was retained. However, this change has not been sufficient to avoid confusion of products. Many unwary customers, who find in the word "Virginia" alone the chief significance

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in complainant's label, are shown to be open to easy deception. The court has difficulty, also, to avoid the conclusion, from all the evidence, that the defendant has not desired to avoid unfair competition with the complainant, but has undertaken only to so conduct its business along the border line of legitimacy, but still riding on the crest of popularity induced by complainant's advertising, that the latter would have the least possible excuse for complaint to a court of equity and the greatest difficulty to find a remedy for injuries sustained.

[3-5] It appears now that the defendant has made three experiments with the use of the word "Virginia," each of which has worked to complainant's disadvantage, and the evidence satisfies the court that it is improbable that use of the word "Virginia" in any combination may be found which will at the same time work a distinctive designation of defendant's wine and not unfairly interfere with complainant's business. The court is at the point where it finds itself compelled to say that defendant must abandon the use of the word "Virginia" in any kind of combination for the marketing of this particular kind of wine, unless, as defendant says as a last resort, the consent decree is too narrow to afford thereunder to the complainant this broad relief. Defendant is right in saying that this consent decree must be construed as if it were a contract. The correspondence between the parties leading up to it was brought and received tentatively against the objection of the complainant, upon defendant's insistence that it showed an agreement of the parties not to interpret the decree as affording opportunity for excluding from the defendant the use of this word. We have examined this correspondence with some care, and find, aside from objections to its competency as evidence, that, accepted, it affords no such criterion of interpretation. In fact, the consent decree was arrived at on the express stipulation by complainant that it should be interpreted without reference to previous negotiations. This decree, however, is unambiguous; wherefore resort to previous negotiations is, on familiar principles, impossible. It is as follows:

"This day came the parties, the complainant and respondent, by their counsel, and by consent of both parties hereto it is adjudged, ordered, and decreed that the defendant, its officers, agents, and employés, be and they are hereby perpetually enjoined and restrained from, directly or indirectly, manufacturing, selling, or exposing for sale, or causing or being in any way concerned in the manufacture, selling, or exposing for sale, of wine in bottles bearing labels in colorable imitation of the 'Virginia Dare' labels now used by complainant on its wines, and from furnishing labels in colorable imitation of the 'Virginia Dare' labels now used by complainant, to be used by others in the sale of wines. And they are further perpetually enjoined and restrained from using on bottles the name 'Virginia Belle,' or other names or insignia upon their labels, marks, or brands in connection with the sale, or exposing for sale, of wines in such manner as would mislead, or be likely to mislead, prospective purchasers into the belief that wine bearing such marks, labels, brands, or other insignia is the 'Virginia Dare' wine of complainant. It appearing to the court that nothing further remaining to be done in this case, it is ordered that the same be removed from the docket of this court; the costs of the same to be taxed against the respondent."

By it, as we read it, defendant is bound to mark the wine it puts out in competition with the "Virginia Dare" wine in a way to avoid un-

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fair injury to complainant's trade. We think the terms of this agreement are broad enough to compel defendant to abandon the use of the word "Virginia" in combination, as a trade-name, if it is shown that such use produces unfair rivalry with complainant's business. It appears to the court that the second paragraph of this order, under an interpretation most favorable to the defendant, permits the use of the word "Virginia" only under circumstances which, as the facts developed before this court in the two hearings which we have had on evidence, show are impossible to be had, and that the word cannot be used as a significant word of the trade-name of defendant's product without producing a colorable and unavoidable imitation of complainant's trade-name, wherefore the defendant should be perpetually enjoined from the use hereafter of the word "Virginia" in any form as a distinctive part of the trade-name of its wine of this character.

The label exactly complained of by the complainant in the supplemental petition is not shown to have been used very extensively by the defendant. For this and other reasons appearing on the record, upon which the court deems it now unnecessary to enlarge, the motion for an accounting will be denied.

The court has considered the authorities relied upon by the defendant. Oral comments from the bench distinguish, in our judgment, the case of Joseph Schlitz Brewing Co. v. Houston Ice & Brewing Co., 241 Fed. 817, 154 C. C. A. 519. In that case the labels are not only dissimilar in shape, at least, but the distinctive words were utterly unlike, being in each instance but the maker's names. It was not a case where the same controlling arbitrary word was used, as here, nor do we find the Circuit Court decision respecting the use of the terms "Union Leader" and "Union World" as designating brands of cut plug tobacco (193 Fed. 1015) to have been on facts so similar to the situation before us as to give it much significance.

The decree will carry costs.

UNITED STATES v. M. PIOWATY & SONS et al.

(District Court, D. Massachusetts. September 12, 1917.)

No. 1236.

1. MONOPOLIES ⇐29—OFFENSES—VIOLATION OF ANTI-TRUST ACT.

Under the Sherman Act an unlawful agreement is the essence of the offense of combination or conspiracy, and to hold it illegal for persons in the same business and trade organization, after exchanging information and views, to act in the same way, but independently of each other, on buying, selling, or prices, would unduly extend the scope of the act and cause much confusion.

2. MONOPOLIES ⇐29—OFFENSES—INFERENCES.

An unlawful agreement, which is the essential of the offense of combination or conspiracy denounced by the Sherman Act, may be tacit as well as expressed, and its existence may be inferred, even in criminal cases, from the conduct of the parties.

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3. MONOPOLIES ⊂=31—OFFENSES—INDICTMENT—"CONCERTED."
An indictment charging that defendants, with certain other members of an association, unlawfully entered into a combination in restraint of trade, to be brought about by a concerted plan, *held*, despite the use of the word "concerted," which often, but not necessarily, indicates an agreement, not to charge an unlawful agreement, which is the essence of the offense of conspiracy under the Sherman Act.

4. MONOPOLIES ⊂=31—OFFENSES—INDICTMENT.
An indictment charging a combination and conspiracy to monopolize the trade in Northern onions, in violation of the Sherman Act, etc., *held* sufficient to charge that defendants acted jointly and by agreement, though not expressly so stating.

M. Piowaty & Sons and others were indicted for violating Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209. On demurrer to indictment. Demurrer sustained to first count, and demurrer to second count overruled.

Gardner Perry, of Boston, Mass., for defendants Belden.

Eaton & McKnight, of Boston, Mass., for defendant Austin, specially.

George R. Sheldon, of Middleport, N. Y., for defendants Jackson-Sebring Co., Sebring, and Jackson.

MORTON, District Judge. This is an indictment under the Sherman Anti-Trust Act (26 Stat. 209). The defendants have demurred, assigning many grounds of demurrer. So far as they relate merely to the sufficiency of the language used, they seem to be not well founded, nor to require discussion. The principal question is whether the facts alleged in either count constitute a violation of the statute.

The indictment, as I construe it, sets out the following facts: Practically all onions used during winter and spring are grown in certain Northern states and are called "Northern onions." There is a recognized and defined trade in them of interstate character. Upon being harvested in the autumn, they are stored until the need for them arises. Then they are taken out of storage and turned into the general channels of commerce. Growers of onions sell their product to middlemen, who buy in the autumn, store the onions for a time, and sell them later to the jobbing and retail trade. In these respects, onions do not appear to differ materially from other winter vegetables, except, perhaps, in the extent to which they are bought and stored by middlemen.

[1-3] Various persons interested in buying and selling onions formed an association called the National Onion Association. Nothing is stated in the indictment as to the purposes, constitution, by-laws, or rules of this association. Its members were apparently middlemen. During the storage season in each of the years specified in the indictment, 75 per cent. of the existing Northern onions were owned or controlled by the members of the association. There are no allegations as to the extent to which the buying market in the autumn was dominated by them, nor to what extent they bought in competition with outsiders. In these respects the case stated is very different from the Milk Cases. U. S. v. Whiting (D. C.) 212 Fed. 466.

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Upon these facts, amplified in statement, the first count charges a combination or conspiracy in restraint of trade. Its vital allegations are as follows:

"The said defendants, together with certain other * * * members of said association, * * * unlawfully have engaged in a combination and conspiracy in restraint of said trade and commerce among the several states; * * * that is to say, * * * said defendants and said other members of said association have caused nearly all the Northern onions bought by the members of said association to be bought in accordance with a concerted plan followed and executed by said defendants and by said other members of said association and more fully hereinafter described, and have caused nearly all the storage onions and other Northern onions owned and controlled by the members of said association, being during the whole of said onion storage season more than three-fourths of the total then existing amount of said Northern onions, to be handled, sold, and disposed of in accordance with the concerted plan aforesaid, followed and executed by said defendants and by said other members of said association and more fully hereinafter described."

One of the grounds of demurrer is that a combination or conspiracy under the Sherman Act necessarily involves an agreement to which the persons charged were parties, and that no such agreement is alleged in this indictment. The government's position is, as I understand it, that no agreement is necessary, and that, if it is, the indictment sufficiently alleges one.

In U. S. v. Naval Stores Co. (C. C.) 172 Fed. 455, 460, it was said:

"The gist of the offense is the unlawful agreement. * * * Without corrupt understanding there is no conspiracy."

In Patterson v. U. S., 222 Fed. 599, 631, 138 C. C. A. 123, 155, the court said, with reference to a charge under this Act:

"'It is a partnership in criminal purposes' (quoting Holmes, J., U. S. v. Kissel, 218 U. S. 601 [31 Sup. Ct. 124, 54 L. Ed. 1168]) to which we might add, brought about by an agreement."

See, too, U. S. v. Greenhut (D. C.) 51 Fed. 205.

In Eastern States Lumber Ass'n v. U. S., 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788, relied on by the government, the language of the opinion indicates that the court so understood the law. It held that "the conspiracy" (i. e., the illegal agreement) might "be readily inferred" from the facts.

In my opinion, unlawful agreement is the essence of the offense of combination or conspiracy under the Sherman Act. It is what separates what is permitted from what is forbidden. To hold it illegal for persons in the same business and same trade organization, after exchanging information and views, to act in the same way, but independently of each other, on buying, selling, or prices, would extend the scope of the act beyond anything heretofore decided, and beyond its proper meaning, and would cause the greatest confusion and uncertainty.

The necessary agreement or understanding may, of course, be tacit, as well as expressed; its existence may be inferred—and, even in criminal cases, often is inferred—from the conduct of the parties. Eastern States Lumber Ass'n v. U. S., supra; U. S. v. Naval Stores Co. (C. C.)

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172 Fed. 455, 460. Concert of action among the members of an association, in particulars such as are set forth in this indictment, strongly suggests agreement; but, if that is the construction which the prosecution places upon the defendants' conduct, it ought to be so stated.

The government's contention that the indictment alleges an agreement to which the defendants were parties is based principally on the word "concerted." It is a word which unquestionably is often used in a sense implying agreement. But it is also used to describe similar action by different persons with the same object in view, not proceeding from agreement between them. An unorganized mob may be said to make a "concerted" attack. If the indictment as a whole were obviously based on the assumption of an agreement to which the defendants were parties, it might be that the language used would be sufficient; but that is not this case. There is no allegation or direct suggestion that the defendants acted under agreement with each other. The absence of such an averment is apparently not due to inadvertence; it seems to be studiously avoided. The indictment appears to have been drawn on the theory that agreement was not essential. Its language and tenor are not such that the averment of one can be found by implication—certainly not with such clearness and definiteness as the defendants are plainly entitled to upon such an important allegation.

I greatly doubt whether the bald allegation that the defendants "caused" certain acts to be done by other persons not under their control, without stating how they did so, is sufficient; but it is unnecessary to decide this point. See In re Greene (C. C.) 52 Fed. 104, 112.

[4] The second count charges a combination and conspiracy to monopolize the trade in Northern onions. It incorporates by reference the allegations of the first count, descriptive of the Northern onion business and of the defendants. It then alleges in substance that the defendants and other persons have combined and conspired to monopolize said trade and commerce among the several states, as follows:

"For the purpose of enabling said defendants and said other members of said association to monopolize said interstate trade and commerce, and with the intent on the part of all of said defendants and of said other members to monopolize said trade and commerce, said defendants and said other members of said association continuously throughout said period of three years have concertedly conducted their respective businesses as such onion dealers in accordance with a plan adopted by said defendants and by said other members, which was intended to involve and which did involve:

"(a) The concerted acquisition by said defendants and by said other members of said association of substantially all the said Northern onions existing in the United States, for the purpose of later selling the same at an excessive profit.

"(b) The concerted hoarding and withholding from interstate trade and commerce aforesaid by said defendants and by said other members of large quantities of said Northern onions theretofore so acquired by them, to the end and at such times and in such manner that persons, if any, other than the defendants and said other members owning onions, would be induced before and during the early part of the onion storage season to market and dispose of all their onions, with the necessary result of creating for the defendants and said other members a monopoly of Northern onions shortly after the beginning of said onion storage season.

"(c) The raising of prices and the fixing of prices of said Northern onions in interstate commerce by means of the concerted hoarding and withholding from

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interstate trade and commerce aforesaid by said defendants and by said other members of said association of large quantities of said Northern onions controlled by them."

The plan is adequately described. It cannot be said to be patently inadequate to accomplish the unlawful purpose and intent charged to have inspired it, nor obviously to involve no unlawful action by the persons participating in it.

This count states explicitly that the defendants, with the intent to monopolize the trade in question "adopted" said plan, an averment not found in the first one, and that they "concertedly conducted their respective businesses * * * in accordance therewith," which is also stronger and more definite than the corresponding allegations in count 1. If there were an express statement that the adoption of the plan by the defendants was brought about by agreement to that effect, I should have no doubt as to the sufficiency of this count. Taking it as it stands, and as a whole, it is plainly intended by it to charge a crime based on joint action aimed to secure a monopoly by a group of persons, among whom were the defendants. In many particulars such a joint action is explicitly alleged. While the point is not free from doubt, it seems to me that the defendants must be understood to have acted jointly and by agreement in the adoption of the plan, as well as in the particulars expressly so stated, and that the failure distinctly to allege that the adoption of the plan was by agreement is not of substantial importance, in view of the general tenor of the count and its other allegations. See Swift & Co. v. U. S., 196 U. S. at pages 394 and 395, 25 Sup. Ct. 276, 49 L. Ed. 518.

Various other grounds of demurrer were argued and have been considered. None of them seems to me well founded, nor to require discussion.

Demurrer to first count sustained.

Demurrer to second count overruled.

THE KERRY RANGE.

THE ANTHONY GROVES, JR.

(District Court, D. Maryland. May 20, 1918.)

COLLISION ⊂=71(2)—MOVING AND BURNING VESSEL—FAULT.

A collision in Baltimore harbor at night between a moving steamship and one on fire, held by salving tugs fighting the fire as far from the burning piers as she could be drawn because of her anchor, which the fire had caused to drop, *held* on the evidence due solely to the fault of the moving vessel.

In Admiralty. Suits for salvage against the British steamship Kerry Range by the Curtis Bay Towing Company, owner of the tugs Dandy and others, by the Merchants' & Miners' Transportation Company, owner of the tug Isis, and by the Baker Whiteley Coal Company, owner of the tugs Britannia, Chicago, and Elma, heard with suit for collision by Furness, Withy & Co., Limited, owner of the

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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Kerry Range, the Salvage Association, London, and the Inter-Ocean Transportation Company, Limited, against the steamship Anthony Groves, Jr. Decrees for libelants.

George Weems Williams and L. Vernon Miller, both of Baltimore, Md., for Curtis Bay Towing Co.

Thaddeus H. Swank, of Baltimore, Md., for Merchants' & Miners' Transp. Co.

Harry N. Abercrombie, of Baltimore, Md., for Baker Whiteley Coal Co.

Whitelock Deming & Kemp and John B. Deming, all of Baltimore, Md., for the Kerry Range, Furness, Withy & Co., Limited, Salvage Ass'n, London, and Inter-Ocean Transp. Co., Limited.

George Forbes and Willis R. Jones, both of Baltimore, Md., for the Anthony Groves, Jr.

ROSE, District Judge. At about 20 minutes before 11 on the night of October 30th last fire was discovered on the Baltimore & Ohio Railroad Company's Pier No. 9, on the Locust Point side of the Baltimore Harbor. It speedily involved Pier No. 8 and the British steamship Kerry Range, which at the time of its outbreak was made fast to the east side of Pier 9, bow in. A number of tugs tried to get her out of her dangerous position and to extinguish the flames aboard her. While still engaged in their salving operations, the steamship Anthony Groves, Jr., came into collision with the Kerry Range. In these cases, the salvors seek compensation from the steamship Kerry Range, and the latter asks damages from the Groves.

The fire, in its first stages, spread with such rapidity that it was with difficulty that any of those on the steamship escaped with their lives, and a number of them perished. Her master, before he was forced from her decks, managed to have her lines, or most of them, cast off. Unfortunately the anchor chock burned, and the anchor dropped to the bottom. The steamship was about to sail, and she had on board shells and ammunition for her armament against submarines. So soon as the fire reached her stern, in which her magazine was, exploding shells made approach to her dangerous. From time to time different tugs contrived to get a line upon her. Three of them, pulling in tandem fashion, tried unavailingly to force her to drag her anchor. All they succeeded in doing was to pull her out into the stream so far as her 135 fathoms of chain would let her go. There they held her, with her bow about 200 or 250 feet away from the burning piers, until morning came, and with it men and an acetylene flame to cut her chain. They then towed her over to the flats, where by cutting holes in her sides, and having the powerful city fireboats pump water into her, she was scuttled in shallow water. It was not until a day or two later that the fire aboard her was finally put out. The salving tugs, or some of them, continued pumping on her from the time they first got her out into the stream until the fire on her was finally extinguished.

It is not possible to say how much the tugs saved to the owners of ship and cargo. When they left her, she was a wreck, but a wreck

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which, in these times, at least, was not without money's worth. The value of the cargo, which was not destroyed, or even much injured, ran into large figures; but then most of it was proof against both fire and water. Weighing everything in evidence, it seems probable that the tugs were of not a little use. Moreover, what they did, or the larger part of it, was done under the eyes and with the approval of the master of the ship. He seems a competent and sensible man. In the end, a salvage award of $17,500 was made, reduced, however, by the sum of $250, the cost to the ship of the unnecessarily large stipulation which the salvors demanded. The net award is therefore $17,250. This sum was apportioned among tugs of a total value of nearly $450,000, in proportion to services rendered by them, respectively; due allowance being made for danger, difficulty, time, and success. This apportionment was much facilitated by the fact that, while there were seven tugs, there were only three owners. Of the total salvage decreed, a sum slightly less than one-fourth was allotted to the masters and men of the tugs. The owners, however, assumed to pay out of their share all fees to proctors and advocates, so that the men will receive in fact slightly more than one-fourth of all the money actually reaching the libelants. No one on any of the tugs will receive less than one-half a month's wages; none of them more than one and a half months'. The master in each case will be paid an extra allowance, ranging from $25 to $100. Fifty dollars will be added to the share of each of the men who took whatever personal risk there was in making the line fast to the rudder post of the burning ship. The aggregate award was more than the ship thought she ought to pay, but less than the tugs were persuaded they should get. I understand, however, that no one of them wishes to carry this part of the controversy further. It follows that no good purpose will be served by a more detailed statement of the reasons which led to the fixing of the salvage at the figures named.

The Collision.

The Anthony Groves, Jr., runs over the inside route between Philadelphia and Baltimore, passing through the Chesapeake & Delaware Canal. On the morning after the fire, while on its regular trip to Baltimore, it ran into the Kerry Range, and damaged it to the ascertained extent of $7,908. At that time, for some hours before, and for two hours afterwards, the Kerry Range was lying in the main ship channel, and at right angles to its course. The tugs Britannia and Curtis Bay were holding the ship in position. For this purpose, the former had a line from its stern to the rudder post of the ship, and the Curtis Bay was lashed to the port side of its companion. The ship, the hawser, and the tugs must have occupied a space of not less than 600 feet, and perhaps a little more, directly across the fairway. There was, however, a sufficient depth of water on either side for any vessel, inbound that morning, safely to pass, either to the westward, between the ship's stem and the pier, or to the eastward, across the bows of the tugs. A half dozen or more steamers did so; some going to the east, some to the west. The Groves, on the other hand, came head on

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squarely into the Kerry Range, striking it on its port side, a little aft of midships. The master of the Groves was then in its wheelhouse, directing its navigation. After seeing him on the stand, and hearing his testimony, there is no question that he was greatly in fault. It is true that, while the night had been clear and dawn was breaking, sunrise was still three-quarters of an hour off. There were, of course, no lights on the Kerry Range. She gave no signals, because from the time her crew fled for their lives until after the collision nobody was on her, and nobody could get on her. There was much smoke, and a good deal of it came from the ship itself. The wind was light, but its direction was such that the smoke cloud interposed between the helpless ship and upbound craft. Nevertheless, the master of the Groves says distinctly that the smoke was not coming from the shore, but from the river. He must have known it could not have been rising out of the water, and yet he says he did not stop his engines until he got within 100 feet of the smoke bank, and did not reverse until he was within 4 or 5 feet of the Kerry Range. He claims it was not until then he saw the ship.

In a number of particulars, it is impossible to reconcile his testimony with itself. It would be useless labor further to analyze what he says. Some of the others who testified for the Groves were better witnesses, but the net effect of their testimony leaves unshaken the conclusion which must be drawn from that of the master. On her behalf, it is, however, urged that others were to blame. The Kerry Range at least must be held guiltless. She had been for hours an inert log. Her master had; not long after his escape from her, hired a small tug and had thereafter cruised around in her vicinity. He occasionally made suggestions to the salving tugs. They seem to have been uniformly sensible, but he was in no sense in control of the salvors. At the time of the collision, he was not on the scene at all. He had gone off to do the best possible thing—namely, to get men and appliances with which to cut the anchor chain, so that his ship could be moved.

It is said that it was wrong to place the Kerry Range across the channel. What else could have been done to her? As she was held fast by her anchor, the tugs were not able to get her more than 250 feet at the extreme estimate, outside the piers. The only possible choice of position for her lay within that distance of the pier heads. It is urged that she should have been put parallel to the channel course, and not across it; but to have done so would have brought her close to the piers, when everybody wanted to get her away from those burning structures. Moreover, in any such position as is suggested, the ship would have greatly hampered the movements of the city fireboats and their helping tugs in their efforts to get water on the piers. The chief of the city fire department told the tugs to pull the ship as far out as they could. In short, there were many experienced men on the ground. They represented quite diverse interests. It never occurred to any of them that what was then done was not the best, and indeed the only, thing to do. They were clearly right.

It is strongly urged that as the ship, lying directly across the fairway, was without lights, unable to signal, and hidden by the smoke, the

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tugs, which had placed her there and there held her, were bound to do something to warn upbound vessels of her presence. What would that something have been? The smoke cloud did not keep the Britannia from seeing approaching craft, nor apparently did it hide its lights from them. It sounded danger signals whenever the movements of an inbound boat suggested that it was coming close to the Kerry Range, without being aware of the latter's presence. Such signals were admittedly given to the Groves. The dispute is as to when they were sounded. According to the testimony from the Britannia, they were given in ample time. The men from the Groves say they did not hear them until too late to avoid the collision. It is quite likely that one side exaggerates and the other minimizes the time which elapsed between the giving of the first of these signals and the collision. There can be little question, however, that they were sounded in ample time to have prevented any possibility of the ships coming together, had the Groves approached the ominous smoke bank with the caution prudence dictated. Unusual care is required of her, if any credence can be given to the testimony of her master as to the distance she moves after her engines have been stopped, and even after they have been reversed.

It is said that a tug should have been sent down the river to warn ships of the position and helpless condition of the Kerry Range. Such a precaution would have prevented the collision, had those on the tug been able to have attracted the attention of any one on the Groves; but is the failure to take it a legal fault, and, if so, whose? No positive rule or regulation imposes such a duty on any one. The tugs were in one sense co-operating; but, after all, they were legally each acting for itself. Which one of them was to blame for not leaving the burning ship and going down the river to give warning? In short, the Groves' fault is palpable. It caused the accident. It must bear all the consequences, unless it is able to fix definite liability on some one or more of the other vessels. This it has not done. The facts sharply distinguish the instant case from that of The Bremen and The Main (D. C.) 111 Fed. 228. There salvors unnecessarily beached a burning ship with red-hot plates close to another vessel, which was thereby greatly damaged. Everybody who had a part in this careless act was properly held liable for its consequence. In this case no one of the salvors did anything which it should not have done.

The Groves cannot shift its liability to any of the tugs, because they did not do something which no law or rule required, and which it did not occur to anybody to do. The Groves must be held solely responsible.

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THE KOAN MARU.

(District Court, S. D. New York. December 31, 1917.)

1. SHIPPING ⇐123—IMPROPER STOWAGE.
The stowing of shellac, which is easily stained, in a compartment which had recently contained coal, and from which the coal dust had been removed by sweeping only, without washing, was negligent stowage.

2. SHIPPING ⇐138—FAULT IN MANAGEMENT.
Negligence in stowing of shellac in a compartment which had recently contained coal, and from which the coal dust had been removed by sweeping only, without washing, was not relieved because of fault in management.

3. SHIPPING ⇐123—IMPROPER STOWAGE.
The stowing of shellac, which is easily stained, in between-decks compartment above coal bunkers, arranging the bags of shellac to form a hole through which the vessel was later coaled, the coal being separated from the bags by a temporary coal chute, consisting of planking and dunnage mats, not dust tight, and without canvas, was negligent stowage.

4. SHIPPING ⇐138—FAULT IN MANAGEMENT.
Negligence in stowing shellac in a between-decks compartment above coal bunkers, arranging the bags of shellac so that the vessel was coaled through a hole in them protected only by planking and dunnage mats, was not relieved because of fault in management.

5. SHIPPING ⇐140—LIMITATION OF LIABILITY.
A bill of lading clause, limiting liability to invoice cost, not exceeding £50 per freight ton or £20 per package, was valid.

6. SHIPPING ⇐140—LIMITATION OF LIABILITY.
A bill of lading clause providing that, in the event of liability against vessel or owners, no value should be placed on the merchandise higher than the invoice cost, not exceeding £50 per freight ton, and relatively for any portion thereof, or exceeding £20 per package, limits liability to £50 per ton in any case, and also to £20 per package, and shipper did not have option to choose whether its goods came under one or the other of these figures.

In Admiralty. Libel by Mark & Rawolle, Incorporated, against the steamship Koan Maru. Decree for libelant as indicated.

Black, Varian & Simon, of New York City (Herbert M. Simon and Warren Bigelow, both of New York City, of counsel), for libelant.

Burlingham, Montgomery & Beecher, of New York City (Roscoe H. Hupper, of New York City, of counsel), for claimant.

MAYER, District Judge. Libelant was the owner of 2,720 packages or bags of shellac delivered to the Koan Maru at Calcutta in December, 1916. When the vessel discharged her cargo at New York on March 12, 1917, it was found that 737 bags and their contents had been blackened and damaged. This condition libelant attributes to negligent stowage, which, if shown, would concededly make the ship liable. Claimant contends: (1) That there was no negligence; (2) that, if there was, it was a fault in management; and (3) in any event liability is limited by the limited liability clause of the bills of lading.

[1-4] The bills of lading provided inter alia:

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(a) "But nothing herein contained shall exempt the shipowner from liability to pay for damages to cargo occasioned by bad stowage;" but (b) "the steamer is not liable for * * * loss or damage by dust from coaling on the voyage."

The 737 bags were stowed in No. 2 hold 'tween-decks, just above the bunkers, which contained coal. The rest of the shellac was stowed elsewhere in the ship and arrived undamaged. The vessel had gone from Japan to Singapore with a cargo of coal in this same compartment 'tween-decks. This coal was unloaded at Singapore, and the vessel then proceeded without cargo to Calcutta, where she took on the shellac.

The cleaning of the compartent was done on the voyage from Singapore to Calcutta under the supervision of the boatswain, and when completed was inspected by Yamashaita, chief officer, whose deposition was taken out of court with the aid of an interpreter. If properly cleaned, it would seem that this stowage would have been prudent. The testimony shows, however, that the cleaning was perfunctory; i. e., merely sweeping, at best, broom clean. Yamashaita's testimony is:

"Q. I understood you to say that before the ship began loading at Calcutta, you inspected this No. 2 'tween-decks and saw that it was clean; is that correct? A. Yes. Q. Was there any coal left there then? A. No; all cleaned up. Q. What do you mean by cleaned—swept and washed? A. Swept."

Shellac is easily stained, and thus a perishable commodity. I should think, without expert testimony, that mere sweeping would not remove the danger of staining a cargo such as this, or, in any event, would be likely to expose it to that danger. However, Capt. Bagger, a well-known expert, whose qualifications were referred to in Kirsch v. San Guglielmo (D. C.) 241 Fed. 969, pointed out that proper cleaning would have required those in charge to "either wash the hold out, or sweep the hold out with wet sawdust, or with lime or some other substance that will remove the coal dust"—none of which was done.

The vessel, after leaving Calcutta, took on coal at Durban. In addition, it further appears that the damaged shellac was improperly stowed, in that the bags were themselves so arranged as to constitute a coal chute through which the ship was coaled at Durban. Yamashaita testified that in the deck or flooring of this compartment there was a hatch leading to the coal bunkers below, and a corresponding hatch in the roofing or main deck; that when the 737 bags were stowed at Calcutta they entirely covered the lower hatch; that, when the shellac settled, the bags on top of the closed hatch were pushed to one side and a temporary coal chute erected right through the compartment full of shellac, from the deck above to the coal bunkers below; and that coal was loaded through this opening and remained in the chute itself until consumption of the coal below caused the level to fall. This condition existed from one day out of Calcutta until the vessel's arrival at New York. The situation was summarized in the following question to and answer by Capt. Bagger:

"Q. I want you to further assume that this compartment in which the shellac was stowed was for the coal bunkers of the vessel, the cross-bunker, and

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that in the flooring of that compartment is a cross-bunker hatch, and that it was apparent to the captain of the vessel, and known to him, that on the voyage he would have to stop for the purpose of coaling. The only means of access to this coal bunker underneath is assumed to be the hatch in question, and the only means that was taken for the protection of the shellac in the compartment through which the coal was inserted is the erection of a bulkhead composed only of planking and of dunnage mat, and without any canvas in the construction. I ask you, under those circumstances, whether it was or was not proper to stow shellac in the compartment with this bulkhead, instead of less perishable goods, merchandise? A. It is not good stowage to stow shellac in a place where coal had passed through a chute, as it would be only of single planks, without canvas, or something to make it tight. Mats would be no use for that purpose."

Capt. Bagger also made clear that dunnage mats which are composed of vegetable fiber are not dust tight. For either of the causes above described, the ship is liable as for bad stowage, and not relieved because of fault in management.

Yamashaita endeavored to account for the damage because the coal taken on at Durban was "so fine that the coal itself went through even into the chief officer's cabin" at the stern of the vessel; but that explanation seems unsatisfactory, when it is remembered that all the shellac cargo elsewhere stowed was not damaged. If true, however, the chute arrangement above described was clearly bad stowage. Knott v. Botany Mills, 179 U. S. 69, 21 Sup. Ct. 30, 45 L. Ed. 90; Lancashire Shipping Co. v. American Import Co., 243 Fed. 523, 156 C. C. A. 221; The Jeannie, 236 Fed. 463, 149 C. C. A. 515. The proposition in The Indrani, 177 Fed. 914, 101 C. C. A. 194 (cited by claimant), where the vessel was tipped by the head while discharging cargo, is quite different.

[5, 6] The final question is as to the amount of liability. The bill of lading clause is as follows:

"It is mutually agreed that unless a higher value be stated herein, and an increased freight rate specially arranged therefor, the value of the merchandise hereby receipted for does not exceed £50 per freight ton, or relatively for any portion thereof or exceed £20 per package, and that the freight has been adjusted on such valuation, and no oral declaration or agreement shall be evidence of a different provision, or of a waiver of this clause in the event of any liability being adjudged against the steamer, or owners in respect of the merchandise no value shall be placed on such merchandise higher than the invoice cost not exceeding £50 per freight ton, and relatively for any portion thereof or exceeding £20 per package, or such other value as may be expressly stated herein, nor shall the shipowner be held liable for any profits or consequential or special damages, and the shipowner shall have the option of replacing any lost or damaged goods."

Such a clause is good, under repeated authority, of which Hart v. Penn. R. R. Co., 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717, and Wells Fargo v. Neiman-Marcus Co., 227 U. S. 469, 33 Sup. Ct. 267, 57 L. Ed. 600, are examples. This clause means that the liability shall not exceed £50 per ton in any case, and also shall not exceed £20 per package.

If libelant's construction to the contrary were adopted—i. e., that it had the option to choose whether its goods came under one or the other of these figures—the clause would be inconsistent and meaningless.

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It is elementary that, whenever possible, contracts must be construed so as to make sense and give them a consistent meaning. In the left-hand margin of the bill of lading it is noted that the freight was paid on a tonnage basis, and, by virtue of the provisions of the bill of lading, it must be presumed that the freight rate was based on a valuation of £50 per ton, and this must be the basis and limit of liability in this case.

Libelant may therefore have a decree as indicated, and with costs.

KUHNHOLD v. COMPAGNIE GÉNÉRALE TRANSATLANTIQUE.

(District Court, S. D. New York. February 27, 1918.)

1. CONTRACTS ⇐127(4)—OUSTING COURT OF JURISDICTION.
A provision in a bill of lading for maritime shipment, by which a foreign court is made the sole forum in case of litigation over the interpretation of the bill of lading, is void.

2. STATUTES ⇐290—FOREIGN LAWS—BURDEN OF PROOF.
The burden of proving the law of a foreign jurisdiction is on him who asserts or relies on it.

3. SHIPPING ⇐140—BILLS OF LADING—JEWELRY.
Where a bill of lading provided that the ship was not responsible for gold, jewelry, etc., unless there be signed a regular bill of lading with express indication of the value of the articles, the vessel is liable where the bill of lading described the articles, as watches, etc., and the vessel owner contended there was an agreement as to value.

4. SHIPPING ⇐141(1)—CARRIERS—LIMITATION OF LIABILITY.
Rev. St. § 4281 (Comp. St. 1916, § 8019), declaring that the masters and owners of vessels shall not be liable as carriers for jewels not declared as such, etc., merely relieved carriers by water of liability as common carriers, not of their liability as bailees, and hence where carrier not only failed to account for a loss, but in effect conceded that a loss of jewelry was occasioned by its own fault, it is liable.

5. SHIPPING ⇐140—LIMITATION OF LIABILITY.
A provision in a bill of lading limiting the liability of a vessel to 1,000 francs per package, which was applicable to a shipment of jewelry because the value was not declared, is valid; the limit being reasonable.

6. SHIPPING ⇐140—CARRIERS—LIMITATION OF LIABILITY.
Where a bill of lading limiting the carrier's liability to 1,000 francs per package in case value was not declared, provided that the indemnity should be calculated pro rata, etc., *held*, that the amount recoverable should bear that proportion to the indemnity that the amount of the loss bore to the value of the entire package.

In Admiralty. Libel by William Kuhnhold against the Compagnie Générale Transatlantique. Decree for libelant, as indicated.

Theodore L. Bailey and Oscar S. Blinn, both of New York City, for libelant.

Joseph P. Nolan, of New York City, for respondent.

MAYER, District Judge. There is no dispute as to the essential facts; the parties having stipulated in respect thereof.

On or about September 17, 1915, at Bordeaux, France, the Gruen Watch Manufacturing Company delivered to respondent (hereinafter

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called French Line), for shipment to New York, nine cases of goods, for which one bill of lading was given. The shipment was made through the American Express Company, and consigned to D. Gruen & Sons of Cincinnati, Ohio. All of the nine cases were delivered ex steamship Espagne at New York, on or about October 4, 1915, but one of the cases (marked 274) was delivered short a certain part of the goods (watches and watch cases) which had been originally shipped in said case at Bordeaux. The actual invoice value of the missing goods was $826.60, but the invoice value was not stated in the bill of lading. It is also stipulated between the parties that the full invoice value of all the goods contained in case marked 274 at the time of shipment was 13,478.50 francs, or approximately the equivalent of $2,695.70. At the time of the trial the parties did not know the invoice value of the remaining eight cases shipped under the same bill of lading, but agreed that they would stipulate as to such value in the event that the court should so construe the bill of lading as to make the value of these eight cases relevant and necessary to the ascertainment of damages.

D. Gruen & Sons of Cincinnati, Ohio, assigned their claim to libelant. In the bill of lading delivered by the French Line appears the following:

"Art. 11. In case of losses or irregularity in the delivery, for which they would be responsible, from any cause or at any place whatever, the captain and the company can only be held to reimburse for each package lost, the intrinsic value at the loading port, calculated on the presentation of the original invoice, or upon the declaration on the bill of lading, without any profit, damages, commission, interest, etc. In default of declaration of value on the bill of lading, it shall not be allowed in any case more than one franc per cubic decimeter or per kilo., at the choice of the company, nor more than 1,000 francs per package. In case of damage or shortages for which they may be responsible, the captain and the company can only be held to pay an indemnity calculated pro rata on the sum to be paid in case of loss, according to the foregoing various stipulations."

The expression "it shall not be allowed," if properly and freely translated, means "there shall not be allowed." It is also provided, under rule 5 of the bill of lading, that:

"The ship is not responsible for gold, silver, precious metals, cash, titles, jewelry, works of art and similar articles of value, unless there be signed a regular bill of lading with express indication of the value of the said articles."

Article 18 provides:

"All litigation arising from the interpretation of the execution of the present bill of lading shall be judged according to French law and by the court of the place indicated on the bill of lading, which court the shippers and the claimants formally declare they accept as competent."

[1] 1. The provision under article 18, by which the Bordeaux court is made the sole forum, must be construed as void in this jurisdiction. Gough v. Hamburg, etc., Co. (D. C.) 158 Fed. 174; United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co. (D. C.) 222 Fed. 1006.

[2] 2. Whether the bill of lading under article 18 should be construed in accordance with the French law need not be discussed, because no testimony was introduced as to the French law and the prop-

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osition has now become elementary that the burden of proving the law of a foreign jurisdiction is upon him who asserts or relies upon it.

[3, 4] 3. The French Line seeks to escape liability upon the ground that the shipment was one of jewelry, and therefore the French Line is excused, under the provisions of rule 5 of the bill of lading and section 4281 of the Revised Statutes (Comp. St. 1916, § 8019). The bill of lading clearly described this package as "caisse mouvements et boites moutres." It is thus entirely clear that the nature of the contents of the package was made known, and, as the French Line insists that in law there is an agreement as to value, all of the requirements of rule 5 were conformed with. In any event, it is now settled that section 4281 is to be construed so as to relieve the carrier only of its liability as a common carrier, and not of any liability as a bailee. Wheeler v. Oceanic Steam Navigation Co., 125 N. Y. 155, 26 N. E. 248, 21 Am. St. Rep. 729; Mallory S. S. Co. v. Bahn (Tex. Civ. App.) 154 S. W. 282; La Bourgogne, 144 Fed. 781, at page 786, 75 C. C. A. 647, affirmed in 210 U. S. 95, 28 Sup. Ct. 664, 52 L. Ed. 973.

As under this head the liability of the French Line would be that of a bailee, libelant must recover because the bailee has not only not accounted for the loss, but has, in effect, affirmatively conceded that the loss was occasioned by its own fault.

[5] 4. The foregoing having been disposed of, there is now to be considered the important question in the case. Libelant attacks as void the provision of the bill of lading limiting the liability, while the French Line insists that the limitation is valid and fully within recognized authority.

It will be noted that in the first part of article 11 provision is made for those cases where the original invoice or the bill of lading declares the value. Then follow the clauses relating to those cases where value is not declared. In the latter event, the company has the choice of determining whether to allow the valuation per standard of measurement or per standard of weight, providing, however, that in no instance shall the damage exceed 1,000 francs per package.

The language is simple and clear. It is entirely within the power of the shipper to declare value, and, in such event, in case of loss, the intrinsic value at the loading port is allowed. If the shipper, however, fails to declare value, and thus leaves the carrier entirely in the dark, in that regard, the shipper is fully informed by the bill of lading what the maximum allowance for loss will be, with the reservation to the carrier at its option to make good either at so much per measurement or so much per weight; the assumption being, of course, that the carrier will choose the lesser figure.

Since Hart v. Pennsylvania Railroad Co., 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717, limited liability clauses have been held good, if these clauses amount to an agreement and are reasonable. Where, however, the carrier, utterly irrespective of declared value, places an arbitrary limitation on his liability, the courts have held such limitations void.

Scruggs v. Baltimore & O. R. Co. (C. C.) 18 Fed. 318 (which has been frequently cited), is really not in point, because the court seems

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to have determined the case upon the oral agreement between the parties, irrespective of the provisions of the bill of lading; but, if otherwise construed, it cannot be regarded as authority in view of the later decision in the Hart Case, supra.

In Eells v. St. Louis, K. & N. W. Ry. Co. (C. C.) 52 Fed. 903, the clause under consideration did not involve a failure to declare value, but limited liability to a sum not to exceed $100, unless the parties made an agreement for a larger sum. Obviously that clause is not similar to the clause in the bill of lading in the case at bar.

In Schwarzchild v. National S. S. Co. (D. C.) 74 Fed. 257, the limit of liability of the shipowner was not to exceed £1 sterling in respect of each animal shipped, and was obviously a stipulation irrespective of any agreed value. So, also, The Gambetta, 74 Fed. 259, 20 C. C. A. 417.

There is nothing in Lines v. Atlantic Transport Co., 223 Fed. 624, 139 C. C. A. 170, which helps libelant, because the point in that case was that the clause under consideration was void for the reason that it was capable of the construction that the carrier would not, in any event, be liable to any extent whatever for any goods which were in fact of a greater value than £20 per package. This clause was characterized by Judge Lacombe as "a double-barreled form of exemption"; the purpose being to have a clause so ambiguous that it might free the carrier in the British courts under one construction, and also free it in the American courts under another construction. The authorities in support of the validity of the French Line bill of lading clause are numerous and need only be cited. Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; Wells Fargo & Co. v. Neiman-Marcus Co., 227 U. S. 469, 33 Sup. Ct. 267, 57 L. Ed. 600; Kansas So. Ry. v. Carl, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683; Mo., Kans. & Tex. Ry. v. Harriman, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. 690; Great Northern Ry. v. O'Connor, 232 U. S. 508, 34 Sup. Ct. 380, 58 L. Ed. 703; Boston & Maine R. R. v. Hooker, 233 U. S. 97, 34 Sup. Ct. 526, 58 L. Ed. 868, L. R. A. 1915B, 450, Ann. Cas. 1915D, 593; Atchison, etc., Ry. Co. v. Robinson, 233 U. S. 173, 34 Sup. Ct. 556, 58 L. Ed. 901; Pierce v. Wells Fargo & Co., 236 U. S. 278, 35 Sup. Ct. 351, 59 L. Ed. 576; Hohl v. Norddeutscher Lloyd, 175 Fed. 544, 99 C. C. A. 166; Cau v. Tex. & Pac. Ry. Co., 194 U. S. 427, 431, 432, 24 Sup. Ct. 663, 48 L. Ed. 1053; Reid v. American Express Co., 241 U. S. 544, 36 Sup. Ct. 712, 60 L. Ed. 1156. To these may be added (at least for the time being) The Koan Maru, 251 Fed. 384, filed December 31, 1917.

Of course, in the cases just above referred to, the clauses are phrased in different forms; but the underlying principles, so far as here applicable, are the same. The point is that the clause now under consideration amounts to an agreement by which the carrier says to the shipper:

"If you declare the value of the goods, you are shipping, I herewith agree with you upon the basis on which I will pay you damages for loss; but, if you do not declare the value, then I agree with you upon another basis whereby I limit my liability, so that I will pay you the value of your goods

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only up to a certain amount, irrespective of the value of your goods beyond that amount, because you have not given me any information as to the value of your goods."

As the limit of 1,000 francs is reasonable, the clause must be held valid.

[6] The final question is as to the apportioning or prorating of damage. The contention of the French Line is that the apportionment clause contemplates taking into consideration the value of the entire shipment, or, to illustrate: That if the entire shipment of nine packages were worth $10,000, then libelant would be entitled to only $^{826.60}/_{10000}$ths. This obviously is not the meaning of the apportionment clause. "Per package" undoubtedly must mean per each individual package. "Shortages" is a word which applies to the contents of an integral package. I think the clause is clear; but, if there is any ambiguity, the doubt must be resolved against the carrier, who framed the printed bill of lading. As the lost goods were in the case No. 274, and the value of all the goods in that case was approximately $2,695.70, and the value of the lost goods was $826.60, and the limitation is 1,000 francs per package, or in round numbers, $200, libelant is entitled to recover $^{826.60}/_{2695.70}$ths of $200. The accurate computation can be worked out by counsel.

Libelant may therefore have a decree as indicated, with costs.

THE BRITANNIA.

THE M. MITCHELL DAVIS.

(District Court, D. Maryland. May 17, 1918.)

COLLISION ⇐95(2)—VESSEL IN TOW—FAULT OF TUGS.

A collision between a steamship and a car float, against which the steamship, without motive power of her own, was driven by the wind while being moved to another pier in Baltimore Harbor by two tugs, *held* due to the fault of the tugs; the ship having expressly asked for three tugs.

In Admiralty. Suit by Clarence A. Wilson, master of the British steamship Helenus, against the tugs Britannia and M. Mitchell Davis. Decree for libelant.

George Forbes, of Baltimore, Md., for libelant.

Harry N. Abercrombie and Daniel H. Hayne, both of Baltimore, Md., for respondents.

ROSE, District Judge. The libelant is the master of the British steamship Helenus. He asks from the tugs Britannia and M. Mitchell Davis compensation for the damage done his ship by a collision between it and a car float. The same corporation owns both tugs. When the accident happened, they were moving the ship. It was then without motive power of its own. Its movements, as well as those of both the tugs, were directed by the master of the Britannia. If the collision was

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caused by his default, both the tugs are liable. The Anthracite, 168 Fed. 693, 94 C. C. A. 179.

The ship had been lying at Pier 7 on the Canton side of the Baltimore Harbor. On the 23d of October, 1917, the libelant told the ship's agents that on the morning of the next day he would be ready to move to the Standard Oil pier, some 1,600 feet further up, and upon the same side of the stream. He said he would like three tugs. The agents replied that it was customary to leave the determination of the number of tugs to be used to the tugboat people. The latter were at once notified to have tugs on hand the next day. For some reason they did not show up at the time indicated. The libelant waited for them until about 11 a. m. The business of the ship then called him to the city. At about 11:45, while at the agent's office, he had the claimant again telephoned to send tugs. In view of the stiff southwest breeze which was blowing, he reiterated his wish for three of them, and this time, at least, his desires in this matter were communicated to the tugboat owner.

Somewhere in the neighborhood of half past 1, or perhaps a little later, the respondent tugs came to the ship, and the master of the Britannia went aboard it and told its first officer, then in charge, that he was there to move it. The ship was of 7,500 tons gross register. It was high out of the water, as it had less than one-fourth of its cargo on board. The wind was blowing from 20 to 25 miles an hour, and the ship was to be moved parallel to a lee shore. In view of these conditions, the first officer asked for three tugs. The master of the Britannia testifies no such request was made. I am satisfied that his recollection is at fault. He replied that they were not needed, as he had just moved a somewhat larger vessel with two. All concerned knew that the ship was without her main steam, and must depend upon the tugs for motive power. The master of the Britannia stationed himself on the ship's bridge, and took charge of her navigation. She was lying alongside of the pier, bow in. He intended that the power to move the ship backward out of the slip, and then, after she had been turned, to carry her forward through the water, and to hold her up against the wind while she was on her journey, should be supplied by the Britannia. The work assigned to the Davis was of another kind. After the ship was clear of Pier 7, it was to turn the ship's bow out, and, when the ship had reached the Standard Oil pier, to reverse the process by pushing the bow in.

Accordingly the Britannia was lashed on the starboard quarter of the Helenus. The tug then backed the ship out of the slip. While the Davis had a line to the starboard bow of the Helenus, it practically took no part in this work. When the ship had cleared the pier ends by perhaps 200 or 250 feet, the Davis pushed its nose against the starboard side of the ship's bow, and thereby turned the stem of the Helenus upstream. Some 15 or 20 minutes was occupied in getting the ship out from the pier and in putting her substantially parallel to the pier ends. The witnesses for the claimant say that she was then 250 feet away from the wharves. The wind was blowing her down on them, and the Britannia, lashed to the ship's starboard quarter, could not

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make effective resistance to its force. The master of the Davis says that his tug remained on the starboard bow of the ship until they were off the Baltimore Copper Works, and by that time something more than half of the journey had been completed, an estimate which is confirmed by the harbor charts.[1]

According to the master of the Britannia, the ship was making from 3 to 4 knots an hour. Other witnesses make its speed somewhat less. A ship moving 3 nautical miles an hour covers 300 feet a minute, and 200 feet if it is going only 2 miles an hour. It certainly was not proceeding at a lower rate than 2 miles, so that the time the Davis cast off from the starboard bow to the time of the collision could not have been more than four minutes. Most of the witnesses for both sides make a more liberal estimate as to time, but they are quite certainly mistaken. The importance of this matter will appear later.

The Davis then moved around the stem of the ship and got a line upon the steamship's port bow, taking a position with its own stem towards the ship and at an angle of about 70 degrees to the latter's side. The tug remained in this position for an appreciable time, fixed by its master at five or six minutes. It took him some time to cast off, to go around the bow, to get a heaving line on the ship, then have it bent on the hawser, and to make the latter fast. His testimony shows that, having done all that, he remained on the port bow for what seemed to him a measurable time. It may not have been as much as five or six minutes, as he says. It is very probable it was not, but, from the time when, opposite the Copper Company's Works, he left the starboard bow to the time he cast off the port bow to go back to the ship's quarter, could scarcely have been less than four minutes, and it may have been considerably more, but not more than four minutes could have elapsed between his leaving the starboard bow and the collision.

Under the force of the wind, the ship, so soon as it got out of the slip, began rather rapidly to sag down toward the pier heads. After the Davis had been for some little while on the port bow, the master of the Britannia, in consequence of what he saw himself, and the warnings given him by the ship's company, attempted to prevent the collision by directing the Davis to cast off the port bow of the ship and to get a line on the port quarter, so as to use its power to hold the ship off. He gave the order too late, or the Davis was too slow in obeying. I think the former. In any event, the Davis was not made fast to the ship's port quarter until after the collision. There is a direct conflict of testimony as to why it was not. The master of the Davis and his deck hand say that, before the collision, the latter three times threw a heaving line upon the ship's port quarter before any one on the ship made it fast to the hawser. This assertion is categorically denied by the witnesses from the ship. The facts already stated make it impossible to accept the tug's version. The failure of the claimants to supply a sufficient number of tugs safely, as against the wind then blowing, to

[1] On some of the maps, only the Copper Company's wharf, and not its works, are shown. This wharf is only about 400 feet north of Pier 7; but the works themselves are where the master of the Davis places them, namely, 800 feet or thereabouts from Pier 7.

move the ship in the manner in which the master of the Britannia attempted to move it, was the sole cause of the accident.

It is, of course, possible that he could have prevented the collision by sending the Davis to the ship's port quarter the moment he had her headed up stream; but he did not do it, because, if he had used the Davis in that way, he would not have had her available to turn the ship's bow into the Standard Oil slip, as he had planned to do. What he had undertaken to do, as he had originally made up his mind to do it, would have required three tugs. He says he had them at hand. The ship asked him to use them, and warned him of the danger of not doing so; but, self-confident, as his whole manner showed him to be, he refused, and his tugs must bear the resulting loss. It is true that he is a highly skilled tugboat man, with probably more experience in the moving of ships than has any one else hailing from the port of Baltimore. There is no reason to think that he did not suppose that he was acting according to the best of what he had a right to think, as he certainly did think, was an unusually good judgment indeed, however much it may on this occasion have been subconsciously warped by his desire to show that he could do what others thought dangerous to attempt.

"It is quite true that negligence must be determined upon the facts as they appeared at the time, and not by a judgment from actual consequences which then were not to be apprehended by a prudent and competent man. * * * But it is a mistake to say * * * that if the man on the spot, even an expert, does what his judgment approves, he cannot be found negligent. The standard of conduct, whether left to the jury or laid down by the court, is an external standard, and takes no account of the personal equation of the man concerned. The notion that it 'should be coextensive with the judgment of each individual' was exploded, if it needed exploding, by Chief Justice Tindal in Vaughan v. Menlove, 3 Bing." The Germanic, 196 U. S. 595, 25 Sup. Ct. 318, 49 L. Ed. 610.

The contention of the claimant that the accident was the result of a sudden and unexpected squall, which, in the space of a very few minutes, doubled or nearly doubled the velocity of the wind, is not supported by the facts, and, indeed, is distinctly negatived by the great weight of the testimony.

It follows that the tugs were solely to blame.

UNITED STATES v. CHARLIE DART.

(District Court, N. D. Georgia. April 5, 1918.)

1. ALIENS ⇐32(5)—PROCEEDINGS FOR DEPORTATION OF CHINESE—BURDEN OF PROOF.

Where, in Chinese deportation proceedings, defendant claims to be a natural-born citizen and never to have left the United States, he is entitled to rely on his constitutional right to remain, and the burden is on the government to prove noncitizenship.

2. ALIENS ⇐32(8)—DEPORTATION OF CHINESE—PROOF OF NONCITIZENSHIP.

A person of Chinese descent, claiming to have been born in the United States and to have never been out of this country, which fact is testified

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to by himself and other unimpeached witnesses without contradiction, and where his good character and truthfulness are testified to by white persons of standing, who have known him for years, cannot be ordered deported.

On review of order of commissioner for the deportation of Charlie Dart as a Chinese alien. Reversed.

J. W. Henley and W. Paul Carpenter, Asst. U. S. Attys., both of Atlanta, Ga.

Hugh Howell, of Atlanta, Ga., for defendant.

NEWMAN, District Judge. This is a question as to whether Charlie Dart, a Chinaman, should be deported from the United States; he being charged with violation of the Chinese Exclusion Act (Act May 5, 1892, c. 60, 27 Stat. 25 [Comp. St. 1916, §§ 4315–4323]). This man was taken before Commissioner Cornett, at Athens, Ga., and his finding on the subject is as follows:

"A complaint, verified by the oath of John Worden, a United States official, to wit, an immigration inspector, having been filed before me, the undersigned United States commissioner, charging the said Charlie Dart with a violation of the act of Congress of the United States entitled "An act to prohibit the coming of Chinese persons into the United States," approved May 5, 1892, and of the acts amendatory thereof, and a warrant for the arrest of the said Charlie Dart having been issued by me thereon, and the said Charlie Dart having been duly apprehended upon said warrant and brought before me for hearing at Athens, Ga., upon said charge (the United States attorney for said district having duly designated me as United States commissioner before whom said Charlie Dart should be taken for hearing), and the said Charlie Dart having been duly informed by me of the charge against him and of his right to the aid of counsel, and on the 13th day of July, 1916, the said Charlie Dart being present in person, and also being represented by his attorney, Hugh Howell, Esq., of Atlanta, Ga., and W. Paul Carpenter, Esq., Assistant United States Attorney, appearing for the United States, this cause came on regularly for hearing, and the same having been duly heard and submitted, and due consideration having been thereof had, I do find as follows:

"That the said Charlie Dart was found within the limits of the United States, to wit, at Madison, in the county of Morgan, in the Eastern division of the Northern district of Georgia on the 24th day of June, 1916, and that when he was so found, as aforesaid, he was without the certificate of residence required by the said act and amendments, and he had not clearly established that by reason of accident, sickness, or other unavoidable cause he has been unable to procure the said certificate.

"I do further find that the said Charlie Dart is by race, language, and color a Chinese person, a laborer by occupation, and that the said Charlie Dart has failed to establish by affirmative proof to my satisfaction his lawful right to remain in the United States, and that he has not made it appear to me that he is citizen or subject of any other country than China, and I find and adjudge the said Charlie Dart to be unlawfully within the United States.

"Now, therefore, in consideration of the premises aforesaid, it is ordered, adjudged, and decreed that the said Charlie Dart be deported from the United States to the country from whence he came, to wit, China, and that he, the said Charlie Dart, be hereby committed to the custody of the marshal of the Northern district of Georgia, to carry this order into effect."

This was signed by Commissioner Cornett, at Athens, Ga., with a photograph of Charlie Dart attached.

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The real question in this case is whether Charlie Dart was born in the United States. He claims that he was born in San Francisco, Cal., on Sacramento street, 31 years ago in 1916, making him about 33 years old now, and claims to have remained in San Francisco until he was 11 years old, when he went with his father to Los Angeles, Cal., and stayed in Los Angeles, according to his claim, and his witnesses, 6 or 7 years, and then went with Low Hing, who is a witness for him here, to Chicago. According to the evidence, his father died before he left Los Angeles, and he states where his father was buried, in the Old Mission Cemetery in Los Angeles; and it seems that his mother had left his father when he was a little boy, according to the evidence, and was not with them or with his father when he died. Dart came from Chicago to Montgomery, Ala., and from there, according to the testimony, to La Grange, Ga., and from there to Carrollton, Ga., and then to Madison, Ga., where he was at the time of his arrest, and where he now lives.

It is unnecessary to go very thoroughly into the evidence but he has established clearly, if Chinese testimony is to be believed, that he was a little boy when one of his witnesses, who was a Chinaman, first knew him, and that was on Dupont street, in San Francisco, and he went with him to Los Angeles, and then to Chicago, and afterwards saw him in Montgomery and elsewhere. This man was arrested by Immigration Inspector John K. Worden, in Madison, Ga., on June 24, 1916, by reason of an anonymous letter received by the Immigration Department, stating that Charlie Dart had come into the United States from Mexico 3 years previously. He says that Dart told him, when he arrested him, that he was 26 years old, and that he was born at 837 Dupont street, San Francisco, Cal. He did not know whether he was born there or not, but he took his statements to be false. He said that Dart spoke English very well, and told him that he had been lots of places, but did not name them. This evidence by Mr. Worden was the only testimony offered by the government in the case. It relied upon its contention that Dart held the affirmative in the case, and it was incumbent upon him to satisfy the commissioner, by affirmative evidence, of his right to remain in the United States.

It is incontrovertible that the information given the inspector about Dart having come to this country from Mexico 3 years ago was untrue, for he proved by a number of witnesses, besides his Chinese witnesses, that he had been in this country longer than that. He proved by J. T. Rutland, who testified that he had lived in La Grange all of his life, except 4 years, that he had known Dart in La Grange 6½ years before the hearing before the commissioner, that he was in a laundry near his father's place of business, and then he went to the A. & M. School at Carrollton, and knew Charlie Dart there, and recognized him before the commissioner as the person he had known and known well in La Grange and in Carrollton.

He also proved by D. L. Hearn, of Carrollton, Ga., that he had known Charlie Dart since the first of 1913; knew him in Carrollton, where he was with Charlie Fong in the Ideal Laundry; that Charlie Dart stayed in Carrollton about 2 years, and he saw him every day,

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two or three times a day; that he was engaged in an establishment which furnished the steam for the laundry in which Dart worked. He says he knows his reputation in Carrollton, and that it was good, and that he would believe him on oath. He only knew that Dart came from La Grange to Carrollton from what he told him.

He also proved by J. F. Stovall, the postmaster at Madison, Ga., that Charlie Dart was in the laundry business there, that he knew him, and that "Charlie was one of the best Chinese he ever knew, if not the best; he is a man of good character and reputation; attends to his business."

Harry Loo, a witness for Dart, was shown a letter, and said that he had seen the letter that Mr. Worden, the inspector, had exhibited, and that it was in the handwriting of Sam Long, another Chinaman, who was running a laundry in Dalton at the time of the hearing, and had run a laundry in Bleckley, Ga., at one time, and also at Manchester, Ga., at one time. This testimony, it is claimed by counsel for the defendant, taken in connection with certain testimony that Sam Long was indebted to Charlie Dart, showed that Sam Long had a motive for writing the letter produced by the inspector, and did write this letter.

Low Hing was the main witness for Charlie Dart, and testified that he had known him ever since he was a little boy. He stated where he first met him, and how he knew him, and all about his father's death, and all the circumstances connected with the various trips they took together. This witness was subjected to severe cross-examination, and yet stood by his story. His evidence sounds like the truth, and he is not impeached in any way.

Harry Loo, another Chinaman, who was born in this country, and lives in Atlanta, testified that he had known Charlie Dart over 2 years, and that he knew him while he lived in Carrollton. Loo testified that he was himself born in San Francisco, on Sacramento street, and this street, he says, is about two streets below Washington, and, if I understand it, Dupont street runs across it. The testimony is this:

"I was born in San Francisco, on Sacramento street, which is about two streets down below Washington, crossing Dupont; Sacramento, Clay, and Washington all cross Dupont."

Then he says he is 31 years old, and that he lived at that place 11 years, and that it is in China Town; thus locating, as I understand it (outside of his knowledge of Dart for the 2 years previously), the fact that Dupont street was near where he had lived and was in China Town.

[1] The real question which will dispose of this case is whether or not the defendant, Dart, holds the affirmative here, and must himself show to the satisfaction of the court, or the commissioner before whom he is heard, that he was born in this country and not subject to deportation. This question has been before the courts several times and the decisions are not entirely reconcilable. The Circuit Court of Appeals for this circuit had the question before it in the case of Gee Cue Beng v. United States, 184 Fed. 383, 106 C. C. A. 493, and the court there held that, where a Chinaman claimed to have been born in this country,

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section 3 of the act of Congress of May 5, 1892 (27 Stat. 25), did not apply. That provision is as follows:

"That any Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended shall be adjudged to be unlawfully within the United States unless such person shall establish, by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States."

It was held as follows:

"Where in Chinese deportation proceedings defendant claims to be a natural-born citizen, never to have left the United States, he was entitled to rely on his constitutional right to remain, and the burden was on the government to prove noncitizenship."

The court then cites the decision of the Circuit Court of Appeals for the Seventh Circuit, in Moy Suey v. United States, 147 Fed. 697, 78 C. C. A. 85, and quotes from it as follows:

"But the government claims that, under section 3 of the deportation act, any Chinese person or person of Chinese descent shall be adjudged to be unlawfully within the United States, unless such person shall establish 'by affirmative proof, to the satisfaction of the judge or commissioner his lawful right to remain in the United States,' and that this provision in some way nullifies the weight that would otherwise be given to the evidence referred to. Unquestionably Congress has power to exclude from our shores aliens of any birth, including the Chinese, and, having that power, has the power also to prescribe the conditions on which such exclusion shall be exercised. That the conditions prescribed may be hard would in a judicial inquiry be of no moment, for under such circumstances the question is not one of constitutional right, but of national policy. Fong Yue Ting v. U. S., 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905; Japanese Immigrant Case, 189 U. S. 86, 23 Sup. Ct. 611, 47 L. Ed. 721. But when a person physically and politically present in the United States at the time he is arrested for deportation claims that he is an American-born citizen, and resists deportation on the basis of his rights of citizenship, the case is an entirely different one. Nativity gives citizenship, and is a right under the Constitution. It is a right that Congress would be without constitutional power to curtail or give away. It is a right to be adjudicated in the courts in the usual and ordinary way of adjudicating constitutional rights. No rule of evidence may fritter it away. When such right is in court asking for the protection of the law, no question of public policy can affect it. The citizen deported is banished, and banishment is a punishment that can follow only a judicial determination in due process of law. Black's Law Dictionary; 4 Blackstone Commentaries, 377. True, it was held in United States v. Sing Tuck, 194 U. S. 161, 24 Sup. Ct. 621, 48 L. Ed. 917, that a person asserting his right to enter the country on the ground that he is a citizen is not entitled to a writ of habeas corpus in the absence of an appeal to the Secretary of the Treasury from the order of the Inspector denying his entry; and subsequently (United States v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040) that even after such appeal to the Secretary of the Treasury, and a denial of his right to enter, a person whose right to enter the United States is questioned under the immigration law may not obtain entry by writ of habeas corpus, even though the right claimed is in virtue of American citizenship; a very vigorous dissenting opinion by Justices Brewer and Peckham having been filed in the latter case. These cases proceed upon the principle that the person applying for the writ is not within the United States, but is seeking to enter or re-enter, and that, as against such right of entry or re-entry, the government constitutionally may make the political department the final judges. But there is a fundamental distinction between the case of a citizen of the country who has left the country and is asking to re-enter it and a citizen of the country who has never left

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it, but whom the government is asking to deport; and while it is true now that the Supreme Court has so decided that the political power of the government may say whether a citizen of the country who has gone away shall be allowed to return or not, it seems to us incontrovertible that a citizen of the country, who has not gone out, may not be deported or banished until the right of government to deport or banish has been judicially determined. And, approached from this point of view, the case made out by appellant entitles him to a reversal of the order of the District Court."

In the opinion the court also refers to Pang Sho Yin v. United States, 154 Fed. 660, 83 C. C. A. 484.

In the case of Moy Suey v. United States, supra, the first headnote is as follows:

"A resident of the United States claiming to be a native-born citizen, although of the Chinese race, may not be deported or banished until the right of the government to deport or banish has been judicially determined in accordance with the usual and ordinary rules of evidence."

The language of the court, in the opinion by Circuit Judge Grosscup, is given above in the quotation by the Circuit Court of Appeals for this circuit.

Counsel for the government here, in a well-prepared brief, cites a number of authorities which are not in entire accord with the decisions to which I have referred; but inasmuch as the decision in the Gee Cue Beng Case is by the Circuit Court of Appeals for this circuit, and was rendered after all of the decisions cited on behalf of the government had been rendered, I am disposed to follow it, especially as it is supported by the decisions of other able Circuit Courts of Appeal.

[2] I had this same question before me in the case of United States v. Jhu Why (D. C.) 175 Fed. 630, and I quoted then from the Moy Suey Case, supra, as well as from the Case of Pang Cho Yin, and I held that:

"A person of Chinese descent, claiming to have been born in the United States and to have never been out of this country, where he and other unimpeached witnesses testify to such fact without contradiction, and his good character and truthfulness are testified to by white persons of standing who have known him for years, cannot be ordered deported solely on testimony tending to show that he made false statements to an inspector, which is denied."

I am perfectly satisfied that the inspector was wrongly informed to the effect that Dart had come, 3 years before he was arrested, from Mexico. His English and his appearance controvert that very clearly, as well as the evidence to which I have referred, showing unquestionably that he has been in the United States longer than that.

I am satisfied, from the authorities I have cited, that the government is wrong in its contention that this man, in a case like this, where he claims to have been born in the United States, must show, by affirmative evidence, his right to remain. And even if it were correct in that, with the evidence in the case before me, I should be unwilling to make an order for his deportation.

Being of the opinion, and I so find under the evidence which has been submitted in this case, that Charlie Dart is not subject to deporta-

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tion, the action of the commissioner ordering his deportation is reversed, and it is further ordered that he be discharged, and the case against him dismissed.

UNITED STATES, to Use of YARNALL, v. SOUTHERN DREDGING CO. et al.

(District Court, D. Delaware. May 14, 1918.)

No. 1.

1. PLEADING ⇐36(2)—SWORN STATEMENT—CONCLUSIVENESS.
An erroneous statement in the return of process cannot prevail against the sworn statement in the petition that defendant surety company is a corporation of Oklahoma, which statement is conclusive on the point against plaintiff.

2. COURTS ⇐344—FEDERAL COURT—SERVICE OF PROCESS—SURETY ON BOND OF CONTRACTOR FOR PUBLIC WORKS—STATUTES.
Under Act Cong. Aug. 13, 1894, § 2, as amended by Act Cong. Feb. 24, 1905 (Comp. St. 1916, § 6923), for protection of persons furnishing materials and labor for public works, service upon surety company, doing business under act beyond state or territory of incorporation, through clerk of District Court, being manifestly personal, there must be personal service upon resident agent of such company; Rev. St. § 914 (Comp. St. 1916, § 1537), having no application.

3. ACTION ⇐35—STATUTE CREATING NEW RIGHT—ENFORCEMENT.
Where a new right is created by statute, unknown to the common law, and the mode in which it may be enforced is specifically provided, the prescribed mode measures the extent of the power, and the right can be enforced in no other manner.

4. PROCESS ⇐158—DEFECT IN RETURN OF SERVICE—MOTION TO QUASH.
Defect in the return of service of process appearing on the face of the record is properly the subject of a motion to quash, and need not be taken up under a plea of abatement.

5. JUDGMENT ⇐17(1)—ABSENCE OF SERVICE OF PROCESS—LACK OF JURISDICTION.
Without valid service of process upon defendant, in the absence of its voluntary appearance, there can be no recovery.

At Law. Action by the United States, to the use of Robert W. Yarnall, against the Southern Dredging Company and the Southwestern Surety Insurance Company. On defendant surety's motion to quash return of service upon it. Motion granted.

Richard S. Rodney, of Wilmington, Del., for plaintiff.

Thomas M. Fields, of Washington, D. C., for defendant Southwestern Surety Ins. Co.

BRADFORD, District Judge. This is an action brought under the act of Congress of February 24, 1905, (33 Stat. 811, c. 778 [Comp. St. 1916, § 6923]), amendatory of the act of Congress of August 13, 1894 (28 Stat. 278, c. 280), entitled "An act for the protection of persons furnishing materials and labor for the construction of public works." It appears from the petition or statement of claim of the use-plaintiff that the defendant, Southern Dredging Company, the principal in the bond, is a corporation of Alabama, and the Southwestern

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Surety Insurance Company, surety therein, a corporation of Oklahoma, the latter corporation being hereinafter referred to as the surety company. In the process issued in the proceedings the two defendant corporations are referred to as of Alabama and Oklahoma respectively, as specified in the petition. September 11, 1917, the marshal made return of the process as follows:

"District of Delaware, ss:

"I hereby certify and return that at Dover, in said district on the tenth day of August, A. D. 1917, I served the within Summons upon the within named defendant Southwestern Surety Insurance Company, a corporation of the State of Delaware, by leaving a true copy thereof at the dwelling house or usual place of abode of Alexander M. Daly, resident agent in charge of the principal office of the said corporation, defendant, in the state of Delaware, in the presence of Mrs. Alexander M. Daly, an adult person; the President of said Company, residing outside the State of Delaware. And I further certify and return that after diligent search in my district I have been unable to find the within named defendant, Southern Dredging Company."

[1] An error in fact appears in the return as tested by the petition and process in the statement that the surety company is a corporation of Delaware. This erroneous statement cannot prevail against the sworn statement in the petition that that company is a corporation of Oklahoma, which sworn statement is conclusive on this point as against the use-plaintiff. No process having been served upon the principal in the bond the only defendant to be considered is the surety company. Its counsel having, pursuant to leave, entered a special appearance for it, has moved that the return of service made by the marshal be quashed, and has also submitted several other motions which I deem it unnecessary to discuss.

[2, 3] Section 2 of the above-mentioned act of August 13, 1894, (28 Stat. 279, c. 282 [Comp. St. 1916, § 3294]), provides with respect to surety companies as follows:

"No such company shall do business under the provisions of this act beyond the limits of the state or territory under whose laws it was incorporated and in which its principal office is located, * * * until it shall by written power of attorney appoint some person residing within the jurisdiction of the court for the judicial district wherein such suretyship is to be undertaken, who shall be a citizen of the state, * * * wherein such court is held, as its agent, upon whom may be served all lawful process against such company, and who shall be authorized to enter an appearance in its behalf. A copy of such power of attorney, duly certified and authenticated, shall be filed with the clerk of the district court of the United States for such district at each place where a term of such court is or may be held, which copy, or a certified copy thereof, shall be legal evidence in all controversies arising under this act. If any such agent shall be removed, resign, or die, become insane, or otherwise incapable of acting, it shall be the duty of such company to appoint another agent in his place as hereinbefore prescribed, and until such appointment shall have been made, or during the absence of any agent of such company from such district, service of process may be upon the clerk of the court wherein such suit is brought, with like effect as upon an agent appointed by the company."

The act of congress contemplates the service of process upon the agent, or if that be impracticable, upon the clerk of the district court. As the service upon the clerk of the court is manifestly a personal service, so in the absence of any provision for substituted service it

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must be a personal service upon the resident agent. I know of no principle or authority to justify the contention that service may be made in any other manner than personally on the resident agent or the clerk of the court. Section 914 of the United States revised statutes (Comp. St. 1916, § 1537) has no application to the case, as it relates to conformity in practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, to the practice, pleadings and forms and modes of proceeding existing at the time "in like causes" in the courts of record of the State. There is and can be no like cause in the state courts, for the action here is one within the exclusive jurisdiction of the federal court, and is a new and wholly statutory procedure. Congress in providing for the giving of bond under the act with "the additional obligation," and for the rights to be enjoyed thereunder by persons furnishing materials and labor for the construction or repair of public works, and for the manner in which those rights should be enforced, created a new statutory cause of action and a new statutory remedy for its enforcement. Where a new right is created by statute, unknown to the common law, and the mode in which it may be enforced is specifically provided, the prescribed mode measures the extent of the power, and the right can be enforced in no other manner. Sutherland on Stat. Const. § 399. So, the same writer says (§ 454):

"When a statute is passed authorizing a proceeding which was not allowed by the general law before, and directing the mode in which an act shall be done, the mode pointed out must be strictly pursued."

Under the act of congress in question process "may" be served upon the resident agent of a foreign surety corporation, or upon the clerk of the district court. But while this provision is permissive in form it is mandatory, if the statutory remedy is to be enforced. To secure such enforcement process must be so served. And service in this connection means personal service, there being no statutory or other authority for a resort to substituted service.

The return of the marshal in connection with the petition and process shows that the Southwestern Surety Insurance Company, a corporation of Oklahoma, was the company sought to be served, for the "Southwestern Surety Insurance Company, a corporation of the State of Delaware," is referred to as "the within named defendant." If, however, it should be assumed that the corporation mentioned in the return is not a defendant in this case the attempted substituted service could by no possibility have any force or effect.

[4] It is urged that whatever defect there may be in the return of service cannot be taken advantage of by a motion to quash, but only under a plea in abatement. But this contention cannot be sustained; for here the defect appears upon the face of the record, and, therefore, is properly the subject of a motion to quash.

[5] In view of the conclusions reached it is unnecessary to discuss the other motions submitted in behalf of the surety company; for without valid service of process upon that company and in the absence of its voluntary appearance the right of the use-plaintiff and of the

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intervenors to recover in this suit is necessarily defeated. For the reasons given the motion to quash the return of service of process must be granted.

Ex parte HOR YUK SANG.

(District Court, D. Massachusetts. February 11, 1918.)

No. 1606.

1. ALIENS ⟸32(8)—CHINESE PERSONS—DEPORTATION—CERTIFICATE.
Where a Chinese person was admitted into the United States as a merchant, receiving a certificate from the immigration authorities in accordance with Chinese Exclusion Act May 6, 1882, § 6, as amended by Act July 5, 1884 (Comp. St. 1916, § 4293), the certificate, being issued under a statute made pursuant to a treaty cannot be set aside, and deportation ordered, without substantial evidence to overcome its effect.

2. ALIENS ⟸32(9)—CHINESE PERSONS—EXCLUSION—EVIDENCE.
Whether there is any substantial evidence warranting the immigration authorities in setting aside a certificate and deporting a Chinese person, admitted as a merchant under a certificate issued in accordance with Chinese Exclusion Act May 6, 1882, § 6, as amended by Act July 5, 1884 (Comp. St. 1916, § 4293), is for the courts to determine.

3. HABEAS CORPUS ⟸85(1)—CHINESE PERSONS—FRAUDULENT ADMISSION—EVIDENCE.
On habeas corpus to review an order of deportation against a Chinese person, admitted as a merchant under certificate issued pursuant to Chinese Exclusion Act May 6, 1882, § 6, as amended by Act July 5, 1884 (Comp. St. 1916, § 4293), evidence *held* insufficient to sustain a finding that the admission was secured through fraud, though such Chinese person was found laboring in a laundry some five months after entrance in the United States.

4. ALIENS ⟸23(2)—CHINESE PERSON—MERCHANT STATUS.
Where a Chinese person, admitted into the United States as a merchant, was a member of the merchant class at that time, the fact that he later may become a laborer does not destroy his right to remain.

Petition by Hor Yuk Sang for writ of habeas corpus to the Commissioner of Immigration of the Port of Boston. Petitioner ordered discharged.

William C. Prout, of Boston, Mass., for petitioner.

MORTON, District Judge. Habeas corpus to the commissioner of immigration at the port of Boston. The writ issued, and the case was heard on the question whether the petitioner is entitled to be discharged from custody. The only evidence was a transcript of the deportation proceedings against him in the Immigration Department.

The facts are not seriously in dispute, and are as follows: The petitioner is a Chinese person, who was admitted into this country at the port of New York on March 5, 1917. He then claimed to be a member of the merchant class, and he presented the official papers necessary to entitle him to admission as such. He received from the immigration authorities a certificate in accordance with the provisions of section 6 of the Chinese Act of 1882, as amended. Act May 6, 1882, c. 126, § 6, 22 Stat. 58, 60, as amended by Act July 5, 1884, c.

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220 (Comp. St. 1916, § 4293). On the 4th day of August following, he was found by a United States immigration inspector working in a Chinese laundry in Providence, R. I. A complaint was made against him under section 19 of the new Immigration Act (Act Feb. 5, 1917, c. 29, 39 Stat. 889) as being an alien unlawfully in the United States, and a warrant was issued by the Secretary of Labor for his arrest, under which he was taken into custody about a month later. He was accorded a hearing by the immigration authorities, which, in its formal aspects, was admittedly fair. The Secretary of Labor found that the petitioner, at the time of his admission, was a laborer, not a merchant, and that the certificate under section 6 had been obtained by fraud. He directed that the certificate be canceled and ordered that the petitioner be deported.

Only two questions have been argued by the petitioner under the present petition: (1) That there was no evidence justifying the cancellation of the certificate or the order of deportation; and (2) that the Secretary acted under an erroneous view of the law.

[1-3] As to (1): The petitioner's story as a whole was coherent and probable, and nothing was suggested in argument as throwing doubt upon his claim to have been properly admitted, except the facts that, within five months after his entry into this country, he was doing laborer's work; that, if his story was true, he had money enough so that it would not have been necessary for him to do such work: and that his certificate from the counsel in Mexico stated that he had been a merchant there for three years, while he himself testified that he had been a merchant there for seven years.

The alleged discrepancy between the petitioner's testimony and the certificate amounts to nothing, because, according to statements of counsel, the certificate itself not being in evidence, it does not purport to state the actual length of time during which the petitioner had been engaged in business in Mexico, but only the length of time during which he had been so engaged to the knowledge of the certifying officer. As to the alleged improbability of the petitioner's testimony concerning the amount of his property, he certainly exhibited $1,200 in a draft and cash to the New York officials. The reason which he gave on his examination in the deportation proceedings for not immediately engaging in mercantile business here, viz. the impossibility of getting goods from China at the present time, is certainly not improbable, and can hardly be considered plainly false on its face. The petitioner was not obliged to remain idle; he had the right to engage in labor to support himself, if he desired to do so. I do not see that the facts as to the petitioner's financial situation and his testimony relating thereto afford any reasonable inference that he entered the country fraudulently.

There remains, then, only the question as to how far the single fact that, five months after his entry into this country as a merchant, the petitioner was found doing manual labor, without any other evidence whatever against him, justifies the inference that his original statements and his present testimony are false, and that the certificate based on his original testimony was fraudulently obtained. The certificate does not have the force and effect of a judgment, but, being

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issued under a statute of the United States made in pursuance of a treaty entered into by this country with a foreign power, it is not to be set aside and disregarded without substantial evidence. Liu Hop Fong v. United States, 209 U. S. 453, 28 Sup. Ct. 576, 52 L. Ed. 888.

Whether there was such evidence is for the courts to determine.

"It is settled by numerous decisions that the courts may supervise the action of the executive authorities in these matters, and reverse their ruling when there is no evidence to sustain them." Boyd, J., in Wong Yee Toon v. Stump, 233 F. 194, 198, 147 C. C. A. 200 (C. C. A. 4th Cir.).

"The next question is whether there was evidence to fairly sustain the finding of the Secretary of Commerce and Labor," etc. Pitney, J., in Lewis v. Frick, 233 U. S. 291, 297, 34 Sup. Ct. 488, 491, 58 L. Ed. 967.

"When a Chinaman of an exempt class enters this country, intending to remain, he is not indulging a mere privilege accorded him by us, but he is exercising a right which is guaranteed to him by international treaty and the laws of the United States. He cannot be divested of this right upon a charge of fraud, unsustained by competent and relevant evidence." Boyd, J., in Wong Yee Toon v. Stump, supra.

The case of Lui Hip Chin v. Plummer, 238 Fed. 763, 151 C. C. A. 613 (C. C. A. 9th Cir.), is very similar to the present one. There, as here, the petitioner was admitted as a member of the merchant class. Four months later he was found doing manual labor. On those facts, the immigration tribunals ordered him deported. It was held on habeas corpus proceedings that the evidence did not warrant such action, and that the petitioner was entitled to be discharged.

In this case the petitioner had been longer in the country than Lui Hip Chin, and at a time when conditions were likely to prevent him from engaging in the business of a Chinese merchant. Under all the circumstances, it does not seem to me that the fact that the petitioner, five months after his admission, engaged in manual labor, affords any reasonable proof that he was not a merchant when he entered the country, nor any sufficient ground for canceling and setting aside, as fraudulently obtained, the certificate made after such investigation as was deemed necessary at the time of entry, and in pursuance of our treaty obligations.

[4] As to (2): It is possible that the immigration authorities may have been under the impression that, even though the petitioner was a member of the merchant class at the time of his admission, and therefore entitled to enter the country, he would lose the right to remain here if he subsequently became a laborer, which is not the law.[1] But it is unnecessary to determine whether such error is established with sufficient certainty to warrant this court in interfering with the action of the immigration tribunals on this ground.

I find and rule that the cancellation of the certificate and the order of deportation were unsupported by any sufficient evidence. It does not seem to me that the practice established in the Petkos Case, 214 Fed. 978, 131 C. C. A. 274, applies to a proceeding of this character. The petitioner is entitled to be discharged from custody.

So ordered.

[1] See Lui Hip Chin, 238 Fed. 763, 151 C. C. A. 613; United States v. Fong Hong (D. C.) 237 Fed. 168; Ex parte Lam Pui (D. C.) 217 Fed. 456; In re Yew Bing Hi (D. C.) 128 Fed. 319.

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BAKER & BENNETT CO. v. JOHN C. DETTRA & CO., Inc.

(District Court, E. D. Pennsylvania. June 6, 1918.)

No. 1813.

1. INJUNCTION ⟸137(4)—PRELIMINARY INJUNCTION—CONTEST OF FACTS.
In cases wherein the facts are contested, the courts will not grant relief by preliminary injunction, but will await action until the time for final decree.

2. INJUNCTION ⟸136(2)—PRELIMINARY INJUNCTION—TRADE DISPUTE.
Where plaintiff company sold toys manufactured by defendant company, securing customers and aiding in building up a joint business, after defendant has terminated the relation, and pending final decree in plaintiff's suit, the latter is entitled to preliminary injunction restraining further interference by defendant with its trade through threats of litigation for infringement of patent rights.

In Equity. Suit by the Baker & Bennett Company against John C. Dettra & Co., Incorporated. On motion for preliminary injunction. Writ to issue on condition.

J. Bonsall Taylor and E. Hayward Fairbanks, both of Philadelphia, Pa., and T. Hart Anderson, of New York City, for plaintiff.

Owen J. Roberts, of Philadelphia, Pa., and John M. Dettra, of Norristown, Pa., for defendant.

DICKINSON, District Judge. The fact situation in this case, as stated by the respective parties, presents a sharp contrast. From the viewpoint of the plaintiff, the defendant was its manufacturing agent, and, having quit its employment, is seeking to possess itself of the property if its employer, by appropriating to itself the business which the employer has heretofore done through it. From the standpoint of the defendant, the plaintiff, who was the defendant's selling agent, upon the termination of the employment, is seeking to appropriate the business of the defendant. It is clear that the rights, legal and equitable, of the parties, cannot be determined until the fact situation has been fully developed and the true state of the facts is known. There is the further possibility that the relation of employer and employé did not exist, and that neither was the one or the other, but that the parties were engaged in something in the nature of a joint venture.

[1] The respective positions of the parties, thus sharply contrasted, are advanced and defended with equal vigor. The rule applied by the courts in cases in which the facts are thus hotly contested is itself not open to controversy. It is that the courts will await action until the time for final decree. Under the peculiar situation which develops out of the facts in this case, so far as they are not in dispute, the application of this rule might, however, work an injustice which need not be done.

[2] One of the facts which is not in dispute is that the defendant has in the past been a dealer in flags, with a good firm grip upon the market. Another undisputed fact is that the plaintiff was a large dealer in toys and games, with the market in which it was in firm touch.

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The plaintiff was not a manufacturer, but had the things in which it dealt made for it by others. The plaintiff sold flags for the defendant.

The defendant took to the plaintiff the suggestion of the making of a toy golf club to be added to the list of toys in which the plaintiff dealt. The suggestion, as made by the defendant, was rejected by the plaintiff; but there was finally substituted for it a toy golf bag, with a set of toy golf clubs. To this there was afterwards added battleships, and one or two varieties of games. Out of this grew the business of manufacturing by the defendant of the things thus dealt in and their sale by the plaintiff. The relations of the parties were evidenced by annual contracts and by their course of dealings. The form in which the thing should be manufactured, and the little touches which were thought to make them more marketable, were adopted after conferences and consultations between the parties. This included the character of the packages in which the articles were sold and the labels used. Some of them were sold under the trade-mark of the plaintiff and some without it. The customers were found by the plaintiff, but the goods were shipped by the defendant to the buyers.

Some of the things made were thought to be patentable, and one of the things made and sold was found to have been patented by a third party. With respect to the latter, the right to make and to vend was secured through a license, which was fixed by the patentee at a small sum. For one of the other articles manufactured a patent application was filed, and the patent allowed by the Patent Office, but no patent was ever actually taken out. For another of the articles a patent was applied for, and the application is still pending. The volume of the business grew under the joint efforts of the parties, until their relations were severed by the defendant. This severance was followed by notice given to the trade that the defendant would thereafter sell on its own account what it had theretofore been selling through the plaintiff on commission. This was accompanied by notice that some of the things sold were protected by patents, and a warning that actions would be brought for infringement. The notice was interpreted by the trade as meaning that none could thereafter deal in the articles which the defendant had been manufacturing without incurring the risk of litigation. The notice was in such form as to arouse fear of litigation, and because of this to deter buyers who had theretofore dealt with the plaintiff. To permit the defendant to reap the benefit of the situation thus created is the injustice to which we have referred, so far as the threat of litigation operated. It would leave the defendant in the possession of the whole field until final decree in the present proceedings, and by that time the trade which may possibly be determined to belong to the plaintiff may be wholly lost to it.

The plaintiff recognizes the right of the defendant to manufacture and to sell the things which had before been the subject of the dealings between the parties, but denies the right of the defendant to appropriate the trade which has been built up through the efforts of the plaintiff, by palming off the things sold as the toys and games known as the toys and games of the plaintiff. The plaintiff, therefore, asks for the allowance of a writ of injunction, which shall restrain the defendant

from selling toys and games which are in deceptive imitation of those known to the trade as the toys and games sold by the plaintiff, reserving, however, to the defendant the right to sell such toys and games in likeness to those heretofore sold by the plaintiff, in so far as the likeness pertains to those features which are functional or otherwise essential to the things sold; the prohibition of the right being limited to those features which are in no wise functional, but merely descriptive of the things in which the plaintiff has dealt.

The allowance of an injunction is further asked restraining the defendant from alarming customers of the plaintiff through threats of litigation. The right to an injunction containing the latter feature is based upon two propositions. One is that any patent rights which may be involved belong as much to the plaintiff as to the defendant, although the legal title is in the name of an officer of the defendant company. The other is that, although the right of a patentee to give notice warning against infringements is conceded, the right is limited to a bona fide assertion of the patent right, and may not be used merely as a device to corral or control trade through a threat of litigation not made in good faith. So far as the notice may have had a good-faith motive and purpose, this has been accomplished by the notice already given, and any repetition of notice in the face of the plaintiff's challenge of defendant's patent rights could not be held to be in good faith. The position of the plaintiff in this respect is further buttressed by the averment that the statement of fact made in the notice is false in the respect that it expresses the thought that patents have been actually issued, when in point of fact they have not.

Our conclusion is that the determination of the question of the right of the plaintiff to an injunction against the defendant restraining it from dealing in what it has heretofore made and dealt in must, for the reason already indicated, be deferred until final decree. We think, however, that the plaintiff is entitled to protection at this time from any further interference by the defendant with its trade through threats of litigation, and we allow a writ of injunction, restraining the defendant, until the further order of the court, from giving any further notice to prospective purchasers for the plaintiff, warning them of any danger of litigation through buying of the plaintiff, or threatening them with suits or actions in case they so buy. The writ is to issue upon condition that the plaintiff make no advertising use of this decree, and that it executes and gives to the defendant a bond, with approved surety, in the penal sum of $1,000, with the form of condition usually given upon the allowance of writs of injunction and as is required by law.

A formal decree in conformity herewith may be submitted.

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In re MOOSE RIVER LUMBER CO.

(District Court, N. D. New York. May 27, 1918.)

1. DEEDS ⊂=111—CONSTRUCTION—EFFECT.
Where, to clear up the bankrupt's title, petitioner and her sister conveyed all their right, title, and interest to certain property, such conveyances, having been based on a valuable consideration, would carry with them any leasehold rights which petitioner might have in the land.

2. BANKRUPTCY ⊂=151—TRUSTEE—SALES BY.
A trustee in bankruptcy takes the right, title, and interest of the bankrupt in both real and personal property, and he cannot, by selling the property in which he asserted the bankrupt had an interest, convey a greater right than the bankrupt had.

3. BANKRUPTCY ⊂=288(1)—CONTROVERSIES—SUMMARY PROCEEDINGS.
Where petitioner claimed a leasehold in lands and to own structures thereon, and an adjudication of her title would require other parties to be brought in, her summary petition to restrain the trustee from selling such lands, etc., as those of the bankrupt, cannot be granted, but that question should be left for determination in a plenary action, for petitioner might forbid the sale and notify purchasers of her interest, and such purchasers could acquire no greater rights than the bankrupt had.

In Bankruptcy. In the matter of the bankruptcy of the Moose River Lumber Company. Application by Gertrude A. T. Dix for an order restraining John P. Cloonan, as trustee, from selling certain camp buildings, etc. Application denied.

This is an application by Gertrude A. T. Dix for an order restraining John P. Cloonan, as trustee in bankruptcy, from selling "four camp buildings and outbuildings, known as the Dix camps." Other property including the timber rights on several hundred acres of land is also advertised for sale. Mrs. Dix claims that these camp buildings belong to her individually and that the trustee in bankruptcy has no right or interest therein. The trustee, on the other hand, claims that he has an interest therein which it is his duty to sell in closing out the estate.

Wm. H. Sullivan, of Norwich, N. Y., for petitioner.
H. D. Hinman, of Binghamton, N. Y., for trustee.

RAY, District Judge. This bankruptcy proceeding has been pending about two years or more. The camps spoken of, consisting of buildings, are in the Adirondack region near McKeevor, Herkimer county, N. Y. Mrs. Dix does not claim to be the owner of the fee on which these buildings are located, but does claim that in 1911 she was given a lease of the premises for the term of 25 years by the Iroquois Pulp & Paper Company, and that such lease is in full force. It is claimed that the lease was executed in duplicate, and one given to Mrs. Dix and the other to the Iroquois Company and that the one given Mrs. Dix has been lost. It is not shown that search for the other has been made. The Iroquois Company is not in bankruptcy.

[1] Ex-Gov. John A. Dix, the husband of the petitioner, was president of the Moose River Lumber Company and an officer of the Iroquois Pulp & Paper Company. He testifies that these camps refer-

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red to are not within the boundaries of and located on certain lands recently deeded by Mrs. Dix and her sister to the Moose River Lumber Company to clear up title. If these camps or camp buildings spoken of are on such lands, it would seem clear that Mrs. Dix has transferred and surrendered all her right, title, and interest therein to the Moose River Lumber Company under the deeds referred to, and which were given for a valuable consideration to clear up title. If such camps are not on such lands, then the title and right of Mrs. Dix to such camps are not affected by such deeds. The trustee in bankruptcy of the Moose River Lumber Company claims that these camp buildings are on the property so deeded.

[2, 3] These premises referred to were conveyed by Mrs. Dix and her sister many years ago, it is claimed, to the Moose River Lumber Company, and by that company to the Iroquois Pulp & Paper Company, reserving timber rights in the Moose River Lumber Company, and which timber rights it is now proposed to sell. The Iroquois Company is not a party to this proceeding, and it is impossible to make an adjudication, even if it could be made in such a proceeding as this, as between that company and Mrs. Dix, as to the existence or nonexistence of the lease claimed.

If the lease was executed and delivered as claimed by Mrs. Dix, and if the camps referred to are not on the lands recently conveyed by the deeds referred to, then Mrs. Dix has a right to the use and occupation of these camp buildings for the balance of the term of 25 years. She claims to have expended large sums of money in the erection, etc., of these camp buildings, and to have kept them in repair to an extent, and to have occupied them from time to time, and claims that her occupation has been exclusive as to the buildings; that is, that no one else has occupied them.

It is well settled that a trustee in bankruptcy takes the right, title, and interest of the bankrupt in both real and personal property, and that he, as trustee, has no other or greater right than the bankrupt had. It follows in this case that John P. Cloonan, as trustee, has no other, further, or greater right in these camps or camp buildings than the Moose River Lumber Company had and now has under the deeds referred to, and that he cannot sell any interest in these camps or these camp buildings that the Moose River Lumber Company did not own at the time of the bankruptcy. The subsequent deeds referred to were to clear and settle the title.

The notice of sale given by the trustee under the direction of the referee in bankruptcy only offers and proposes to sell "to the highest bidder or bidders his right, title and interest as such trustee in and to," etc. If the trustee has no right, title, and interest in these camps or camp buildings, he will not sell and will not be able to convey, even if he purports so to do, any interest, right, or title in these camps or camp buildings, and the rights of Mrs. Dix will be unaffected by such sale. The right, title, and interest, if any, of the trustee in bankruptcy is subject and subordinate to those alleged by Mrs. Dix, and if he sells and has any interest, that interest in the hands of a purchaser will be subject and subordinate to the interest of Mrs. Dix, unless she has

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surrendered or conveyed her interest in these buildings in and by the deeds referred to, to the Moose River Lumber Company.

At this time I do not think this court can settle or determine these questions in this summary proceeding between Mrs. Dix, the petitioner, the trustee in bankruptcy, and the Iroquois Company. Whoever purchases at this sale will purchase at his or her peril, notice being given at the sale of her claim, and in an appropriate action Mrs. Dix will be able to assert and prove and establish her claim to these camps, whatever it is, and the sale of his interest therein, whatever it is, by the trustee in bankruptcy, will not affect her rights in any way or manner. The sale proposed, if made, will simply transfer to the purchaser, if there be one, such rights as the Moose River Lumber Company had, and no more, and they will remain subject to the prior and superior rights and interests of Mrs. Dix, if any. Mrs. Dix can take care to attend the sale and forbid same, and give notice of her rights and ownership under the lease. She can take and hold possession, and defend in an ejectment action. This will afford her full protection, and enable her to assert, prove, and maintain her rights against any purchaser. The buyer will purchase with full notice of her claim, and must be prepared to assert or defend his title against her claims.

So long as the trustee makes a claim of interest in these camps or buildings, he has the right and it is his duty to sell same and clean up the estate; but neither he nor the court can give any warranty or assurance to the purchaser that he or she will obtain title thereto as against Mrs. Dix. To repeat: The purchaser at this sale will take such interest, and such interest only, as the trustee in bankruptcy had, or has subsequently acquired, to the property in question. This court ought not to interfere with the proposed sale, as it would operate merely to postpone the sale and embarrass the trustee in closing up the estate.

This question of title to real estate, or to an interest in real estate, ought not to be settled, and I think cannot be settled, in such a proceeding as this. The parties must resort to a plenary action to settle this question of title. It affects and involves an interest in real estate, whether it be in fee or for a term of years under a lease. It must not be understood that this court is deciding that either the trustee in bankruptcy or Mrs. Dix has any title whatever in these camps or buildings, or that the one has title as against the other.

Motion for a restraining order denied.

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THE HELEN FAIRLAMB.

(District Court, E. D. Pennsylvania. May 15, 1918.)

No. 19.

1. SEAMEN ⊂=24—WAGES—UNCOMPLETED VOYAGE.
When seamen are to be paid for the voyage, generally speaking, nothing is earned, unless the voyage is completed.

2. SEAMEN ⊂=19—WAGES—UNCOMPLETED VOYAGE.
When a voyage is interrupted by perils of the sea, so that it cannot be completed, seamen hired for the voyage are entitled to discharge, and if their services rendered have been of benefit to the vessel they are entitled to pay on an equitable basis, otherwise to no wages.

3. SEAMEN ⊂=26—WAGES—DELAYED VOYAGE—EVIDENCE.
Libelants, who signed for a trip for a cargo of sand, but remained with the vessel while she was frozen in, *held*, on the evidence, to have stayed under an agreement with the master that they should be paid, and entitled to recover on a quantum meruit.

In Admiralty. Suit by Jesse Miller and others against the schooner Helen Fairlamb. Decree for libelants.

J. Lawrence Wetherill, of Philadelphia, Pa., for libelants.
J. Frank Staley, of Philadelphia, Pa., for respondent.

DICKINSON, District Judge. This proceeding is for the enforcement of payment of wages due to seamen, and has received the sanction of a United States commissioner, to be disposed of upon summary hearing before the court. The principles of law involved have been discussed and settled in the cases of Thorson v. Peterson (D. C.) 9 Fed. 517, affirmed in (C. C.) 14 Fed. 742, Stark v. Mueller (D. C.) 22 Fed. 447, and Miller v. Kelly, Abb. Adm. 564, Fed. Cas. No. 9,577. In the order of time in which these cases were ruled, the principles have been formulated in the following proposition:

(1) When the pay is for the run or for the voyage, generally speaking, nothing is earned unless the voyage is completed.

(2) If the voyage is interrupted by a peril of the sea, so that it cannot be completed, the men are released from service and have the right to their discharge.

(3) When the voyage is unfinished, because of perils of the sea, if no benefit has been received by the vessel, no wages have been earned.

(4) If, however, the ship has been benefited by services so far as rendered in part, the seamen are entitled to pay on an equitable basis.

(5) When the crew are entitled to their discharge, because the voyage cannot be completed by reason of a peril of the sea, they may be hired for further or different service, and are to be paid as agreed, and, if no rate of pay is mentioned, may recover on a quantum meruit.

These propositions spring out of the following state of facts: The libelants shipped on board the respondent schooner for a voyage to Delaware Bay, there to take on a load of sand to be brought back to the port of Philadelphia. They engaged "for the run" at the stipu-

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lated sums of $11 for one and $10 for each of the others. It was in the contemplation of all parties that the round trip would be made within eight days. When the loading had been about half completed, a heavy storm arose, which compelled the schooner to seek a harbor in Maurice river. After entering the river severely cold weather came on, with the result that the schooner was frozen in, and did not make her return trip until after the lapse of several months. The schooner left Philadelphia December 4, 1917, and returned on March 19th following. She brought back with her a full cargo, so that the voyage was as fruitful as expected, if the loss of time be ignored.

There is a controversy over what took place when the predicament in which the vessel was placed was realized. The admitted fact is that the men remained with the schooner, and at the command of the master performed services, not only in caring for the vessel, but also in the way of overhauling her while she was thus out of service, in the way of repairing her rigging and caulking and painting the schooner, as well as in other ways. The men returned with the schooner and helped to bring her to Philadelphia. On the way up the river, or after she had arrived in this port, and before she was unloaded, the controversy referred to came to a head, by the men being refused the pay to which they thought themselves entitled, and as a result they in turn refused to unload the schooner. The controversy, as has been stated, arose over what took place between the master and the crew, when it became apparent that the voyage was interrupted. The story of the master is that he was appealed to by the crew to know what their then future relations would be. The master testified that his reply was that he did not know, but he would get in touch with the owners and then advise the crew. His further testimony was that, following the instructions of the owners, he engaged two of the crew to stay by the vessel on the agreed terms of compensation that they were to be grubbed as long as the schooner was frozen in, but were to receive no further compensation than the $10 or $11 promised them for the voyage, and that he relieved the other libelant of all obligation to stay with the vessel and paid to him his fare to Philadelphia, so that he might return home.

It is admitted, as before stated, that all three of the crew, however, did in fact remain and were furnished their grub through a ship chandler or storekeeper, whose place of business was in the vicinity of the place at which the vessel was tied up. The position taken by the respondent, supported by the testimony of the master, is that the two libelants, whose services were engaged, are entitled to receive nothing, because of their agreement to serve while the schooner was frozen in without pay other than their grub, and that they had forfeited the agreed pay for the run because of their refusal to perform that part of their contract. The respondent's position with respect to the other libelant is that he had the right, which the respondent recognized, to stay with the ship, if he so elected, in order that he might complete the voyage, and that they were bound to maintain him while with the vessel. Because of this obligation on their part

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they did maintain him, but the further defense is made that he was not entitled to his pay, because he had refused to perform his contract.

The libelants, however, aver, and the averment is supported by the testimony of each one of them, that the master, when it was found the voyage could not be completed, asked the crew to stand by the vessel during the time she was frozen in, and to remain to complete the voyage, promising them that they should be paid whatever was found to be right and proper.

There is no dispute over the proper finding of a quantum meruit compensation. Under the evidence it is found to be $30 per month. Upon the authority of Thorson v. Peterson, above cited, the libelants have made claim for 3½ months of service, at the rate of $30 per month. This is upon the basis of a finding of a contract as above outlined. On this basis the finding is made that each of the libelants is entitled to $105.

This brings the whole controversy down to the point of whether the contract for service as claimed by the crew was made or not. There is no room for dispute that a contract of some kind was made, because the master, as well as the crew, asserts a contract to have been made. The real point in controversy is: Which contract—the one set up by the crew, or the one asserted by the master? It being admitted that the services were rendered, and it being admitted that the fair value of the services as rendered was at the rate of $30 per month, it would seem that the men are entitled to $30 per month, unless they agreed to take less. If they did, they are, of course, bound by their bargain, so that the whole dispute is resolved by a decision of this fact. The weight of the evidence is presented in the statement that the master testifies to the fact of such an agreement having been made, but this is met by the positive and circumstantial denial of three witnesses. The commissioner, in his ruling, followed the weight of the evidence as thus indicated, and although it is true that no fact is to be found solely out of deference to the brute force of numbers, or by the mere counting of the witnesses arrayed on the one side or the other, nevertheless this circumstance, along with the others present in this case, inclines the mind strongly against the finding that the men agreed to serve without compensation. Inasmuch as the men were refused all compensation, unless they accepted the $10 or $11 in full of their claims, they were justified in refusing to render other services, and did not default in their contract by so doing.

Following the rule in the Thorson v. Peterson Case, we therefore find each of the libelants to be entitled to receive the sum of $105, or $315, which sum is awarded in favor of the libelants and against the respondent, with costs.

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Ex parte FALLS.

(District Court, D. New Jersey. May 24, 1918.)

1. ARMY AND NAVY ⊂⊃44(2)—MILITARY LAW—"PERSONS WITH THE ARMIES OF THE UNITED STATES IN THE FIELD."

Under Articles of War, art. 2 (Comp. St. 1916, § 2308a), classifying as subject to military law all persons who in time of war are serving with the armies of the United States in the field, a civilian employed in time of war by quartermaster's department and assigned as cook on a vessel transporting army supplies is "serving with the armies in field," and court-martial has jurisdiction to try him for his attempt to desert the ship just before sailing.

2. ARMY AND NAVY ⊂⊃44(2)—PERSON SUBJECT TO MILITARY LAW—CONSTITUTIONAL GUARANTIES.

As Const. art. 1, § 8, gives Congress authority to make rules for the government of land and naval forces, and as Articles of War, art. 2 (Comp. St. 1916, § 2308a), makes civilians serving with armies in the field subject to military law, such a civilian, who attempted to desert, cannot question the jurisdiction of a court-martial authorized by article 58 to impose death or other penalty, etc., on the ground that he was not tried under the guaranties prescribed by the Fifth Amendment; that amendment excepting cases arising in the land or naval forces.

Petition by Harry C. Falls for writ of habeas corpus. Writ dismissed, on the ground that the petitioner was a person "serving with the armies of the United States in the field," and was therefore "subject to military law," and to trial by court-martial.

Edward O. Stanley, Jr., of Newark, N. J., for petitioner.
William S. Weeks, Major, Judge Advocate, for the United States.

DAVIS, District Judge: Harry C. Falls, the petitioner, a citizen of the United States, applied to the Bureau of the United States Army Transport Service, at its office in New York City, which is under the Quartermaster's Department, for employment. Articles of agreement, providing for the service of the petitioner, were signed by him and Capt. J. J. Dawson, Q. M. U. S. R., who was acting for the United States. Petitioner was then assigned to duty as chief cook upon the ship U. S. A. C. T. Edward Luckenbach, which was lying at Bush Terminal, Brooklyn, and was engaged in transporting supplies for the United States Army. While occupying said position, and just before the said ship sailed for a foreign port, petitioner attempted to leave the ship with his baggage and desert the service, and refused to return thereto. He was arrested by the military police at the pier, and was sent to Camp Merritt, N. J., where he was tried by court-martial. The result of the trial has not been announced, pending the disposition of the writ of habeas corpus issued out of this court. The sole question to be decided is whether or not the petitioner "was a person serving with the armies of the United States in the field," and therefore "subject to military law" and trial by court-martial.

[1] Article 2 of the Articles of War (Comp. St. 1916, § 2308a) classifies all persons who are "subject to military law." Included

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among the subdivisions thereof are: (a) Officers and soldiers, etc., belonging to the Regular Army; (b) cadets; (c) officers and soldiers of the Marine Corps, when detached for services by order of the President; (d) retainers to the camps, etc., including persons who in time of war are "serving with the armies of the United States in the field"; (e) all persons under sentence adjudged by court-martial; (f) all persons admitted into the Regular Army Soldier's Home at Washington. A distinction is made between "the officers and soldiers" belonging to the Regular Army of the United States—section, (a)—and serving "in" the army and "persons" accompanying or serving with the armies of the United States in the field. The former includes officers and soldiers, both volunteers and draftees, serving "in" the Regular Army; the latter includes all "retainers to the camp," and, in time of war, all "persons," including civilians, as distinguished from "officers and soldiers," "accompanying or serving with the armies of the United States in the field." The former class refers to those "in" the service of the "Regular Army"; the latter to those serving "with" the armies of the United States "in the field," and not "in" the "Regular Army." A distinction is likewise made between service "in the Regular Army" and service "in the field." Service in the Regular Army is performed by officers and soldiers in cantonments, fortifications, trenches, etc.; service "in the field" is performed in part, at least, by civilians in any place where their service is required for the good of the Regular Army. The latter service is subservient to the former and exists for it.

"The words 'in the field' do not refer to land only, but to any place, whether on land or water, apart from permanent cantonments or fortifications, where military operations are being conducted." Ex parte Gerlach (D. C.) 247 Fed. 616.

The U. S. A. C. T. Edward Luckenbach was engaged in transporting supplies for the army under the Quartermaster's Department of the United States Army. Carrying supplies to equip and sustain the army is a very important military operation in time of war. The petitioner by a reasonable and natural interpretation of the second Article of War is a person "serving with the armies of the United States in the field," and as such is in the same position with reference to trial by court-martial as any person belonging to one of the other classes enumerated in said article. Any other interpretation of the statute under all the facts would be unreasonable, illogical, and disastrous "in time of war." It is unthinkable that Congress did not mean to include persons in the United States Army Transport Service, engaged in transporting our armies and sustaining them with equipment and supplies, in the class, in time of war, of those "persons accompanying or serving with the armies of the United States in the field." The petitioner, in my opinion, is a person "serving with the armies of the United States in the field," and is "subject to military law." He may, therefore, be tried by court-martial on the charge that he—

"did, at Bush Terminal, Brooklyn, N. Y., on or about the 5th day of April, 1918, attempt to desert the service of the United States by leaving said ship with his baggage just before the hour set for sailing, and refusing to return thereto."

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[2] The fifty-eighth Article of War provides that:

"Any person subject to military law who deserts or attempts to desert the service of the United States shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct."

It is claimed by the petitioner that the trial by court-martial in such case violates the provisions of the Fifth Amendment, and so is unconstitutional, in that it deprives him of a trial by jury on a presentment or indictment by a grand jury. The Fifth Amendment provides that:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces."

This amendment in excepting "cases arising in the land or naval forces" in effect says that in cases arising in those forces a person may be held to answer to a capital or otherwise infamous crime without a presentment or indictment by a grand jury; in other words, such cases may be dealt with according to military law. Runkle v. United States, 19 Ct. Cl. 396; Kurtz v. Moffitt, 115 U. S. 487, 6 Sup. Ct. 148, 29 L. Ed. 458.

It is provided in the Constitution (article 1, § 8), that Congress has power "to make rules for the government and regulations of the land and naval forces." This power Congress has exercised in the second Article of War, by defining the various classes of persons who are subject to military law, and in the fifty-eighth Article of War by declaring the punishment which may be imposed by a court-martial upon any one of those classes who deserts or attempts to desert the service of the United States. The cases—In re Grimley, 137 U. S. 147, 11 Sup. Ct. 54, 34 L. Ed. 636; Tyler v. Pomeroy, 8 Allen (Mass.) 480; Ex parte Milligan, 4 Wall. (71 U. S.) 2, 18 L. Ed. 281, and others cited by counsel for petitioner—arose out of a state of facts so unlike those in the case at bar as to make the language quoted therefrom by counsel inapplicable to the question before me.

It follows from the conclusions reached that the military authorities had jurisdiction to try the petitioner by court-martial, and the writ of habeas corpus must be dismissed.

UNITED STATES v. JOLES et al.

(District Court, D. Massachusetts. December 20, 1917.)

No. 381.

1. CUSTOMS DUTIES ⟸129—"ACTION FOR PENALTY OR FORFEITURE"—LIMITATION.

An action by the United States on bonds given by an importing agent pursuant to Rev. St. § 2787 (Comp. St. 1916, § 5484), for failure to observe the technical requirements of that section, the duties having been paid, is one to recover a penalty or forfeiture accruing under the customs laws, and is barred in three years by Comp. St. 1916, § 1713.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Action for Penalty or Forfeiture.]

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2. ACTION ⊂=19—NATURE—ACTION FOR PENALTY OR FORFEITURE.

Whether or not an action is for a penalty or forfeiture depends on the character of the liability sought to be enforced. If it is to recover compensation for a loss sustained by plaintiff it is not, but if the sum claimed has no relation to any such loss, but is arbitrarily exacted for some act or omission of defendant, the action is essentially penal.

At Law. Action by the United States against Leo S. Joles and others. Judgment for defendants.

Asa P. French, of Boston, Mass., for the United States.

John H. Casey, of Boston, Mass., for defendant Curley.

David Stoneman and Stoneman, Gould & Stoneman, all of Boston, Mass., for various defendants.

MORTON, District Judge. The case is submitted for decision upon the auditor's report, no other evidence being offered.

Section 1713, Comp. St. 1916, which limits the period within which actions to recover penalties or forfeitures of property accruing under the Customs Revenue Laws of the United States shall be begun, is clearly intended to bind the government. Most, if not all, of the actions therein specified would be brought in the name of the United States or for its benefit. Even section 1712, which is much broader in its scope, and relates to any penalty or forfeiture accruing under the laws of the United States, applies to actions brought by the United States. U. S. v. Dwight Mfg. Co. (D. C. Mass.) 210 Fed. 79. The facts being as stated in the auditor's report, if the action be one to recover a "penalty or forfeiture" accruing under the customs revenue laws of the United States, it is barred by section 1713.

[1] The most doubtful question on the first six counts is, whether an action to recover the penal sums of the bonds therein declared on, is one to recover such a penalty or forfeiture. The breaches established are, as to the first three bonds, the defendant's failure to file the names of the actual owners of the goods imported, and, as to the last three counts, their failure to produce corrected invoices. All duties and excess duties were paid. The sums here sought to be recovered are not in payment of any taxes or imposts due the United States.

In U. S. v. Theurer, 213 Fed. 964, 130 C. C. A. 370 (C. C. A. 5th Cir.), proceedings in rem had been instituted against 50 barrels of whisky for forfeiture for violation of the revenue law. The claimant gave a bond and took the whisky. Final judgment of forfeiture was pronounced; but before that took place the claimant had died. The question was whether action on the bond survived against his estate and sureties. It was held (one judge dissenting) that the claim, though nominally based upon the bond, was in fact for a penalty, and as such did not survive. In State v. Schuenemann, 18 Tex. Civ. App. 485, 46 S. W. 260, it was held that an action on a bond given by a retail liquor dealer, conditioned not to do certain things and to pay a certain sum as "liquidated damages" for breach of condition, was one to recover a penalty. See, too, Johnson v. Rolls, 97 Tex. 453, 79

S. W. 513. The same conclusion was reached in Fite v. Lander, 52 N. C. 247, in an action brought upon a bond given by a clerk of court to recover a penalty for issuing a writ without requiring security. In U. S. v. Pomeroy, 152 Fed. 279 (C. C. N. Y.), judgment was entered for a penalty for giving rebates. Before the judgment had been collected, the defendant died. It was held that the judgment was for a penalty and that the suit had abated, that the penal character of the proceedings was not lost on the entry of judgment, and that "courts, whenever necessary, look beneath the form of the judgment to see what was the original nature of the claim"—a statement fully supported by the decision and language in Wisconsin v Pelican Ins. Co., 127 U. S. 265, 292, 293, 8 Sup. Ct. 1370, 32 L. Ed. 239. The foregoing cases certainly hold that an action upon a bond voluntarily given, or upon a judgment, may nevertheless be a suit to recover a penalty.

On the other hand, in Raymond v. U. S., Fed. Cas. No. 11,596, it was expressly held that an action on a bond like those here in suit was not within section 1713; but the reasoning by which that result was reached is not stated. It is settled, too, that the threefold damages allowed in certain cases by the Anti-Trust Act (U. S. Compiled Statutes 1916, § 8829) are not a penalty or forfeiture within section 1712. Chattanooga, etc., Works v. Atlanta, 203 U. S. 390, 27 Sup. Ct. 65, 51 L. Ed. 241.

[2] It seems to me that the question must depend upon the character of the liability sought to be enforced. If it is based upon a loss sustained by the plaintiff, and is awarded as compensation for injury done, it is not a forfeiture or penalty, even though the amount awarded may exceed the damages proved. Brady v. Daly, 175 U. S. 148, 154, 155, 20 Sup. Ct. 62, 44 L. Ed. 109. On the other hand, if the sum claimed has no relation whatever to any loss sustained by the plaintiff, but is arbitrarily exacted for some act or omission of the defendant, it would be essentially penal. Wisconsin v. Pelican Ins. Co., supra.

In everyday speech the sums here claimed would undoubtedly be referred to as penalties, and in fact they are penalties, imposed for failure to observe the technical requirements of the customs law. The defendant agreed that he would file the required names and the corrected invoices, or would pay the penal sum of the bond. His failure to do so has put the government to no loss. The payments sought to be exacted are disciplinary in character. The auditor was of opinion and ruled that they were penalties within section 1713, and that the action on the first six counts was accordingly barred. Although the question is by no means free from doubt, I reach the same conclusion.

The plaintiff's principal contention in argument was that the action is governed by section 1712 (where the limitation is five years), rather than by section 1713 (where it is three years). The argument assumes that the claim is for a penalty or forfeiture, because section 1712, equally with section 1713, relates only to claims of that character.

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The plaintiff's position is that its claim does not accrue under the "customs revenue law," and therefore is not within section 1713. No question is made but that the bonds in suit were legally required in connection with an importation of foreign merchandise. Some of them explicitly refer to R. S. § 2787 (Comp. St. 1916, § 5484), which relates to the customs revenue, and the others are expressed to be given in connection with importations of foreign goods. The plaintiff's claim accrues under the customs revenue law, and is within section 1713.

As to the seventh count: If the obligation of the agent and importer be regarded as joint, the plaintiff, by suing one of the persons jointly liable and acknowledging satisfaction of the judgment obtained against him, has lost its right of action against the others. If the obligation of the agent and the importer be regarded as several, the plaintiff, by proceeding against the agent, has elected to hold him, and cannot now sue the principal. The government, having sued the agent and pressed its suit to judgment against him, cannot now say that it had no cause of action, and has recovered a judgment which it was not entitled to.

Judgment for defendants.

In re GAY & STURGIS.

(District Court, D. Massachusetts. April 2, 1918.)

No. 20856.

1. BROKERS ⇐24(2)—PLEDGES—RIGHTS OF CUSTOMER.

Under the Massachusetts law a customer of a stockbroker, who turns over securities to him as collateral for a trading account, does not lose title to the securities and become simply a general creditor, but such securities remain the property of the customer, subject to the pledge; hence, where the broker repledged the collateral and defaulted, the customer, under familiar principles of marshaling of assets and subrogation, is entitled to any balance remaining after the sale of the collateral to satisfy the broker's obligation.

2. BANKRUPTCY ⇐152—TRUSTEES—RIGHTS OF—MASSACHUSETTS RULE.

Under Bankruptcy Act, § 47, giving the trustee the rights of a creditor holding a lien by legal or equitable proceedings, or having an execution returned unsatisfied, the trustee of a Massachusetts bankrupt takes the property of the debtor, personal as well as real, subject to whatever equitable interests existed at bankruptcy.

In Bankruptcy. In the matter of the bankruptcy of Gay & Sturgis. Order awarding a fund to claimant affirmed.

See, also, 224 Fed. 127; 233 Fed. 604.

David Stoneman and Stoneman, Gould & Stoneman, all of Boston, Mass., for trustees in bankruptcy.

Mark M. Horblit and Horblit & Wasserman, all of Boston, Mass., for Franklin T. Hammond.

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MORTON, District Judge. The facts essential to the consideration of the questions of law upon which the case turns are not in dispute and are as follows:

The bankrupts were stockbrokers in Boston. They made a common-law assignment on April 21, 1914, and were adjudicated bankrupt on an involuntary petition filed May 22, 1914. The various claimants (in whose behalf the present petition is presented by a receiver appointed by the state court to act in their interests) were customers of the bankrupts, buying and selling through them on margin. As collateral security for their several accounts, each deposited with the bankrupts various stocks and bonds. The bankrupts, before their failure, pledged these stocks and bonds, with other securities of their own, to the Boston Penny Savings Bank on a note made by them to that bank for $125,000. The total collateral so pledged aggregated about $130,000 in value, of which about $106,000 belonged to the bankrupts, and about $24,000 to these claimants. The loan was closed out by the bank after the failure, and resulted in a surplus of collateral, amounting to about $17,000, partly in cash and partly in securities, which were later turned over by the bank to the trustees in bankruptcy, and constitute the fund here in controversy. The securities so turned back happened to be those which had belonged to the bankrupts; all the securities originally owned by the claimants were sold and applied on the note. At the time when the claimant's securities were pledged by the brokers, and at all times thereafter, as I understand, the balance of each claimant's account was in his favor, so that the brokers had no actual claim against the collateral.

[1] The claimants contend that, as between them and Gay & Sturgis, the property of the latter was first to be applied in payment of the note, and that, the creditor having used the property of the claimants for that purpose (as it had a right to do), the claimants became subrogated to the bank's original rights against the property of Gay & Sturgis to reimburse them for the loss sustained. The trustees contend that under Massachusetts law a customer of a stockbroker, who turns over securities to him as collateral for a trading account, loses his title to the securities, and becomes simply a general creditor of the broker for the value thereof.

In Furber v. Dane, 203 Mass. 108, 89 N. E. 227, the customer, as here, deposited with the broker securities as collateral for a trading account, and they were pledged by the broker, with other securities belonging to him, as collateral upon a loan by a bank to him. Before the loan was closed out, the bank was notified by the customer that he owned certain of the collateral, and it was requested not to resort to that collateral until the other collateral had been exhausted. The result was, in that case, that the surplus collateral was composed in part of securities which had belonged to the customer. It was held that he was entitled to them as against the general creditors.

"After all the charges properly to be made against them [the securities] have been satisfied, the firm's special property in them no longer exists, and they should be returned to the general owner, if their identity has been preserved." Sheldon, J., supra.

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It seems to follow that the securities belonging to the several claimants and deposited by them with Gay & Sturgis remained the property of the claimants, subject to the rights created by the pledge, and were still the property of the claimants when they were repledged on the bankrupts' note.

This being so, upon familiar principles of subrogation and marshaling of assets, the claimants, as between them and the brokers, would be entitled to the balance here in question. Baker v. Davis, 211 Mass. 429, 441, 97 N. E. 1094, 37 L. R. A. (N. S.) 944; Hutchinson v. Le Roy, 8 Am. Bankr. Rep. 20 (C. C. A. 1st Cir.); Id., 113 Fed. 202; Prairie Bank v. U. S., 164 U. S. 227, 232, 17 Sup. Ct. 142, 41 L. Ed. 412; Ex parte Alston, L. R. 4 Ch. App. 168; In re Leavitt & Grant, 215 Fed. 901, 132 C. C. A. 139.

It is true that in Furber v. Dane the customer gave notice to the bank, and his securities were retained by it in specie; but without those facts the decision would, I think, have been the same. To emphasize notice in cases of this character is to penalize the ordinary customer, and to give the advantage to those who happen to be so connected with stock transactions as to get early knowledge of the failure and know what must be done to protect their interests. In McBride v. Potter-Lovell Co., 169 Mass. 7, at page 9, 47 N. E. 242, 61 Am. St. Rep. 265, the demand by one of the security owners for the return of its security was said by the court to be "immaterial," and the demandant was accorded no priority over those who made no such demands.

[2] The final question is whether the trustee in bankruptcy has greater rights against the claimants than the bankrupts themselves would have had. Section 47 of the act (Act July 1, 1898, c. 541, 30 Stat. 557 [Comp. St. 1916, § 9631]), which is relied on by the trustee, is not the equivalent, so far as he is concerned, of an actual attachment or seizure; his rights are those of a creditor "holding a lien," or an unsatisfied execution. Under Massachusetts law, such a person has no greater rights in the property of the debtor than any other creditor. It recognizes only actual or constructive seizure by legal or equitable process. The trustee takes the property of the debtor, personal as well as real, subject to whatever equitable interests in it exist at the time of the failure. Bailey v. Baker Ice Machine Co., 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. 275; Clark v. Snelling, 205 Fed. 240, 123 C. C. A. 430 (C. C. A. 1st Cir.); In re Floyd Scott Co., 228 Fed. 506, 143 C. C. A. 88 (C. C. A. 1st Cir.).

It follows that the order of the referee, adjudging the fund to be the property of the petitioner, was right, and should be affirmed.

So ordered.

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LEPINE v. LAKE CHAMPLAIN TRANSP. CO.

(District Court, N. D. New York. June 19, 1918.)

TOWAGE ⇐12(2)—ACCIDENTS—FAULT.

Where a canal boat, with two others behind it, which was in tow of a single tug, was injured at a point where the canal crossed the Hudson river, *held*, that the master of the tug was negligent in attempting to tow the three vessels through the cross-current made by the river, and that the owner of the canal boat was also negligent in failing to use adequate care to keep his boat away from the pier with which it collided; hence damages should be divided.

In Admiralty. Libel by Ralph Lepine against the Lake Champlain Transportation Company for damages claimed to have been sustained by a canal boat through the fault of a tug owned by the respondent. Damages divided.

Foley & Martin, of New York City, for libelant.
O. A. Dennis, of Whitehall, N. Y., for respondent.

RAY, District Judge. On the morning of May 7, 1915, the respondent's tug Waterford took in tow the boats Brid S. Coler, Alice Florence May, and Frank W. Myers, lashed firmly together in that order; the Brid S. Coler being ahead. This tow was proceeding northerly in the so-called "Northern Canal." The steering lines of this first boat ran to the Alice Florence May, and its steering lines ran to the Frank W. Myers. This third boat had no steersman, but the others did. Capt. Henry Fleury, a licensed pilot and master, was in charge of the tug. At the point where this accident happened the Hudson river and canal come together, and there is a current below the dam in the river, which is a short distance above and northwesterly of the point in question, and this current runs into and across the canal. There is a pier or wall in the easterly side of the canal, with openings for the water to pass, and also a pier or wall on the westerly side; both piers extending into the water and running north and south, but the pier on the west side does not extend as far south as the other. The result is that boats towed northerly in this canal must cross this current westerly of the easterly pier and a short distance below the westerly pier. If carried by the current too far to the east, the boats are liable to strike the southerly point of the east pier and suffer damage; and if, in avoiding that danger, the boats proceeding north are carried too far to the west, they are liable to strike the southerly point of the west pier, which is what happened in this case. Just how much force the current has at a given time it is not possible or practicable to know, and hence the effect of this current on a tow is uncertain.

The situation and conditions call for great and even extraordinary care and caution, and the exercise of good judgment on the part of both the one controlling and managing the tug and the steersmen on the boats following. The tug is out of the current when the boats, one or more, are in it, and the distance between the piers is only 100 feet, thus limiting the space in which the tug can move from west to east.

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For about 100 feet southerly from the point of this west pier there is slack water. It is evident that a tow proceeding northerly in the canal must go into and cross this current, which strikes it diagonally, flowing from the northwest to the southeast. It is also evident that to safely take a tow into and across this current it must in the beginning be headed into the current to avoid the point of the east pier; but it cannot be kept there for any great length of time headed up the current, as it must be taken across the current and into the canal between the piers, and with three boats following and drawn by a tug it is evident that the head boat will get into the slack water mentioned while the others and following boats are still in and affected by the current. It is evident that the tug can take care of itself, and it is also evident that under such conditions and circumstances the tug must have the careful and intelligent aid of the steersmen on the boats, in order that they may avoid, first, the southerly end of the east pier, and, secondly and mainly, the southerly end of this west pier. If the tug goes into the current, and heads up the same to the northwest, and continues on, it will go to the west of the west pier; and hence it must change its course to the easterly, and then northerly, and as the boats normally follow the tug they proceed in the same direction, but this change of direction of the boats is not instantaneous, unless the line is so short and kept so taut that tug and boats move as one body.

The evidence shows plainly enough that on the occasion in question here the owner of the boats chose to proceed with the three boats in tow lashed together as mentioned, and that both he and the captain of the tug knew it was risky and dangerous to do so. It is also shown to my satisfaction that the captain of the tug, knowing this fact, and also knowing of this current and of these piers, headed to the current as he came to it, and proceeded northerly on the westerly side of the canal, to avoid bringing the boats in contact with the easterly pier, and then changed direction to the easterly and north, as he must do, would he enter the canal between the piers and take the tow with him. It is claimed that a kink was formed in this triple tow as it entered, or when it was within the influence of the current; and I find that such a kink did occur—that is, the boats were not so rigidly lashed to each other that they kept in a straight line. Moved ahead by the pull of the tug, and retarded and influenced by the kink and current together, it is evident that the head boat did not follow in the wake of the tug, but that its head was thrown or kept too far to the west by these influences and negligent steering, and hence came forcibly in contact with the point of the westerly pier, causing the damage complained of.

If the captain of the tug had been able to foresee the kink in the triple tow, and accurately measure the influence of the current on a tow in such condition, he probably could and would have so managed as to avoid this collision, and it would have been his duty to do so. But I think and find he did the best he could under the circumstances, after taking the two into the current, acting on the knowledge he had and with which he is chargeable, and that he is not chargeable with negligence or omission of duty, unless it be that it was negligence on

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his part to attempt to take a triple tow, formed and lashed as this was, into and across the current referred to. If the last or third boat in this tow had been dropped behind as the tug neared the current or easterly pier, it is probable that no kink would have been formed, and that the accident and collision with the west pier would not have occurred. Both the master of the tug and the owner of the boats knew of this current and of these piers, and the dangers incident to navigation at this point, and of the dangers of attempting to take such a tow through. Both knew of the make-up of the tow, as described. I think the master should have caused the last boat to be dropped behind, and that he omitted a duty he owed when he failed so to do, and that such negligence contributed to the injury. I also think the owner of the injured boat was negligent in this matter, and also negligent in steering after entering the current; that is, he trusted to the supposition that the tug itself would avoid the southerly point of the west pier, as it did, and that the tow would follow the tug, and consequently he exercised no adequate or proper care, and made no proper effort to keep his boat away from contact with such pier, and the collision and damage followed.

I hold and find that both were at fault, and that the combined negligence of the two produced the accident and injury. The damage should be apportioned equally.

In re DELANEY.

(District Court, E. D. Pennsylvania. June 5, 1918.)

No. 6125.

BANKRUPTCY ⇐191(1)—LIEN FOR RENT—PENNSYLVANIA STATUTE—"EQUITABLE EXECUTION."

Under Purdon's Dig. Pa. (13th Ed.) p. 2186, giving landlord lien for rent due on property on premises when taken in execution, bankruptcy of the tenant operates as an equitable execution, and the landlord is entitled to payment from the proceeds of the property.

[Ed. Note.—For other definitions, see Words and Phrases, First Series, Equitable Execution.]

In Bankruptcy. In the matter of Catherine A. Delaney, bankrupt. On review of decision of referee. Confirmed.

Edwin Fischer and Alfred Aarons, both of Philadelphia, Pa., for petitioner.

Joseph Hill Brinton, of Philadelphia, Pa., for landlord.

DICKINSON, District Judge. The question involved in this petition for review may be stated in any one of several ways. In its practical form it is whether a landlord, who had, at the time the petition in bankruptcy was filed, a right, or the lawful power, to distrain upon goods and chattels upon premises demised to the alleged bankrupt, is entitled to priority of payment of the rent in arrear (up to the limit of one year's rent) out of the proceeds of the sale of such goods and

chattels by virtue of the provisions of the Pennsylvania statutes (Purdon's Dig. Pa. [13th Ed.] p. 2186) and section 64, clause "b," subdivision 5, of the Bankruptcy Act (Act Cong. July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1916, § 9648]). Inasmuch as a lien, as distinguished from the power to acquire a lien by and through a levy, is given "by the laws of the state" only (so far as affects the instant case) in cases of executions, the real question is whether a proceeding in bankruptcy is in legal intendment and effect an execution, or, as the accepted phrase is, whether it is an "equitable execution."

The referee allowed the claim. This he properly did, because, in doing so, he followed the accepted interpretation of the adjudged cases discussed by the referee, among which are In re Hoover (D. C.) 113 Fed. 136, and Longstreth v. Pennock, 87 U. S. (20 Wall.) 575, 22 L. Ed. 451. The Hoover Case is in itself decisive of the question, because it is authority for the proposition that a bankruptcy proceeding is in its essence, although not in form, an execution, and, if an execution, the state laws give the landlord a claim upon the proceeds of sale in lieu of the lien which he might have acquired by distraint, had the execution not intervened. The wisdom of the policy of the law in allowing this substitution invites us to construe the act in a liberal spirit.

It is true that the Hoover Case under its facts presented the feature of a lien acquired by an actual levy under a warrant of distraint; but it is to be observed that the ruling is not put upon this ground, but upon the effect of the Pennsylvania statute, which gave a lien in cases of executions, and the finding that the bankruptcy proceeding was execution process within the meaning of that statute. As the statute allows to the landlord his rent claim, because of his right to have levied, whether he had distrained or not, the fact of actual distraint becomes unimportant. This is the view which has been uniformly taken both by the courts of the United States and by courts of the state, and the referee did not feel at liberty to oppose this strong current of authority. We feel under a like control.

It is also true that the reasoning upon which the claim of the landlord was allowed in Longstreth v. Pennock proceeded upon the proposition that the local state law was controlling, and as it there seems to have been conceded that the state law gave the lien, the question of what the state law was may not have received consideration. We have nevertheless each and both propositions ruled, and the question of the landlord's right has since been considered set at rest. Counsel for the petitioner here is nevertheless justified in urging that the only ruling in the Hoover Case was that a landlord who had made an actual distraint could successfully assert the rights of a lien creditor, and that under the Longstreth Case, if the law of Pennsylvania gave the landlord no such rights, he had none. This view has been presented with clearness and force.

The first proposition upon which the argument proceeds, that the power to acquire a lien through and by a levy does not confer a lien until levy is made, and that a lien given in the case of an execution is not otherwise given, is sound enough, and is confirmed by the

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case of Grayson v. Aiman, 252 Pa. 461, 97 Atl. 695, upon which petitioner relies. That was the case of a chancery receivership. The proceeding was held to be neither an execution nor an assignment for the benefit of creditors, and that there no lien was given the landlord by the laws of Pennsylvania. The inference, however, is not justified that, because the placing of the property of a corporation in the hands of a caretaker (which a receiver is) is not subjecting the property to execution process, bankruptcy proceedings are not the equivalent of an execution, so as to confer upon the landlord the same right of lien. Petitioner is met by the ruling in the Hoover Case to the contrary, and this ruling we must follow. It may also be that, had the Grayson Case been ruled before the Longstreth Case, the court in the latter case would have found the law of Pennsylvania to have been different from what it was found to be. Here again, however, the petitioner is met by the fact that the court did find that the law of Pennsylvania gave the landlord a lien which the courts of the United States would recognize in bankruptcy cases. This ruling we cannot ignore or change. The further fact that the courts both of the United States and of the state have interpreted these rulings as giving a claim to the landlord makes our duty clear.

The findings of the referee are approved, the order made confirmed, and the petition for a review dismissed.

In re EISENBERG.

(District Court, S. D. New York. February, 1918.)

1. BANKRUPTCY ⊂=123—ELECTION OF TRUSTEE—CREDITORS ENTITLED TO VOTE.
 To entitle a creditor to vote at the election of a trustee, his statement of claim should show the date of the indebtedness, to exclude the possibility of the defense of limitation.
2. BANKRUPTCY ⊂=125—CREDITORS' MEETING—ELECTION OF TRUSTEE.
 A motion to adjourn a meeting of creditors, made after the election of a trustee, to permit claimants to amend their statements of claim, is addressed to the discretion of the referee.
3. BANKRUPTCY ⊂=123—ELECTION OF TRUSTEE—VOTE BY ATTORNEY.
 Under a power of attorney to a law firm or "their representative," their managing attorney, who appeared as such, was properly permitted to vote for trustee.
4. BANKRUPTCY ⊂=331—CLAIM—PROOF—CORPORATION PRESIDENT.
 Proof of claim, signed by a corporation president, who performs the duties of treasurer, is sufficient, under General Order in Bankruptcy 21 (230 Fed. v, 143 C. C. A. v), providing that claims by corporations shall be proved by deposition of the treasurer, or, if the corporation has no treasurer, by the officer whose duties most nearly correspond to those of treasurer.

In Bankruptcy. In the matter of Samuel Eisenberg, bankrupt. On application to review election of trustee. Motion denied.

Robert P. Levis, of New York City (Max E. Sanders, of New York City, of counsel), for trustee.

Saul S. Myers, of New York City (Elkan Turk, of New York City, of counsel), for objecting creditors.

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MANTON, District Judge. [1] This is an application to review the election of Marcus Helfand, who was elected trustee by the creditors of the above-named bankrupt. Helfand's opponent was one Freidenrich, credit man of the Union Exchange National Bank, a creditor. It is claimed that 27 creditors, whose claims aggregated $10,849.24, were not allowed to vote. The reason assigned for this was due to objections advanced by creditors, claiming that the bills of the various creditors did not show when the obligation of the bankrupt was incurred. In each case the date was given, but this represented the date the statement was prepared and while, in some instances, the date is given in the body of the bill or statement, the year is not given, and it cannot be presumed, as claimed by the objecting creditor, that the month indicated a purchase during that month in the year 1917. The objection may be considered technical, still I think it has legal force. Depositions to prove claims against a bankrupt estate should be correctly prepared, and indicate a date of obligation which, of necessity, excludes the possibility of the defense of the statute of limitations.

[2] It was only after the election that the referee was asked to postpone the meeting and permit applications to amend the claims as filed. In the exercise of his discretion, the referee denied the application, and I think I should not interfere with it now. As Judge Haight said, in Re Hudson Porcelain Co. (D. C. N. J.) 35 Am. Bankr. Rep. 18, 225 Fed. 325:

> "It has been uniformly held under the present Bankruptcy Law that the statement of the claim and its consideration must be sufficiently specific and full to enable the trustee and the creditors to make proper investigation as to its fairness and legality, without undue trouble or inconvenience."

Judge Archbald, in Re Blue Ridge Packing Co. (D. C. Pa.) 11 Am. Bankr. Rep. 36, 125 Fed. 619, considering a case where the question of date was at issue, there said:

> "The real objection to this claim is that there is no date. This is certainly necessary to help individuate the debt, as well as to show that it is not outlawed, and, while it was not objected to on that ground, the defect is too patent to be passed by."

The objection raised now came only after the pronouncement of the referee of the election of Helfand. Then the following occurred:

> "Mr. Schnabel: Can I ask for the record that the first meeting be adjourned and the election of a trustee kept open, owing to the fact that so many claims have been objected to, in order to give either side an opportunity to correct claims, if they can do so?
>
> "Referee: No; I think that motion must be denied."

This application came too late, for it came after the objecting creditor had taken his chances, and at a time after a ruling that the various claims rejected could have voted. Indeed, the record discloses that both the present litigants to this plea urged the same objection before the referee with like ruling.

[3] The objection to the vote of Sidney Blumenthal & Co. was urged by Mr. Kaufman, who did so on behalf of the present trustee. The referee ruled that the vote could be taken, and it resulted in a vote

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for Mr. Helfand, and in this he was correct, for the power of attorney ran to the law firm of Blumenthal & Levy, or "their representative," or both of them. Mr. Kahn was their managing attorney, and is well described as their representative, for he appeared as such at the hearing.

In the claim of the Ideal Woolen Company, it is apparent that the power of attorney was revoked by the subsequent power of attorney, and it was upon this subsequently executed power of attorney that the vote was cast.

The objection to the American Woolen Company's proof of debt is not well taken. While it is true it was sworn to outside the Southern district of New York, there was no need for a county clerk's certificate.

As to the Lymansville Company's claim, the record contains the following:

"Mr. Boyd states that he is satisfied not to vote the claim on the ground of the counterclaim, and it is withdrawn."

[4] As to the objection of the Sea Island Thread Company, because the proof of claim was signed by the president, instead of the treasurer, as required by General Order 21 (230 Fed. v, 143 C. C. A. v) the minutes contain the statement that the president performs the duties of treasurer of the said corporation. A president who performs such duties can sign in place of the treasurer, with sufficient legal effect to meet the requirements of the General Order.

The claim of Eisenberg & Friedman appears to have been voted without objections.

I see no reason for disapproving the conclusions of the referee, and the motion will therefore be denied.

In re EDELMAN.

(District Court, D. Maryland. June 18, 1918.)

1. BANKRUPTCY ⇐136(2)—CONCEALMENT OF ASSETS—TURN-OVER ORDER.
Evidence *held* to show that the bankrupt had concealed assets, and to warrant an order directing him to turn over the same to his trustee.

2. BANKRUPTCY ⇐136(2)—CONCEALMENT OF ASSETS—TURN-OVER ORDER.
Where goods are traced into the bankrupt's possession shortly before bankruptcy, he must show what has become of them, where they are not turned over to the trustee.

In Bankruptcy. In the matter of the bankruptcy of Leslie Edelman, bankrupt. On application by the trustee to require the bankrupt to turn over assets alleged to have been concealed. Findings of referee confirmed, and bankrupt required to turn over to the trustee certain assets.

Julius Wyman and Jacob S. New, both of Baltimore, Md., and Herbert A. Wolff, of New York City, for trustee.

Bernhard Cline, of Baltimore, Md., for bankrupt.

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ROSE, District Judge. The trustee in bankruptcy asks that the bankrupt be required to turn over assets which he is alleged to have concealed. The bankrupt says he surrendered them all. The referee was directed to take testimony and report. He finds that the bankrupt has failed to turn over merchandise to the value of $9,147.74. The trustee asks that this finding be confirmed, and the bankrupt directed to deliver such merchandise to him.

[1] The failure is a bad one. The liabilities exceed $16,000. From the assets not more than $1,200 will be realized, if that much. The bankrupt does not claim to have had any serious business losses. He says that his financial wreck was due to his bad habits of drinking, gambling, and consorting with loose women. Much testimony as to his conduct in this respect was taken. He tried to show that he was to the last degree reckless, and that the cost of his dissipations had been great. The trustee essayed to prove that, while he was not a model in the respects mentioned, yet he had not wasted in this way any such sums as he claimed. Into this issue it is not necessary to go. It may be conceded that it is not unlikely that in the last few months of his business career he spent on forbidden pleasures all the ready money which came into his hands, even if it is also highly probable that he has grossly exaggerated their cost. His mode of life may have been sufficient to ruin his business. It explains why, in the last three months immediately preceding his failure, he paid only $65 to his merchandise creditors, and why he owes a year's store rent and 6 weeks' salary to his 17 year old clerk; but it does not throw any light upon the disappearance of that large part of his stock of merchandise which he did not sell or otherwise turn into money. There is nothing in the record to suggest that he made any attempt to force the sale of his wares. He sold them precisely as he had always done, and to about the same extent.

The referee finds that on the 1st of November he had on hand a stock of goods which was worth not less than $5,000, and possibly twice as much. During November, December, and January, upwards of $8,100 of additional goods came in. His sales did not at retail greatly exceed an aggregate of $5,000, and the goods so sold had not cost him over $3,300. In consequence, he should have turned over to his receiver goods of the approximate value of $9,800. All that in fact came into the receiver's hands were appraised at $526. The total appraisement of everything in his store footed up $1,196; but $670 of that aggregate was the value placed upon his fixtures. At public sale his brother bought both stock and fixtures for $905. The referee concludes that the bankrupt has failed to account for upwards of $9,100 of goods which were in his possession immediately before his bankruptcy. The evidence not only justifies, but requires, this finding. The bankrupt says that the goods appraised at a trifle over $500 actually cost him $2,000. The three appraisers were experienced men, whose capacity and honesty were not criticized. His charge of gross undervaluation rests upon his uncorroborated testimony, and unfortunately the record shows him to be utterly unworthy of belief. The costly portions of his stock were of small bulk. They could be removed

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without attracting attention. His clerk testifies that in the 30 days, or thereabouts, preceding the bankruptcy, valuable articles disappeared from time to time. This witness is not hostile to the bankrupt. He is still employed in the same place by the brother of the bankrupt, who now there carries on the same business.

[2] The rule is well settled that, where goods are traced into the bankrupt's possession shortly before the bankruptcy, he must show what has become of them. That he has not done. The findings of the referee will be confirmed, and the bankrupt required within 10 days to turn over to the trustee the goods in question.

In re REA BROS.

(District Court, D. Montana. November, 1917.)

1. BANKRUPTCY ⟸407(5)—DISCHARGE—GROUND FOR REFUSAL—"FALSE STATEMENT MADE FOR PURPOSE OF OBTAINING CREDIT."

The giving by a bankrupt, in payment for property bought, of a check on a bank where he had neither money nor credit, while a false representation, was not a "false statement * * * made * * * for the purpose of obtaining credit," within Bankruptcy Act July 1, 1898, c. 541, § 14b (3), 30 Stat. 550, as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797, and Act June 25, 1910, c. 412, § 6, 36 Stat. 839 (Comp. St. 1916, § 9598), which will defeat the bankrupt's right to a discharge.

2. BANKRUPTCY ⟸407(5)—DISCHARGE—GROUND FOR REFUSAL—"CREDIT."

The word "credit," used in Bankruptcy Act, § 14b (3), as amended by Act Feb. 5, 1903, § 4, and Act June 25, 1910, § 6, prohibiting discharge where the bankrupt has "obtained money or property on credit upon a materially false statement in writing, made * * * for the purpose of obtaining credit," means express credit, and not unintended credit, such as that forced upon a seller, who accepts a check upon a bank in which the purchaser has no funds.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Credit.]

3. BANKRUPTCY ⟸407(1)—REFUSAL TO ANSWER QUESTIONS.

A few days before referee's hearing on objections to discharge, objectors noticed the bankrupts to produce certain contracts, all related letters, and all accounts and bank books and canceled checks for three years before adjudication and afterwards, which bankrupts at the hearing stated they refused to do, but referee was not moved to compel production of the papers and books. *Held*, there was no refusal "to answer any material question approved by the court," within Bankruptcy Act July 1, 1898, § 14b (6), because of which discharge should be refused.

In Bankruptcy. In the matter of Rea Bros., bankrupts. On application for discharge and objections thereto. Objections overruled, and discharge granted.

John H. Johnston, of Billings, Mont., for bankrupts.
James A. Walsh, of Helena, Mont., for objecting creditors.

BOURQUIN, District Judge. [1] The bankrupts purchased sheep, to be paid by check on delivery, which was done. They knew they had neither money nor credit at the bank of the check, and it was dishonored when presented in due course some 20 days later.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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It is held that the check is not a "false statement * * * for the purpose of obtaining credit," and by which property was obtained, within paragraph 3, § 14, Bankruptcy Act. Said paragraph was introduced into the law in 1903, and amended in 1910 by a provision that the false statement, theretofore a bar to discharge when made to the person from whom the property was obtained, would also bar discharge if made to such person "or his representative." Even before 1903 the law dealt with false representations, providing that certain debts for obtaining property by false representations were not released by discharge. It is believed Congress by "false statement" altogether different in phraseology from, and importing false representations and more, intends the financial statements well known in the commercial world, setting out assets and liabilities, disclosing net worth, and made to mercantile agencies and others expressly as a basis for credit. In law, statement generally means more than representation, in that it deals with particulars or facts from which totals and conclusions may be computed, rather than deals with merely totals or conclusions. The check is a false representation that the makers had sufficient money on deposit or had otherwise arranged so that the check would be paid on presentation, but is not a "false statement," within section 14, and as herein defined.

[2] It is not intimated, however, but that other than financial statements as commonly understood may be within section 14, if false and distinguishable from mere representations. Furthermore, it is believed that "credit," within section 14, is express credit, and not unintended credit, forced upon the seller as here. A sale for payment by check on delivery is so far a cash sale that it is not within section 14, though quasi credit is involved to the extent of the time to present the check for payment. It is apparent Congress distinguishes between the false statements and credit that defeat discharge of the bankrupt, and the false representations and credit that defeat discharge of a debt. Here is of the latter type.

[3] A few days before referee's hearing on objections to discharge, the objectors noticed the bankrupts to produce certain contracts, all related letters, and all accounts and bank books and canceled checks for three years before adjudication and afterwards. At the hearing, counsel for the objectors asked that "it appear" that the bankrupts "admit receiving" said notice. Thereupon the bankrupts' counsel stated they refuse to produce any of the said papers and books, for the reason they have at all times been subject to the trustee's orders, who "has had perfect liberty to examine them at any time," and that they are at the bankrupts' office, and for the further reason the most thereof were prior to four months prior to bankruptcy. The referee was not moved to compel production of said papers and books. It suffices to say that this ambiguous situation is not, as contended, a refusal "to answer any material question approved by the court," within section 14b(6), and because of which discharge should be refused.

The evidence is insufficient to sustain objections that the bankrupts failed to keep books, with intent to conceal their financial condition, or at all. So, too, evidence relating to insurance policies.

Objections overruled; discharge granted.

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SHEA v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. August 3, 1918.)

No. 3078.

1. JUDGES ⊂=51(2)—DISQUALIFICATION—TIME OF OBJECTION.
Affidavit of disqualification of judge, required by Judicial Code, § 21 (Comp. St. 1916, § 988), before term, unless good cause is shown, being tendered on the eve of second trial, six weeks after mandate of appellate court went down, was too late; the only excuse being that mandate was not filed in trial court till after term began.

2. CRIMINAL LAW ⊂=1166½(1)—HARMLESS ERROR—PRACTICE.
Though it would have been better practice to have permitted filing of affidavit of prejudice of judge, and then strike it, refusing to permit it to be filed was not prejudicial.

3. CRIMINAL LAW ⊂=1151—REVIEW—DISCRETION—DENIAL OF POSTPONEMENT.
Denial of postponement to enable counsel to prepare for second trial *held* not reviewable, it not clearly involving an abuse of discretion; it being impossible to say under the facts that counsel did not have sufficient time.

4. CRIMINAL LAW ⊂=1043(2)—REVIEW—OBJECTION TO EVIDENCE—STATEMENT OF GROUNDS.
A mere "I object" to questions, without stating ground of objection, did not necessarily suggest impropriety of cross-examination as to indictments or arrests, as distinguished from convictions, so as to allow review.

5. CRIMINAL LAW ⊂=822(16)—INSTRUCTIONS—REASONABLE DOUBT.
Considering in its entirety charge on reasonable doubt, *held*, that jury could not have been misled into construing it as meaning that merely because 12 minds agree that constitutes conviction beyond a reasonable doubt.

6. CRIMINAL LAW ⊂=822(6)—USING MAILS TO DEFRAUD—INSTRUCTION.
Considering all parts of charge on conspiracy, on prosecution for conspiracy to use the mails in furtherance of a scheme to defraud, *held*, it was not open to the interpretation that defendant would be guilty, if all he did was to assist in the defrauding, or to share in the proceeds.

7. CONSPIRACY ⊂=47—USING MAILS TO DEFRAUD—PRESENCE AT DEFRAUDING.
That defendant was not present at the time of the defrauding is not conclusive on prosecution for conspiracy to use the mails in furtherance of scheme to defraud.

8. CONSPIRACY ⊂=32—USING MAILS TO DEFRAUD—INTENDED VICTIM.
For conviction of conspiracy to use the mails in furtherance of a scheme to defraud, it is not necessary that the person defrauded had been, in the formation of the original conspiracy, selected as its victim.

9. CRIMINAL LAW ⊂=775(6)—INSTRUCTIONS—ALIBI.
Charge on alibi, on prosecution for conspiracy to use the mails in furtherance of a scheme to defraud, *held* not open to criticism of belittling and disparaging, as matter of law, the defense of alibi.

In Error to the District Court of the United States for the Northern District of Ohio; John M. Killits, Judge.

John J. Shea was convicted of conspiracy to use the mails in furtherance of a scheme to defraud, and brings error. Affirmed.

Cornell Schrieber, of Toledo, Ohio, for plaintiff in error.

E. S. Wertz, U. S. Atty., and J. C. Breitenstein, Asst. U. S. Atty., both of Cleveland, Ohio.

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Before KNAPPEN and DENISON, Circuit Judges, and WESTENHAVER, District Judge.

KNAPPEN, Circuit Judge. This proceeding is brought to review a second conviction of plaintiff in error upon an indictment under section 37 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1096 [Comp. St. 1916, § 10201]), for conspiracy to use the mails in furtherance of a scheme to defraud condemned by section 215 of the Code (section 10385). A former conviction of plaintiff in error and others upon the same indictment was reviewed by us in Shea v. United States, 236 Fed. 97, 149 C. C. A. 307, where the fraudulent scheme charged and the salient facts appearing on the trial are set out. It is enough at this time to say that the fraud alleged to have been accomplished is the swindling of one Rundel out of $3,000 by fake horse race betting at a fictitious "turf exchange" in Toledo, Ohio.

The case is a companion of No. 3079, 251 Fed. 440, — C. C. A. —, this day decided, in which Shea and Taylor are plaintiffs in error, and which involves the defrauding of one Hoblitzel out of $5,000, by similar methods; the Hoblitzel case figuring in the evidence on the trial of the instant case. On this review six alleged errors are urged:

[1, 2] 1. Section 21 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1090 [U. S. Comp. Stat. 1916, § 988]) provides that when a party to a civil or criminal cause shall file affidavit that the judge before whom the case is to be tried has a personal bias or prejudice either against him, or in favor of his adversary, the judge shall proceed no further, and another judge shall be designated to hear the case. The affidavit must be filed at least 10 days before the commencement of the term (unless some good cause is shown for failure so to do), and must be accompanied by certificate of counsel of record of the good faith of the affidavit and application. The opinion of this court on the former review was handed down October 13, 1916. The mandate was received below November 18th following. The then current term of the District Court began October 31st, and in due course the case was assigned for trial December 4th following, or as soon thereafter as it could be taken up. On the date last named, on application of plaintiff in error that the trial be passed for a few weeks, the case was specially set for trial on Monday, January 8, 1917. On Saturday, January 6th, when the jurors were under notice, and witnesses for the government at distant places in Ohio and adjoining states had been subpœnaed to attend on the following Monday, an affidavit of plaintiff in error, verified on information and belief, but containing formally sufficient averments of the judge's disqualification, was tendered for filing and the tender refused. The certificate of counsel was made by an attorney who had not theretofore appeared in the case. The only reason given for failing to file the affidavit sooner was that the mandate of this court was not filed in the District Court until after the current term had begun.

Upon this state of facts the court rightly refused to consider the application. Technically, the application came too late. Assuming,

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however, for the purposes of this case, that it could not have been filed before the mandate went down, it clearly could and should have been filed at the nearest available time thereafter. The delay in filing after the mandate issued was in no way explained or accounted for. There is no claim of ignorance of the actual filing of the mandate, or of the announcement of this court's decision more than a month previously. Counsel's appearance had not been entered at the time the affidavit was tendered for filing. Appearance was entered later in the day, but was withdrawn still later in the same day, but after the denial of leave to file affidavit. We do not pass upon the sufficiency of the certificate, nor (though intimating no opinion to the contrary) whether the affidavit in question, made, as it was, on information and belief, was technically sufficient under the statute. We rest our affirmance of the action of the District Judge upon the ground that the affidavit of disqualification was not tendered in due season, and that the circumstances were such as to justify belief that the affidavit was purposely held back, and its use on the eve of trial resorted to for the purpose of securing a postponement. The better practice would have been to permit the affidavit to be filed, and then strike it from the file, thus preserving a more complete record. But no prejudice resulted from the specific practice followed.

[3] 2. On the following Monday (January 8th), which was the date set for trial, and when the government was ready therefor, a postponement was asked to enable counsel for plaintiff in error to prepare for trial. The application was denied. The denial is not reviewable, unless it clearly involves an abuse of discretion, which we think it does not. True, counsel who had represented plaintiff in error, on the review in this court of the former trial, had given up their employment January 3d, and the attorney afterwards employed, and who presented the affidavit of disqualification on January 6th, gave up his employment that day, apparently because he concluded that he was not expected to actively represent plaintiff in error on the trial. A New York attorney was expected to attend on behalf of plaintiff in error, although he seems not to have been expected to take an active part in the trial itself. Counsel who made the application to postpone, and who actively tried the case, had been retained on the evening of the previous day.

The meritorious question was whether, under all the circumstances, counsel was given reasonable time to prepare. The opinion of this court on the former review contained a fairly full statement of the history and salient facts of the case. The transcript of the record of the former trial (less than 300 pages) was printed, and the New York attorney had had a copy since November 18th. Plaintiff in error was very familiar with the case and seems to be highly intelligent. Although the jury was impaneled on Monday afternoon, it was not expected that the taking of testimony would begin until Tuesday, and it so turned out. Under all the circumstances, we cannot say that counsel could not be as well prepared to take up the trial on Tuesday as they would be after several weeks' preparation in advance of a first trial. Certainly the record does not indicate prejudice from lack of preparation.

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[4] 3. Plaintiff in error took the witness stand. On cross-examination the government's counsel was permitted to ask him if he had been charged with fraud or crime in Philadelphia, if he was not at present under indictment in New York, whether he had not been indicted in Boston for clairvoyant frauds, and whether he was arrested in Detroit as a clairvoyant. The ground of complaint stated here is that plaintiff in error was not subject to cross-examination as to previous indictments or arrests, as distinguished from convictions. His answers to the criticized questions, to say the least, largely relieved from prejudice. Sawyer v. United States, 202 U. S. 150, 166, 167, 26 Sup. Ct. 575, 50 L. Ed. 972, 6 Ann. Cas. 269; People v. Ogle, 104 N. Y. 511, 11 N. E. 53; Shears v. State, 147 Ind. 155, 46 N. E. 331. As to the Philadelphia charge, he denied knowledge of its nature, declared he was never identified as the party, and that it had been dismissed as against him; as to the New York charge, that he had been in New York considerably "since then, and they have never made any effort to arrest me"; as to the Boston charge, that he "returned there, surrendered, and it was dismissed"; as to the Detroit charge (in apparent substance), that he was not arrested, because found not to be the man wanted. Indeed, on the former trial, as appears by the record on review, the subject of the indictments in Philadelphia, Boston, and New York was introduced by plaintiff in error on his direct examination.

But we are not called upon to consider whether the criticized questions were proper, for the sufficient reason that the ground of the objection was in no case stated, and the objections were thus fatally defective and not entitled to be considered. We need only refer to our own decisions.[1] A mere "I object" did not necessarily suggest the impropriety of cross-examination as to indictments or arrests, as distinguished from convictions. It was broad enough to include an alleged incompetency of the proof as not the best evidence,[2] which is not in all jurisdictions a good objection,[3] or that the cross-examination was unreasonable or oppressive, which would be largely addressed to the court's sound judicial discretion. Complaint is made of other questions allowed on cross-examination; but, in view of what we have already said, we think the complaint without merit.

[5] 4. In the course of the charge, after an instruction that the presumption of innocence "must result in your bringing in a verdict of not guilty," unless "the evidence convinces you of the truth of the charge beyond a reasonable doubt," the court said, in substance, upon the subject of reasonable doubt, that if the individual juror, after considering all the facts and circumstances in evidence, putting them together in a logical order, giving to each of them that force and effect

[1] Pennsylvania Co. v. Whitney, 169 Fed. 572, 575, 95 C. C. A. 70; Robinson v. Van Hooser, 196 Fed. 620, 624, 116 C. C. A. 294; Tucker v. United States, 224 Fed. 833, 840, 140 C. C. A. 279.

[2] Unless in one instance where a copy of an indictment seems to have been at hand.

[3] Clemens v. Conrad, 19 Mich. 170; People v. Hoffman, 154 Mich. 145, 117 N. W. 568; Lang v. United States (C. C. A. 7) 133 Fed. 201, 204, 205, 66 C. C. A. 255.

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which it should have as part of the chain of circumstances, trying to get at the actual facts without passion or prejudice of any kind, then submitting his judgment to the test of "the judgment of the other men on the jury, * * * still holds a doubt of the defendant's guilt, he is entitled to say that he is entertaining a reasonable doubt, and he ought to hold to it to the production of a verdict of acquittal, or at least to prevent a verdict of guilty." Immediately following the words last quoted, language was used which we quote in the margin.[4] The portions we have italicized (together with the words used in a later paragraph, "You act in short as a deliberative body") are criticized as erroneous, the argument being that "a deliberative body is usually governed by the majority," and, inferentially, that the charge means that "merely because twelve minds agree that that constitutes conviction beyond a reasonable doubt." If the language complained of was all that was said upon the subject of reasonable doubt, it would be subject to criticism; but the language quoted, besides being preceded by what has already been referred to, was followed soon afterwards by the further instruction, not only that if "you all agree that there is a reasonable doubt of the defendant's guilt you ought to bring in a verdict of not guilty," but that:

"The defendant cannot be convicted upon merely the belief of the jury that he is probably guilty. If you do not get any further than that, you ought to bring in a verdict of acquittal. But if these facts convince *each one of you* beyond a reasonable doubt, then there is no recourse to you, as honorable men, but to bring in a verdict of guilty."

Considering the charge upon the subject of reasonable doubt in its entirety, we think the jury could not have been misled into the construction put upon it by counsel, and that it was not erroneous. Allen v. United States, 164 U. S. 492, 501, 502, 17 Sup. Ct. 154, 41 L. Ed. 528.

[6-8] 5. Upon the subject of conspiracy the jury was instructed that:

The "government is not limited, in a case of this kind, to proof that all the men named in the conspiracy and in the charge were in the scheme from the beginning."

There was substantial, though not conclusive, evidence tending to establish that plaintiff in error was the one who gave to the Detroit newspaper in August, 1914, the advertisement quoted in our opinion

[4] "*But that juror should remember always that this case is not submitted to him for his individual judgment.* It is submitted to the judgment of twelve men. In human affairs you and I observe that it is very seldom that absolute certainty can be attained in anything. Reasonable certainty is the best we can reach. We are all liable to make mistakes. We are all liable to the infirmities of judgment. *But for centuries it has been the policy of Anglo-Saxon and Teutonic law, derived from our forefathers centuries ago in Germany, carried over to England, so that it is the principle wherever the Teutonic and Anglo-Saxon blood runs, that the coming together of the minds of twelve impartial, fair-minded, intelligent, honest men upon one proposition, each man surrendering his individual judgment to the scrutiny and criticism of every other man, that when twelve men unite upon the same result on the appeal of facts to their minds, that that judgment is so near accurate, so near to absolute certainty, that it may be said to be free from any reasonable doubt.*"

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in the companion case, No. 3079, before referred to. Immediately following the language we have just quoted was an instruction which we print in the margin,[5] regarding the part played by that advertisement in connection with the use of the mails charged. There was found in Shea's office at the time of his arrest a large amount of paraphernalia identified as that used in the alleged fictitious "turf exchange" in which the government claimed Rundel was swindled. In this connection the court used the further language which we have also printed in the margin.[6] Later, after stating the necessity that the government prove beyond a reasonable doubt that one of the persons charged in the indictment with the conspiracy put the advertisement across the counter in Detroit, but that it was not necessary that the government should prove that that person was plaintiff in error, and after stating that there was evidence tending to establish Shea's identification, and, on the contrary, evidence tending to show that that was a case of "mistaken identity," a further instruction, which we also print in the margin, was given.[7] This later language, in connection with the first marginal quotation in this subdivision, is construed as meaning that:

"Even though the witness should fail to identify Shea as the man who had placed the ad in Detroit, or in the paper, yet Shea would be guilty if all that he did was to assist in defrauding Rundel, or if all that he did was to participate in the result; that is, share in the money of which he was defrauded."

The charge, considering all its parts, is plainly not susceptible of such interpretation, and it clearly states the applicable law. The fact

[5] "Two men may promote a conspiracy to do a thing, violate a law, and after they have got it formed and started and running, anybody who comes in afterwards and gets into the game and helps it, takes part in it, becomes thereby guilty from the beginning as a conspirator. Now, this conspiracy must have an unlawful purpose. The unlawful purpose charged in this indictment is that the mails were to be used to promote a scheme to defraud. The government proves that purpose, attempts to prove that purpose rather, by showing the fact, which is not disputed in this case, that an advertisement was put in the Detroit News, which in its terms, and you are justified in reaching that conclusion yourselves, invited correspondence by mail, and the government establishes, and there is no one here who says otherwise, that he who put that advertisement in the Detroit News did it with the expectation that the mails would be used thereby as a result of its invitation, and that that fact, as the testimony in this case developed, was productive of its victim, Mr. Rundel; the government insists that that fact shows that part of this conspiracy was the unlawful purpose to use the mails."

[6] "And if you find beyond a reasonable doubt that they are the paraphernalia of a swindling scheme of the nature charged in this indictment, and if you find beyond a reasonable doubt that part of that scheme was to violate the mails in the execution of which this overt act at Detroit was perpetrated, then the finding of these articles in Mr. Shea's possession becomes a matter of sufficient substance in this case as to demand some sort of explanation, because unexplained possession indicates domination, ownership."

[7] "If you find that there was a case of mistaken identity, and that was somebody else, and that that somebody else was still one of these men named in this indictment, Collins, or Collier, or somebody else, the fact that you leave Shea out is not conclusive of your duty in this case, if you find there are left in the case other facts which convince you beyond a reasonable doubt that Shea was interested in this conspiracy and participated in some form or other, either in the result of the conspiracy, or in its execution in some step or other, by evidence which convinces you beyond a reasonable doubt."

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that Shea was not shown to have been present in the "exchange" at the time Rundel was defrauded is not conclusive. The court properly instructed that under the charge of conspiracy it was not necessary that the government prove that Rundel had been, in the formation of the original conspiracy, selected as its victim.

[9] 6. Plaintiff in error presented testimony tending to show an alibi as respects both the placing of the Detroit advertisement and personal participation in the swindling transactions in issue. The charge upon the subject of alibi is criticized as belittling and disparaging, "not as matter of comment, but as a matter of law, the plain and conclusive alibi, which the defendant had proved." The more prominent grounds of this criticism are the reference to a "so-called alibi," the statement that "in a conspiracy case an alibi performs a very different and much smaller, much less important, function than in a charge of direct crime," and the italicized words contained in a long paragraph which we print in the margin.[8]

It is enough to say that in our opinion the charge not only is not subject to the criticism stated, but, on the contrary, was, taken in its entirety, unusually helpful in the way of calling the jury's attention to the application of the defendant's alibi to the particular situation presented to the jury. See, also, Young v. United States, 249 Fed. 935, — C. C. A. —, and the reference thereto in the companion case of Shea and Taylor v. United States, No. 3079.

Finding no reversible error in the record, the judgment of the District Court is affirmed.

[8] "Now, you cannot find that Shea was in Detroit, and thereby charge him with that particular transaction in the furtherance of this conspiracy, unless the evidence convinces you of that fact beyond a reasonable doubt. You cannot find that Shea directly participated with Rundel and thereby carried the burden of that transaction, unless you find that fact beyond a reasonable doubt. And, as in every alibi transaction, all Shea needs to do is to bring in evidence against those two particular incidents charged against him that deprive you of the judgment that Hoblitzel was right in the one instance and Gorton and Remington right in the other, beyond a reasonable doubt. Shea is not called upon to prove actually that he was not in Detroit, that he was elsewhere, or to prove by a preponderance of evidence that he was not present when Hoblitzel parted with his money: all he needs to do is to introduce evidence enough to establish in your minds a reasonable doubt as to whether those matters were true. *But as I have said, that is the extent of the force of alibi testimony in this case; it simply goes to the credibility of a certain line of testimony.* It is not an absolute defense if there remains in this case other incidents, transactions and facts which you accept as established beyond a reasonable doubt, and which in your judgment connect the defendant with this swindling transaction and the element in the transaction which involved the fraudulent use of the mails."

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SHEA et al. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. August 3, 1918.)

No. 3079.

1. CRIMINAL LAW ⟸372(1)—EVIDENCE—OTHER OFFENSES.
Evidence of other frauds accomplished or attempted at substantially the same time, and inferably the outgrowth of the same general fraudulent scheme, *held* admissible on prosecution for using the mails in furtherance of scheme to defraud through fake horse race betting in a sham turf exchange.

2. CRIMINAL LAW ⟸424(5)—EVIDENCE—ACTS OF COCONSPIRATOR.
Telegram sent by defendants' coconspirator to another victim, the day after he lost his money, is not inadmissible, as being act done after the fraudulent scheme was at an end; the general fraudulent scheme, fake horse race betting in sham turf exchanges, not being shown to have then been abandoned, and the telegram being part of the res gestæ.

3. CRIMINAL LAW ⟸424(3)—EVIDENCE—CONSPIRATORS—ARTICLES IN COCONSPIRATOR'S OFFICE.
There being evidence, on a prosecution for using the mails to defraud, tending to connect defendant T. with the general scheme to defraud through fake horse race betting in sham turf exchanges, the finding in another defendant's office on the day of arrest of paraphernalia adapted to use in the scheme was admissible against T., though he was not present at the finding.

4. WITNESSES ⟸266—CROSS-EXAMINATION—DEPRIVING OF BENEFIT.
The standing up of the named inspector, when witness, on cross-examination on a collateral matter going merely to his credibility, had stated he saw one of the inspectors, naming him, did not, as having deprived defendants of the benefit of cross-examination, entitle them to have witness' testimony identifying them stricken.

5. CRIMINAL LAW ⟸423(1)—EVIDENCE—CONSPIRACY.
The act of one of several associated in the transaction of a common enterprise, done in furtherance of the common object, is generally admissible against the others; and this applies generally to existing schemes to defraud, under Criminal Code, § 215 (Comp. St. 1916, § 10385), denouncing the offense of using the mails in the furtherance of a scheme to defraud.

6. CRIMINAL LAW ⟸787(1)—INSTRUCTIONS—FAILURE OF DEFENDANT TO TESTIFY.
Reference in charge to certain government testimony as uncontradicted does not violate Act March 16, 1878 (Comp. St. 1916, § 1465), declaring defendant's failure to testify shall not create any presumption against him; it not being plain that no one but defendants could have disputed the facts.

7. CRIMINAL LAW ⟸822(4)—FEDERAL COURTS—COMMENT OF JUDGE ON EVIDENCE.
Part of charge as to turf exchange being a sham, considered with its context and the entire charge, held not to go beyond the rule in federal courts that the trial judge may express his opinions on the facts, and advise the jury regarding their conclusions thereon.

8. CRIMINAL LAW ⟸762(2)—FEDERAL COURTS—COMMENT OF JUDGE ON EVIDENCE.
In federal courts, trial judge may express his opinions on facts, and advise jury regarding its conclusions thereon, provided it is given to unequivocally understand that it is not bound thereby; his comments to be judicial and dispassionate, and leave jurors free to exercise their independent judgment.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

9. Conspiracy ⊂=48—Natural Consequences—Use of Mails—Question For Jury.

Whether use of the mails to collect the check deposited in betting by the victim of a scheme to defraud by fake betting in sham turf exchanges, was not such a natural and probable consequence of the execution of the scheme that the other participants would naturally have foreseen the likelihood thereof, rendering them liable under Criminal Code, § 215 (Comp. St. 1916, § 10385), for acts of confederates, is a proper jury question.

10. Post Office ⊂=49—Use of Mails to Defraud—Evidence.

Evidence on prosecution for using the mails in furtherance of a scheme to defraud *held* not to show at most, a mere suggestion that the victim of the fraud used the mails for collecting his check and substituting cash.

11. Criminal Law ⊂=793—Instructions—Acts of Coconspirators.

Charge, on prosecution for using the mails in furtherance of a scheme to defraud, *held* not to amount to one to find defendants guilty, even though the use of the mails was a fresh and independent product of the mind of one of their confederates.

12. Post Office ⊂=49—Using Mails to Defraud—Evidence—Custom.

Proof of custom of banks to collect checks by mail is competent, on prosecution for using the mails in furtherance of a scheme to defraud, where check of victim on a distant bank was deposited in local bank for collection; persons of ordinary business experience being presumed to know of such custom.

13. Post Office ⊂=49—Using Mails to Defraud—Evidence—"Causing."

Evidence, on prosecution for using the mails in furtherance of a scheme to defraud, *held* to warrant conclusion that defendants consciously participated in bringing about the use of the mails for the purpose, which would be a "causing" of such use, within Criminal Code, § 215 (Comp. St. 1916, § 10385), defining the offense.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Cause.]

14. Criminal Law ⊂=829(1)—Instructions—Requests Covered.

It is enough that the subject-matter of refused requested instructions was sufficiently covered by the charge given.

In Error to the District Court of the United States for the Northern District of Ohio; John M. Killits, Judge.

John J. Shea and Edward Taylor were convicted of using the mails in furtherance of a scheme to defraud, and bring error. Affirmed.

See, also, 251 Fed. 433, — C. C. A. —.

Ralph Emery, George P. Hahn, and Cornell Schreiber, all of Toledo, Ohio, for plaintiffs in error.

E. S. Wertz, U. S. Atty., and J. C. Breitenstein, Asst. U. S. Atty., both of Cleveland, Ohio.

Before KNAPPEN and DENISON, Circuit Judges, and WESTENHAVER, District Judge.

KNAPPEN, Circuit Judge. Plaintiffs in error were convicted upon an indictment under section 215 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1130 [Comp. St. 1916, § 10385]), for using the mails in furtherance of a scheme to defraud. The indictment named several defendants, in addition to plaintiffs in error, including one Collins and one Brown. The alleged fraudulent scheme is best understood from a brief statement of the government's claim, which the record

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tends to sustain, and which is sufficiently covered by the indictment. The substance of the government's case is this:

Defendants operated in the Nasby Building, in Toledo, Ohio, a purely fictitious "turf exchange," equipped with paraphernalia apparently adapted thereto, including blackboard, charts, telephone and telegraph instruments, fictitious packages of money, betting tickets, etc. Hoblitzel, who resided in Marion, Ohio, while at Toledo on business, was met by Brown, who pretended to be acting for a syndicate of gamblers in betting on the turf exchange, and who won Hoblitzel's confidence, introducing him to Collins; the two bringing him to the "turf exchange" rooms referred to, where Hoblitzel was induced to bet his check for $5,000 on a pretended horse race, in the belief and on the false representation that Collins had advance information by wire from New York on the result of the races, whereby he always won the bets. It was announced that Hoblitzel had won $10,000, but that the money could not be paid until $5,000 cash was substituted for his check—which several days later was done. It was then announced that Hoblitzel's bet turned out to have been lost, through an alleged misunderstanding of betting instructions, whereby the wager was laid on the wrong result. Hoblitzel was thus swindled out of his $5,000. The transaction extended from August 15 to August 25, 1914. The use of the mails will be referred to later.

The instant case is a companion to No. 3078, 251 Fed. 433, — C. C. A. —, this day decided, in which Shea alone is plaintiff in error, and which involved another alleged case of swindling through fake horse race betting by means generally similar to those charged to have been employed here. A former trial of that case was reviewed by us. Shea v. United States, 236 Fed. 97, 149 C. C. A. 307. On the former trial proof of the Hoblitzel transaction (the subject-matter of the indictment in the instant case) was received as evidence of intent and motive in the other case. In our opinion referred to, the substance of the evidence relating to each of the alleged frauds is stated. The alleged errors argued relate to the admission of evidence, the charge of the court as given, and refusals to charge. So far as seems practicable, we consider the questions in that order.

[1] 1. Proof of similar offenses. On August 14, 15, and 16, 1914 (which was about the time the Hoblitzel transaction started), there was published in a Detroit newspaper this notice:

"Gentleman will invest from $30,000 to $50,000 in modern fertile farm. Must be unincumbered. State size and acreage and full particulars in first letter. Owners only. Agents need not answer. Address Box R-20, News."

The evidence tended to show that Rundel, a farmer living in Oakland county, Mich., read and replied to the advertisement. Later he was called upon by one Collier, who claimed to be representing the "Guggenheims" in the prospective purchase of a farm. Rundel met Collier by appointment at Toledo, September 21, and was thereafter inveigled into a fictitious "turf exchange" in the Denison Building, where he was induced to bet $3,000 on a fake horse race, under representations similar to those made to Hoblitzel, and by which he was induced to make his bet. Rundel's money was lost by the claim that the

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bet had been mistakenly laid on the wrong horse. The evidence tended also to show that one Millard, a farmer living near Rundel, also saw the advertisement in August, and answered it by mail. He was later called upon by Collier on September 5 and 17, who told a "Guggenheim" farm purchase story in substance as related by Collier to Rundel. The Millard transaction went no further than an agreement upon the purchase price, because of his refusal to add Collier's commission to the price of the farm and to bring the commission with him to Toledo.

The evidence of these transactions was properly admitted. There was testimony sufficiently connecting both plaintiffs in error with the Rundel transaction. True, neither plaintiff in error is directly shown to have been connected with the Millard incident; but the Rundel and Millard transactions were apparently the result of the Detroit advertisement with which there was testimony directly connecting Shea. Both these transactions were in progress at substantially the same time, and the same man (Collier) opened the fraudulent negotiations in both cases and by similar representations. The two alleged frauds—the one accomplished; the other attempted—were inferably the outgrowth of the same general fraudulent scheme charged, with which the evidence tended to connect both plaintiffs in error and in whose execution the testimony indicated fictitious "turf exchanges" were at different times maintained in the Nasby Building (where Hoblitzel was swindled), in the Denison Building (where Rundel lost his money), and in the Chamber of Commerce Building.

As to the admissibility generally of this class of testimony, we content ourselves with a reference to what was said on the subject in Shea v. United States, supra, 236 Fed. 102, 103, 149 C. C. A. 312, 313. The charge (an extract from which we print in the margin[1]) so limited the use of the Millard testimony as to remove any danger of undue prejudice.

[2] The telegram from Collins to Rundel was also properly admitted. It was sent September 25, 1914, the day after Rundel lost his money; but it is not for this reason subject to the objection of being an act done after the fraudulent scheme was at an end. The general fraudulent scheme is not shown to have been at that time abandoned; the telegram was part of the res gestæ. McDonald v. United States, 241 Fed. 793, 800, 154 C. C. A. 495, is not in point.

[3] 2. It was not error to admit, as against Taylor, evidence of the finding in Shea's office in the Spitzer Building, on the day of the arrest (October 5, 1914), of the large amount of paraphernalia apparently of the kind used in the fictitious "turf exchanges" and adapted to the fake betting schemes charged. The fact that Taylor was not present

[1] "The Millard testimony ought to be disregarded by you altogether, unless it is your judgment that some one then associated and confederated with either Taylor or Shea in the scheme to defraud, such as involved Rundel, and such as involved Hoblitzel, was the party who negotiated with Millard, and that his dealings with Millard were for the purpose of bringing the latter within the reach of the confederates in the alleged fraudulent scheme, that Millard might be victimized substantially in the same manner as Rundel and Hoblitzel were defrauded, and substantially in the manner as alleged in the indictment."

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when the paraphernalia were found is not material. There was evidence tending to show his connection with the general scheme to defraud by fake betting, in which scheme the paraphernalia are claimed to have been used.

[4] 3. One Blaine had testified to participation by both plaintiffs in error in renting rooms in the Chamber of Commerce Building. On cross-examination he stated that a post office inspector had shown him certain pictures, and in answer to a question whether he saw in the courtroom the inspectors who showed him the pictures said he saw one, whom he named, whereupon the inspector stood up. Plaintiffs in error moved to strike Blaine's testimony from the record and to instruct the jury to disregard it, on the ground that by the inspector's action they had lost the benefit of cross-examination. The motion was rightly denied. The meritorious question was one of identification of plaintiffs in error. The cross-examination related to a collateral matter, going merely to the credibility of the witness. The jury was presumably competent to give to the criticized incident whatever weight it deserved.

[5] 4. The charge as to alleged alibis. There was testimony that both Shea and Taylor were at the "turf exchange" in the Nasby Building on the occasion of certain important steps in the consummation of the alleged fraud, the dates thereof being expressly given—Taylor being alleged to have acted as manager of the pretended exchange; Shea, as its cashier. Both Shea and Taylor offered evidence, by way of depositions of others, relating to alibis covering the entire period of time involved. The charge of the court on the subject is criticized as instructing, in substance, that plaintiffs in error "could be convicted, although their alibis were fully established." We think the charge not subject to this criticism. On the contrary, the jury was instructed that, if the proof of alibis was sufficient to create a reasonable doubt of the defendants' guilt, they should be acquitted. It was said that, even if the government's witnesses, including Hoblitzel, were mistaken as to the presence of the defendants at the various times and places testified to, the jury might yet find them guilty on other evidence in the case. In this there was no error. The important question of their presence related, not to the precise date, but to the occasion, unless (as we cannot say) their presence on the precise date testified to was indispensable to guilt. Young v. United States, 249 Fed. 935, —— C. C. A. —— (decided April 2, 1918). The instruction that Hoblitzel's alleged mistake as to the presence of plaintiffs in error "would be merely to discredit him as a witness" was coupled with the express limitation—"if other evidence in the case convinces you beyond a reasonable doubt that Taylor was a member of the band whose fraudulent common purpose worked to defraud Hoblitzel." The act of one of several persons associated in the transaction of a common enterprise, and done in furtherance of the common object, is generally admissible as evidence against the others. See Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 249, 38 Sup. Ct. 65, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461. We think this principle applicable generally to existing schemes to defraud under section 215 of the Criminal Code.

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We find no prejudicial error in refusing request No. 29. So far as it correctly stated the applicable rule, we think it sufficiently covered by the charge.

[6] 5. Reference to "uncontradicted testimony." Neither plaintiff in error testified on the trial. In discussing the testimony, in the course of the charge, the court several times referred to certain testimony on the part of the government and certain identifications of Shea and Taylor as "uncontradicted," "not directly contradicted," or "without any contradiction." These statements are criticized as violating the statute (Act March 16, 1878, c. 37, 20 Stat. 30 [3 U. S. Comp. Stat. 1916, § 1465]), which provides that the failure of a defendant in a criminal case to voluntarily testify "shall not create any presumption against him." If these comments were manifestly designed to direct the attention of the jury to defendants' failure to testify (or, perhaps, if they had such necessary effect), they would constitute reversible error. Wilson v. United States, 149 U. S. 60, 65, 13 Sup. Ct. 765, 37 L. Ed. 650, and following; McKnight v. United States (C. C. A. 6) 115 Fed. 972, 981–983, 54 C. C. A. 358. But unless they were intended as such comment, or would naturally be so understood, no error was committed. Jackson v. United States (C. C. A. 9) 102 Fed. 473, 487, 42 C. C. A. 452; Carlisle v. United States (C. C. A. 4) 194 Fed. 827, 114 C. C. A. 531;[2] Rose v. United States (C. C. A. 8) 227 Fed. 357, 363, 142 C. C. A. 53. To say the least, it is not so plain that, as to any of the subjects commented upon by the District Judge, no one but plaintiffs in error could, in the nature of things, have disputed them, if untrue, as to make it clear that the court's remarks were intended to be, or that they would naturally be understood as, an unfavorable comment on the failure of plaintiffs in error to testify. They thus did not constitute error.

[7, 8] 6. The trial court is alleged to have invaded the province of the jury, first, by instructing in effect that the so-called "turf exchange" was a sham and a fraud, the requested instruction that such alleged fact must be proved beyond a reasonable doubt not being in terms

[2] In Jackson v. United States, supra, the prosecutor's inquiry, in the course of argument to the jury, "Why didn't the defendant put a sworn witness on the stand?" was held not necessarily to imply, and not ordinarily to be understood to mean, that comment was being made on the defendant's failure to testify. In Carlisle v. United States, supra, an argument by prosecuting counsel that the government had made out a prima facie case, which had not been contradicted, was held not reversible error. In Rose v. United States, supra, an argument that the evidence "is such that no sane man can arrive at any other conclusion" than that the defendant was guilty, followed by an inquiry, "Who is it that denies that Mr. Warren told the truth when he went on the witness stand?" was held to be no more than an argument that the evidence of the government is uncontradicted and unexplained. The statute, indeed, does not go so far as to forbid any nonprejudicial reference by the court to the defendant's failure to testify, as in Hanish v. United States (C. C. A. 7) 227 Fed. 584, 586, 142 C. C. A. 216, where it was held that an instruction that the fact that defendant had not testified is not to be considered against him was not prejudicial comment, and so was not error. A verdict cannot be impeached merely by showing that the jurors discussed in the jury room defendant's failure to testify. Stout v. United States (C. C. A. 8) 227 Fed. 799, 803, 804, 142 C. C. A. 323.

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given; and, second, in that the charge as a whole was unduly argumentative in favor of the prosecution. The rule is well settled in the federal courts that the trial judge has the right to express his opinion upon the facts of the case and to advise the jury regarding their conclusions thereon, provided the jury is given to unequivocally understand that it is not bound by the judge's expressed opinion. Simmons v. United States, 142 U. S. 148, 155, 12 Sup. Ct. 171, 35 L. Ed. 968; Allis v. United States, 155 U. S. 117, 123, 15 Sup. Ct. 36, 39 L. Ed. 91; Young v. Corrigan (C. C. A. 6) 210 Fed. 442, 127 C. C. A. 174. This general rule is subject to the limitation that his comments upon the facts should be "judicial and dispassionate, and so carefully guarded that the jurors, who are the triers of them, may be left free to exercise their independent judgment." Rudd v. United States (C. C. A. 8) 173 Fed. 912, 914, 97 C. C. A. 462; Sandals v. United States (C. C. A. 6) 213 Fed. 569, 576, 130 C. C. A. 149.

The important question is whether the court went beyond a proper exercise of his functions. In discussing the evidence of the existence of the alleged scheme to defraud the trial judge used the language which we quote in the margin.[3] Plaintiffs in error specially criticize the portions we have italicized. Obviously, the criticized extract must be considered in connection, not only with its context, but with the entire charge. The court had already told the jury that it was its business "to decide the facts, regardless of what it may assume to be the impressions of the judge." Several times afterwards the jury was expressly told that it was the sole judge of the facts, including these statements:

"If your opinion upon the questions upon which the court has ventured an opinion, namely, that a scheme to defraud was in operation, which was substantially of the character charged in the indictment, and that the mails were misused to promote such a scheme, without reference to the identity of the parties interested, differs from that entertained by the court, your duty is to adhere to your own opinion, and not allow that of the court to have any influence whatever upon your conclusion."

It is true that the court did express his opinion that no reasonable man could question that the so-called turf exchange was a pretense and a sham. This proposition, under the evidence in the case, was not reasonably open to question. There was uncontradicted and competent testimony which could reasonably mean only that neither the telephones nor telegraph instruments connected anywhere. The only reasonable inference from the testimony was that the charts, racing forms, etc., were shams. In view of the court's charge, taken as a whole, including the express instructions regarding the presump-

[3] "There is little chance for dispute here, in the court's opinion, but that the paraphernalia employed to impress Hoblitzel with the thought that he was in touch with a real turf exchange, so called, where real wagers on the outcome of real horse races might be laid, were but the furniture of this swindle. *The large amount of apparent money was but a simulation, the telegraph and telephone instruments were but shams, in that neither was a real instrument of communication; the announcements and posting of races were shams, the bookings were tricks. Any one who devised this scheme produced just such a fraudulent device as the statute condemns.*"

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tion of innocence and the necessity of proving the various elements of the charge beyond reasonable doubt, we find no prejudicial error, if indeed, there is any, in the failure to give the request we have referred to. While the charge of the court was argumentative, in the sense that it contained a considerable discussion of the testimony, which was applied to the various elements of the offense charged, we are not impressed that it was unduly so, or that it went beyond the limitations upon the trial judge's right of comment as previously expressed in this paragraph.

[9-13] 7. The use of the mails. Hoblitzel testified that by way of substituting cash for his original $5,000 check he procured $2,500 in currency and paid it over to Taylor at the "exchange," and then drew his check on the Marion bank for the remaining $2,500. This check was forwarded through a Toledo bank, by mail, to the Marion bank, and the proceeds remitted through the mails by the latter bank to the Toledo bank. These uses of the mails were respectively the subjects of the charges in the two counts of the indictment. The refusal to direct verdict is assigned as error, on the ground that plaintiffs in error did not cause the mails to be so used. Error is also assigned upon the admission of testimony regarding the custom of banks to make such collections by mail, as well as upon the giving of an instruction to the effect that plaintiffs in error should be convicted, if they were confederated with Brown and Collins, or either of them, in a scheme to defraud substantially of the character charged, and if in the promotion of the scheme any one of the confederates was the conscious and inducing occasion of Hoblitzel's taking the check to the bank for the purpose of having it sent through the mails for collection, as the natural and probable consequence to be anticipated by the parties interested in the alleged scheme to defraud, and if the mails were thereafter used for transmitting the check to Marion, and as the natural and reasonable consequence, so to be anticipated by the parties interested in the fraudulent scheme, the proceeds of the check were sent by mail from Marion to Toledo.

We think the court did not err in either of the three respects complained of. There was testimony that at the "exchange," in answer to Hoblitzel's statement that he did not wish to go to Marion for the money, Taylor said to him, in the presence of Brown and Collins, that there was no need of his going down after it—"you can send a check just as quick as you can go yourself after it;" that Taylor then extended for a few days the time for getting the money, whereupon Collins, in the presence of Taylor and Brown (Shea was not present), asked Hoblitzel to go with him to the bank and send the check out through the bank; that Collins and Hoblitzel then went to the bank, where the collection was arranged for, Collins introducing Hoblitzel and indorsing the check; that a few days later, when the money was paid by the Toledo bank to Hoblitzel, in the company of Brown and Collins, it was taken by Hoblitzel to the "exchange" and there received from him by Taylor, in Shea's presence and with the latter's participation.

Notwithstanding the fraudulent scheme charged did not include the use of the mails, and such contemplated use is not necessary to a vio-

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lation of section 215 of the Criminal Code (United States v. Young, 232 U. S. 155, 34 Sup. Ct. 303, 58 L. Ed. 548), we think the court rightly submitted to the jury the question whether the use of the mails in collecting the Hoblitzel check was not at least such a natural and probable consequence of the execution of the original scheme (taking into account the original use of the check for betting purposes) as that all the participants would naturally have foreseen the likelihood that such resort to the mails would be had whenever it appeared expedient so to do in aid of the common purpose. Hitchman Coal & Coke Co. v. Mitchell, supra, 245 U. S. 229, 249, 38 Sup. Ct. 65, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461.

We see no merit in the suggestion that the evidence showed "at most, a mere suggestion that Hoblitzel could use the mails"; nor do we think the effect of the portion of the charge criticized amounted to an instruction to "find the defendants guilty, even though the use of the mails was a fresh and independent product of the mind of one of their confederates."

The proof of the custom of banks to collect checks by mail was clearly competent. The existence of such custom would be presumed to be within the knowledge of people of ordinary business experience (Spear v. United States [C. C. A. 8] 246 Fed. 250, 158 C. C. A. 410); and the jury might well think plaintiffs in error more than ordinarily waywise.

We think, moreover, that the testimony would warrant a conclusion that plaintiffs in error consciously participated in bringing about the use of the mails for the purposes stated. Such a bringing about of the use of the mails would be a "causing" of such use, even though neither of them personally made the arrangements with the bank. United States v. Kenofskey, 243 U. S. 440, 37 Sup. Ct. 438, 61 L. Ed. 836; Goldman v. United States (C. C. A. 6) 220 Fed. 57, 61–63, 135 C. C. A. 625.

We find it unnecessary to consider the question (not presented in brief of plaintiffs in error nor clearly raised on the record) whether the mere fact of the formation of the fraudulent scheme charged would make plaintiffs in error liable for the act of either of their associates (not directly or indirectly participated in by plaintiffs in error) in causing the mails to be used in collecting the check, without reference to whether such use was such a probable, incidental, or reasonable consequence of the execution of the alleged fraudulent scheme as that it should naturally have been foreseen by all the parties thereto as likely to happen.

[14] 8. The subject-matter of the requested instructions whose refusal is complained of in the twelfth paragraph of brief of plaintiffs in error was sufficiently covered by the charge as given.

We have discussed the prominent assignments argued by plaintiffs in error, and have considered all so argued. We find no prejudicial error, and the judgment of the district court is accordingly affirmed.

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PACIFIC MAIL S. S. CO. v. PANAMA R. CO.

(Circuit Court of Appeals, Second Circuit. March 8, 1918.)

No. 18.

1. WHARVES ⊂=20(7)—ACTIONS—BURDEN OF PROOF—RES IPSA LOQUITUR.
While the collapse of a wharf under control of a respondent, under the doctrine of res ipsa loquitur, raises a presumption of negligence, it does not, strictly speaking, change the burden of proof, which remains on the libelant, as in other cases, to establish the truth of all of its allegations.

2. WHARVES ⊂=20(1)—INJURY TO VESSEL BY COLLAPSE OF WHARF—NEGLIGENCE.
While libelant's steamship was lying at night alongside a wharf of respondent in the Panama Canal, where she had been loading during the day, the wharf collapsed, and a heavy loading crane standing on a track near the edge fell upon and did serious damage to the vessel and her cargo. The wharf had been in operation for seven years, and was built upon piles; those in front being 75 or 80 feet long and driven for several feet into the mud. Many of these piles were broken off when the accident occurred, and the tops of the others were forced outward. The wharf was a long one, and there had been some settling and movement in different places and at different times during several years, and at the worst place it had been strengthened by guy wires extending inland. This movment had been gradual, and not serious in character: *Held*, on the evidence, that the collapse was due to the sudden sliding of a large section of the earth on which the structure was built into the canal; that the wharf was properly built, and there was nothing to charge respondent with negligence in its building or maintenance, nor in failing to move the vessel, since there had never been anything to give warning of any sudden movement such as took place.

Ward, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by the Pacific Mail Steamship Company against the Panama Railroad Company. Decree for respondent, and libelant appeals. Affirmed.

Appeal from a decree dismissing a libel in personam in admiralty. The libel was brought to recover damages against the respondent for the negligent maintenance of a wharf at Balboa, in the Canal Zone, at the Isthmus of Panama, on the 18th day of August, 1912. A steamer of the defendant, the Newport, was lying alongside the wharf in question, loading; her starboard side inshore, but breasted out some 12 feet or more. Along the edge of the wharf there ran tracks, upon which were moved two large loading cranes. These cranes on the night in question had been left opposite where the Newport lay, and at about 1:40 on the morning of the 18th the whole dock collapsed, throwing one of the cranes across the bow of the vessel, submerging her in the mud, and causing great damage to her and much loss to her cargo.

The questions at issue were whether the wharf was properly constructed and maintained, and whether there had been sufficient warning of the collapse to require the respondent either to take measures to stay the wharf or to warn ships away. The wharf was to be abandoned a short time thereafter in favor of another a part of the permanent structure of the canal itself. The District Judge concluded that there was no evidence of any negligence in the maintenance or construction of the wharf, or of any failure to warn the

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Newport of impending danger. The evidence was exceedingly voluminous and is discussed at length in the opinion. A complete statement of the facts would extend to an inordinate length.

Kirlin, Woolsey & Hickox, of New York City (J. Parker Kirlin, of New York City, of counsel), for appellant.

Richard R. Rogers and John Hunter, Jr., both of New York City, for respondent.

Before WARD and ROGERS, Circuit Judges, and LEARNED HAND, District Judge.

LEARNED HAND, District Judge (after stating the facts as above). [1] We think that the collapse of the wharf created a presumption of negligence under the rule correctly stated in Hastorf v. Hudson River Stone Supply Co. (D. C.) 110 Fed. 669. That presumption does not change the burden of proof, strictly speaking, since the libelant, though it makes a case by showing the collapse, does not put upon the respondent the duty of satisfying us that it was not negligent. When the respondent once put in proof that the wharf and embankment were well made and well maintained, it had done all that was required of it under the presumption. The libelant must convince the court of the truth of all its allegations in this as in every other case. In so far as Hastorf v. Hudson River Stone Co. means more than this, we do not agree. The better form of expression appears in the kindred case of inevitable accident. Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270. It is true that sometimes the phrase "burden of proof" is spoken of in cases of inevitable accident (The Edmund Moran, 180 Fed. 700, 104 C. C. A. 552); but this is to be taken only in the sense that the respondent in such cases must by evidence exclude all the possibilities of neglect. Such cases do not profess to lay down a rule touching the duty of finally satisfying any doubts upon the crucial issues. The analogy applies, we think, of bailments (The Genessee, 138 Fed. 549, 70 C. C. A. 673), where this distinction is generally observed (Stewart v. Stone, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215; Claflin v. Meyer, 75 N. Y. 260, 31 Am. Rep. 467). Therefore, as the respondent put in proof to show that the wharf and the embankment were made in accordance with proper principles of engineering, and that the embankment went out without warning, because of circumstances which they could not control, it had discharged any duty arising from the presumption. The burden of proof remained on the libelant. Wigmore, §§ 2485, 2487.

[2] The first question is whether the wharf was made according to proper principles of engineering. No challenge is made of its construction, except the length of the piles, the depth of the excavation in front, and the embankment on which lay the tracks. The best evidence of the length of the piles is that of Bierd (folio 4720), who built the dock. He was corroborated in this respect by Hunt (folio 726). The longest piles which would naturally be, and are stated to have been, those at the front of the dock, were about 75 or 80 feet long. As they ran back to the shore, they naturally decreased this length,

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so that some of them were probably 60 feet long. The testimony of Clark that they were from 50 to 75 feet long (folio 651) does not materially vary and was not intended to be exact. If so, they were certainly driven below any possibility of exposure by whatever dredging took place. To take the figures most favorable to the libelant, we should assume 10 feet of them above high tide—a tide of 20 feet—and a depth of 30 feet close to the wharf at low water. This leaves 20 feet of the pile driven below the surface of the mud. These figures are too high. We should rather take 9 feet above high water below low tide, which leaves 27 feet of grip upon the mud. It is of no great consequence which of these figures we assume. By no possibility could the toes of the piles be exposed by any dredging which took place. If the dredging was a contributing fault, it was for some other reason than this. There is other conclusive testimony: Many of the piles were broken off at the time of the slide. Hull says that all were broken off which he examined, and we read his testimony as meaning all those at the edge of the wharf. Mears says (folio 2295) that 25 per cent. were broken, which is enough to include those at the edge, though he does not say which he means. Those which were not broken off bent outward after the slide, which showed that their toes could not have been detached. Those which were broken off just below the mud line, the broken feet of which swung outwards as the slide carried away the wharf, give an opposite impression at first, but not when one considers that their broken toes pointed west. There is nothing in the suggestion that the teredos had weakened them, for the testimony is uniform that all broke below the mud line, where the teredo does not attack.

The next question is of the depth of the excavation. In view of the depth to which the piles were driven, this is a relevant question only because of the libelant's other theory that so much of the lateral support had been removed from the bank that it swept between the piles and broke them off. Mears says (folio 2214) that they attempted to maintain for normal purposes a depth of 30 feet at low tide, but it is doubtful whether they ever succeeded. Later (folio 2313) he says that they did not get 30 feet, but only about 28 feet, which corresponds exactly with the calculation reached by Judge Hough from the dimensions and position of the Newport after she sank. Clark says (folio 196) that "they were supposed to have 30-odd" feet 12 feet off the piles, but before the Cardenas dredged vessels of 22 feet or 23 feet draught lay aground (folio 197), and he thinks that the dredge never came nearer than 25 or 30 feet of the piling (folio 290). This contradicts Geenzier's version of dredging within 4 feet of the piles and McKay and Schuber's estimates, both of whom Judge Hough saw and discredited. Hunt merely says that the dredging was "inside of 12 feet" (folio 792), and that they dredged to 30 feet at low water. Yet they handled vessels of a maximum draught of 25 feet 6 inches (folio 794). Moreover, some allowance must be made for 3 months' fill after the Cardenas left. The contours upon Sartor's map, Exhibit A, May 11, 1915, are at mean sea level, and the deepest of these, 35 feet, runs only under the stern of the Newport. The 30-foot contour at the bow, and further forward on the stern, is equivalent only to 22 feet. The

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soundings near the collapse are, of course, of no value to this inquiry. Sartor's soundings of January, 1911, if at mean tide, give 28 feet, 30 feet off the pier end, and about 23 feet close to them. Drennan's figures reduced to low tide, Exhibit 8, do not lead to the belief that as much as 28 feet was obtained at the pile ends, or over 30 feet at the next soundings, which are at a distance out from the piles of say 30 feet. They, like Exhibit A, May 11, 1915, are valueless over the area of the collapse. The contour lines of Exhibit T probably are not to be taken literally, though they are the basis of Spooner's calculations. For what they are worth they show a mean tide depth opposite the Newport's forward hatch of only 25 feet—30 feet off the pile ends.

It is certainly impossible to ascertain exactly what the depth was. Judge Hough made an elaborate calculation from the photographs of the Newport and her known dimensions, and reached the conclusion that under the Newport's stern there was 28 feet at low water. This is as near accuracy as is possible. There is no reason to suppose that the foundations had been weakened by undue dredging. We can make no sure deductions from Roquebert's soundings. Probably the original dredging lowered the bottom over 20 feet as Bierd says, but the evidence shows that it preceded the driving of the piles. What the depth was close to the piles we cannot say, but we incline to put it at not more than 25 feet, though this is necessarily hardly more than a conjecture. These calculations are relevant only to a consideration of the general stability of the embankment, and therefore lead directly to a consideration of that feature of the case. There had been no change in this since the wharf was completed, about seven years before the collapse. The old tracks, two in number, leading to the old French fill, were carried on an embankment opposite the collapse, and three new tracks, about 18 inches below, and all substantially on a level, had been added to the west. Nothing more had been done to incumber the underlying strata from that time on.

We do not forget so much of the fill for the new Isthmus Canal Commission's railroad across the lagoon as was in place on August 17th. This can be laid out of consideration at the start, although something was made of it. It only touched the old embankment at one spot, and that at the extreme northern edge of the slide, and there it was about 80 feet back from the line of the break. The only possible effect could have been to push down some of the underlying mud, and we dismiss it as too speculative. Frear (folio 4293) was unwilling to commit himself upon its effect, and the point was not pressed with the other witnesses. There is no evidence that the two upper or eastern tracks had ever given any signs of movement, and the same is true of the middle track—that just west of the shed. The only part of the embankment which did show any signs of giving way was under the two tracks within the shed, and it is true that these had from time to time prior to the collapse required to be resurfaced, as they had sunk a little, so that the floor of the car did not come up to the floor of the dock. Clark says this was only in the roadbed for berth No. 1 (folios 206, 519), and the whole fall was not over 8 inches (folio 204): and while Hunt makes it extend across the back of berths 1 and 2 (folio 457), he says

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it began in 1905, and, as we infer, continued off and on from time to time until 2 or 3 months before the accident (folio 758). Slayback (folio 1904) says that the only subsidence after Christmas, 1911, that he knew, was back of berth No. 1. Tysinger, who ought to have known all about it, says that the only resurfacing opposite berth No. 2 was in the early part of 1911 (folio 3594). McKay cannot give the date that the roadbed sank (folio 3963), though he does say it was for the most part opposite No. 2 (folio 3965), and it seems likely from Slayback's testimony that this was before 1912. We conclude that the total sinking had been in the aggregate 8 or 9 inches, and had been progressive, but that there had not been any opposite berth No. 2 for nearly 18 months before the collapse. It seems undoubtedly to be the fact that in all structures of this sort there is a subsidence more or less progressive for an almost indefinite time. Bierd, certainly a competent man, put it as high as 20 years (folio 4742) for piles under railroad bridges. Whether this applies to embankments is not clear.

Spooner's criticism presupposes that the original slope as shown in Exhibit T was stable, and figures upon the angle of repose as therein shown. All his conclusions are based upon supposed subsequent excavation close to the pile ends of 50 feet below the top of the embankment where the slide began; i. e., the two western tracks. This involves a recent excavation at that point to a depth of 32 feet at low water. He concedes that there is no a priori angle of repose, but that it is contingent upon the material. Now it is obvious that the libelant may not blow hot and cold with Exhibit T. If the ground lines do not represent the situation on August 17, 1912, there is no warrant for assuming that they represent anything. Spooner has proceeded upon the assumption in his diagram, Libelant's Exhibit C of June 3, 1915, that the stable conditions had been changed for the worse by the Cardenas. His whole conclusion hangs in the air for this. Thus we must assume that the embankment, which was designed by a competent engineer, had shown substantial stability for 7 years, barring the other indications of movement which we shall consider later. We conclude that both wharf and embankment were proper in design and that nothing has been proved of their being weakened by dredging.

There remains only the question whether the libelant has succeeded in proving that there were such warnings of the slide as required precautions. The libelant alleges a number of such warnings, of which the sinking of the tracks just west of the shed has been mentioned. In addition to these are the bulging of the stringpiece, the sinking of the floors, the jamming of the doors, the slanting of the roof posts, and chiefly and especially those movements which resulted in the tying back of the angle wharf and the coal wharf some years before, and of berth No. 1 about a month before the accident occurred. Bierd, Mears, and Goethals all testified that most of those symptoms of disturbance were not indications of serious insecurity. Piles will sink, as we have already said, 15 or 20 years after they have been set, and even when driven to a "refusal." One sinking of the floor took place before 1907, for it was in Bierd's time (folio 4750); indeed, Hunt (folio 740) says it was shortly after the pier was made in 1905. It cannot be taken as an

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indication of sinister weakness. There seems to have been another depression in the floor some 3 or 4 months before the accident (folios 346, 347) of an inch or more (folio 349). In August, 1911, Geenzier says he found at one place the floor 10 inches down (folios 2833, 2835), but Slayback puts this in the northern half of the dock (folio 2004) abreast of where the bracings were afterwards put. Geenzier was certainly less accurate in details than the other witnesses, and although he may have been quite honest, he is not to be relied on as much as Slayback and Tysinger for exactness. There is no doubt that there was such a "mashed or soft spot" in the summer of 1911, due to an overload on the dock at that time (folios 3457, 3458). But these were all direct depressions of the piles, and did not indicate any sagging outward of the wharf as a whole, whether they were in the northern part or about the center, as Tysinger and Geenzier recall. The jamming of the doors and the slanting of the uprights were proved, and occurred from time to time; but these can all be accounted for, as they were accounted for, by the movements of the tops of the posts or piles, which are apparently not serious. In so far as these were a part of the bulging of the piles toward the west, as they may have been, they properly come in for consideration with that; but, taken alone, they seem not to have been necessary signs of a disaster. The same thing is true of the curvature of the crane tracks to the west. This was due probably to the bulging out of the stringpiece near which the crane tracks lay, or perhaps to the vertical sinking of some piles at such places as they dropped.

We therefore come to the movements to the west, the symptom which was the most important of all. That the piles were themselves straight, Hull, the diver, testified, who had been over them about a month before (folios 1468, 1471). On June 25, 1912, Tysinger went along the whole bottom of the dock (folio 3468) and found the piles perpendicular (folio 3471). The only trouble he found was that in one spot some piles had dropped 12 inches (folio 3472) caused by a drop in loading the crane. Slayback examined under the docks from month to month (folio 1846) until the 1st of July, 1912, and he found them all upright (folios 1902, 3574). He thought there might have been a movement outward (folio 2008) of the piles, but it was accompanied by no inclination. There certainly was a movement of the whole wharf outward in June, 1912, and upon this feature the libelant properly enough relies very much, for it indicated a slipping of the whole substratum, even below the toes of the piles.

This was, moreover, not the first of such movements. The first of them occurred in Bierd's time, before 1908 (folio 3538). It seems to have been due to putting in some fill to the east of the angle dock at that time (folios 3539, 4899). One of the caissons of the old French pier or steel dock also moved at the same time (folio 3543), and was apparently part of the same movement, perhaps caused by the same fill. The angle dock was then reinforced in the same way that berth No. 1 was reinforced in July, 1912. The coal dock also showed some movement (folio 751), probably some time in 1911, al-

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though the date does not appear. This was also tied back and gave no further trouble, like the angle dock.

In June, 1912, those movements, which the libelant insists were premonitory of the eventual collapse, occurred, and it is of critical importance in our judgment to ascertain just where they were. This was one of the sharply contested issues in the case, but, before entering upon it, it is well to remember that Tysinger and Slayback put in the deadmen in berth No. 1 with the idea of correcting the disturbance where they had observed it. It is extremely improbable that they should have put in the bracing at any other place than where the disturbance was greatest. We may suppose that they did not cover all the area of the difficulty, as Mears was not there at that time; but it is impossible to believe that, even though they did not go as far as they should, they selected for their bracing any other place than that which showed the greatest movement. There is a strong antecedent probability, therefore, that the testimony of Schuber, McKay, and Geenzier that the maximum bulge was opposite where the accident afterwards happened is not true. In the first place, we throw out Schuber's testimony, not only because Judge Hough disbelieved him, which we are bound to accept, but because, after reading it ourselves, he does not impress us even on paper. Nor are we disposed to put reliance on McKay, for the same reasons. Tysinger got word from the timekeeper that "part of the dock was going to sea" (folio 2465) in June, 1902, and on the 25th he went over and made an examination. He found about 200 feet of the track at the north end of berth No. 1 had moved 9 inches toward the west, and that the piling had dropped down from the cap about 12 inches. Before acting he seems carefully to have watched for subsequent movement. The disturbance affected the wharf for a distance of about 130 feet and increased. It appeared to him as though the whole mass of the pier was moving, for the piles themselves did not incline; it is clear that in fact the whole mass must have been in motion. Four days later the dock had moved out to 12 inches in all (folio 3476). There was no change on July 5th (folio 3477), or on July 8th, 13th, or 14th, on each of which he observed the area; but on July 19th he found that the total movement had become 14 inches, at which point it stopped (folio 3482). There was no change or disturbance adjacent to berth No. 2 (folio 3483); all of it was in the middle of berth No. 1, extending a little to the south towards berth No. 2. This was the occasion of the bracing, like that which had proved effective at the angle and coal docks, and which was completed on the 28th of July (folio 3485). Here, also, it checked the movement.

The libelant repeatedly relies upon Tysinger's statement (folio 3572) that the greatest movement in the lumber dock was "in the center," seeking to infer that he had considered that the greatest movement was at the juncture of berths 1 and 2. But this is not the fair interpretation of his testimony. What he means is that the greatest outward movement was in the center of that part of the wharf which in fact did move. In other parts of his testimony he is perfectly clear as to the location of the movement as a whole. It was about 200 feet on the north end of berth No. 1 (folios 3466, 3467), which almost exactly cor-

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responds with the center of the area braced. Clark's testimony (folios 216, 219, 270, 303, 368, 416, 417, 627) located the bulge at a different place, but all he saw was a bulge of 2 inches, which, if he is right, could hardly have referred to the bulge accurately observed by Tysinger and McKay. He placed this generally between berths 1 and 2 at about the center, but this location he first gave in response to a leading question (folio 216), and it is quite clear that his testimony is not to be taken as an attempt to fix the spot accurately. Hunt's testimony is like Clark's (folios 742, 743). McKay places it more accurately, and it must be admitted that he was in a position to know (folios 3961, 3962). The total bulge according to him was five hundred and twenty feet in length (folio 3391), starting 50 feet from the coal dock, and the greatest bulge of 24 inches was about the middle of berth No. 2 (folio 3993); over a distance of 150 feet the bulge was a foot or more (folio 4015), all of it within the area of the collapse (folio 4060). This, of course, contradicts Tysinger; but it is to be noted that, although McKay's notebook gives a maximum of 24 inches, it does not give either the dates or the spot at which the bulge took place. Slayback says (folios 1904, 1925) that before July 3d, when he went away, there was one place in berth No. 1 that showed settlement, but that berth No. 2 was all right (folios 1932, 1933). His estimate of 6 or 8 inches of berth No. 1 (folio 1936) was probably about correct. Geenzier's testimony is confused. At folio 2830 he says that the bulge began 350 feet from the angle dock and worked north. This would make the bulge begin about on the north end of the collapse, which corresponds with Tysinger's testimony. He afterwards said that the greatest bulge was about 500 feet from the north end of the lumber dock (folios 2995, 2998), which, if taken literally, was way below the area of the collapse. Finally, under examination of his own counsel, he located the greatest bulging (folio 3055) as where the collapse occurred. He was confused as to his dates and his testimony is much too uncertain, particularly when taken in connection with his memorandum, which we shall refer to later. Schuber's testimony is somewhat inexact, though he certainly placed the bulge upon No. 2; but he is discredited by Judge Hough and we do not rely on him.

Taking all this evidence into consideration, and especially the probability that the bracing was put in where the bulge is greatest, it seems to us likely that the only bulge thought of consequence was that opposite the braced part of the dock. It is quite likely that Clark and Hunt were right in saying that there was a bulge of 2 inches in March or April about at the division line of the two berths. Such a bulge, located as generally as that, was certainly not an object of alarm. We conclude, therefore, that the bracing which was put in answered any alarming developments, and also that it was sufficient, as judged by the results of similar action in the past. This aspect of the case, therefore, comes down to this: Were the prior evidences of movement in the angle dock, the coal dock and the lumber dock sufficient to show that the structures taken together were instable, and, if so, what was the reasonable requirement under the circumstances? This, of course, is a question between experts, and on the one hand we have Goethals and Mears, who thought that the precautions were sufficient, and Frear,

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Crary, and Spooner, who thought that either the bracings should have been carried further along or that riprap should have been put at the bottom of the piles. Upon that question the libelant has the burden of proof, and we are not disposed to disturb the finding of the court below. While it is true that the dock had moved in the three places mentioned, it is equally true that in the two earlier precisely the same remedy had checked any further movement, and it is also true that the movement had been stopped for over two weeks in berth No. 1; at least Tysinger says so, and his observations were accurate. It is easier to attribute a failure of foresight after the event than at the time.

But there is another consideration which seems to us of controlling consequence. In all three cases the movement, when it did develop, had been very slow, and the engineers had had ample time to correct it. If any other part of the docks showed signs of movement to the extent even of 14 or 24 inches, the engineers had no reason to think there would have been a sudden collapse before they could remedy it. We are willing to agree that they were bound to be very watchful for movements elsewhere, but that they were bound to anticipate any such sudden collapse as took place seems to us entirely outside of the facts, and directly contradicted by the facts. Indeed, the witnesses of the respondent do not, at least expressly, go so far. Therefore we do not charge the respondent with the collapse for failure to extend the bracing further than it did, even assuming, what is in some doubt, that the bracing would have done any good, had it been put in. As to this the respondent's witnesses are somewhat cautious. None of them would assert that the bracing would have done more than retard the slide, while Goethals and Mears are very decidedly of the opinion that it would not.

The only remaining charge of negligence is the appearance of the cracks on the day in question, and perhaps on the 13th, according to Geenzier, and this brings up the memorandum which Geenzier says he made on August 13, 1912. Both he and Tysinger say that at that time he was at work in the lagoon—he says, repairing launches; Tysinger says he did have a talk with him that day, but that he went over into the lagoon and talked about other matters. Whatever the original form of the memorandum, it has certainly been changed at some time; and on his own statement, in December, 1914, his mind was at least open to question as to when it was made. Now in August, 1911, he was at work on the docks, and it is possible that there was a bulge of two inches. We agree with Judge Hough, however, that the whole issue was of small importance, for it would have been absurd for Tysinger to keep vessels off the berths because of any such bulge.

There remains, therefore, only the testimony of Schuber and Arps. Schuber says that he saw one crack in the morning and one in the afternoon of the 16th, the first of which he reported to Clark and the second of which he did not, as he was too busy. The only crack which Clark remembered was across all five railroad tracks and was 3 or 4 months prior to the accident (folios 398, 408), it was not much more than an inch deep (folios 401, 402), and he did not know whether it continued to the time of the accident or not. Goethals examined for it on the

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18th and failed to find any such; his testimony is to be preferred, in case of conflict. Nothing can be based upon Schuber's testimony as such after the finding of the court below, and we do not think we ought to assume that he did report it. That he saw one or both cracks, however, seems unquestionable. Arps corroborates him as to that in the afternoon, and it appears pretty clearly that he testified to seeing the crack at the investigation, when it can hardly be supposed that he had any motive to misrepresent. We must accept it that there was one crack that day, and that Schuber saw it, though the size and position depend only upon his word. There are two reasons, however, for not treating this as of critical consequence in the case. In the first place, he was only a dock clerk (folio 4473) under Clark (folio 4364), though he considered himself as a wharfinger (folio 4478), having general charge of the wharves. He tells what his duties were (folios 4366, 4367, 4368). He had absolutely nothing to do with ascertaining the condition of wharf, but had simply to keep it in good condition, clean the tracks, etc. He reported the conditions affecting the handling of cargo, such as tracks, doors, etc. This evidence is somewhat contradictory. If he had no duty to ascertain the condition of the wharf, his knowledge would not bind the respondent; if he was charged to report the condition of the tracks, the contrary would seem to be true. Clark's testimony (folios 125, 128) does not clear up matters very much. Clark says that his and Schuber's duties were to discharge and load ships, general supervision of the wharves, and "reporting the conditions." We think that the libelant has hardly made out a case from this to show that Schuber was under any duty to watch the wharf, in such sense that his default charged them with responsibility. The fact that he was discharged for failing to report rests only upon his own word. The second reason is that, if he had noticed the crack, it did not become the duty of the respondent to warn the Newport away from the wharf that night. Such cracks had existed before, and they had never been followed by an immediate collapse. The structure had stood for nearly 7 years, and there had always been plenty of time to put in bracing, even when much more serious deformation had occurred. The appearance of such a crack would not have required (Goethals, folios 1749, 1750)—would, indeed, hardly have justified—warning to the Newport to move from the wharf, which is all that could in any event have been done that night. This basis of negligence was not established, therefore, even assuming that notice to Schuber was sufficient to charge respondents.

We do not think it is necessary for us to express any opinion as to the character of the slide. Bierd, who knew the geology of the bottom, for he had built the wharf, does not substantially differ from Goethals in his testimony. That the strata may have slanted upwards at the place of the slide is, of course, a reasonable possibility. The collapse, when it came, certainly did not reach below the toes of the piles, for we have it that none of these were dislodged; they were either bent or broken. In this respect the collapse was different from the movement at berth No. 1 in June and July. We cannot say with certainty what was the depth of the mud stratum or of the

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Indiana clay beneath; we may only say negatively that the slide did not go below the latter. There is some evidence of an upheaval under water, and so far as appears the conditions which Goethals mentioned were actually present. His conclusion and Mears' are not to be lightly disregarded. The presence of the crack that afternoon, of which he knew at the investigation (folios 1806, 1810), did not change his conclusion. Indeed, his search for cracks back of the break was against the possibility that the slide might extend further (folios 1805, 1806). We cannot agree that the testimony of other engineers, however competent, is of so much weight as that of these gentlemen who lived for years at the Isthmus and who actually built the canal. However, we do not think that this issue is in any sense material to this case. While we should be disposed to accept the respondent's position touching it, yet, if the slide was in fact of the other kind, we do not see that the libelant has carried the burden of proof in showing that the respondent had been guilty of any imprudence either in the construction or maintenance of the wharf. That movements were to be apprehended is true; they had occurred elsewhere, and the general conditions were the same all along the line. That is, however, by no means enough; the relevant inquiry here is whether such a sudden collapse was to be apprehended. That we can see no ground to expect; the prior history of the wharf had been all of the other kind. Whenever anything did move, there was ample time to stay it, long after any such disturbances went beyond the utmost that we can suppose existed opposite berth No. 2. The libelant's case can only rest upon the assumption that the bracing done by Tysinger and McKay for some quite unreasonable cause they put in where it was not most needed.

The libelant failed to prove its case, and the decree is affirmed, with costs.

WARD, Circuit Judge (dissenting). Where the thing which causes injury is in the control of the defendant, and the accident is out of the usual, and does not happen or can be provided for when care according to the circumstances is exercised, the accident alone creates a prima facie case against the defendant. The law is expressed in the maxim, "*Res ipsa loquitur.*" This doctrine was originally restricted to contractual relations, but subsequently was extended to pure torts. As the Newport was using the wharf for compensation, a contractual relation existed in this case. While the presumption does not shift the burden of proof from the plaintiff, it does put the duty of explanation upon the defendant, and the court, or the jury, as the case may be, is to determine from the presumption, together with all the evidence whether or not the plaintiff is entitled to recover. The expression that the burden of proof is shifted to the defendant, used in some of the cases, as, for instance, in the Hastorf Case (D. C.) 110 Fed. 669, is inaccurate, though the law laid down was right. Mullen v. St. John, 57 N. Y. 567, 15 Am. Rep. 530; Sweeney v. Erving, 228 U. S. 233, 33 Sup. Ct. 416, 57 L. Ed. 815, Ann. Cas. 1914D, 905; and our decision in Kraljer v. Snare & Triest, 221 Fed. 255, 137 C. C. A. 108.

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I assume that the wharf was constructed by competent engineers with proper materials, properly used, that the support was not weakened by excessive dredging, that the accident was caused by the effect of water sinking through a pervious mass of earth and causing it to slide bodily over a lower impervious substratum sloping into the canal, and I shall consider only the testimony of three witnesses—all employés of the respondent and called by it, viz. Mears, the chief engineer in charge of the upkeep of the wharves; Tysinger, master carpenter in charge of building of wharves; General Goethals, president of the company—and their testimony only as to indications of danger which the respondent admits came to its notice within two months of the catastrophe.

The defense relied on is inevitable accident. It was still incumbent upon the respondent to show that it had no notice of the slide. The Edmund Moran, 180 Fed. 700, 104 C. C. A. 552; The Bayonne, 213 Fed. 216, 129 C. C. A. 560. There was no reason to suppose that the substratum at the place of the break differed from the substratum north and south of that point; nor that the substratum at the point where the respondent, because of the westward movement of which it had notice, had tied back the piles by wire cables to piles driven inshore called "deadmen," was different from the substratum immediately adjoining the place where the Newport lay.

Both Mears and Tysinger testified that in June and July, 1912, movements to the westward were noticed in the lumber dock north of the point where the steamer lay which were stopped by tying back. Tysinger attributed these movements to the ground moving, and Mears admitted that the whole structure moved to the west, while the earth inshore dropped, the piles remaining perpendicular. June 25th Tysinger found the wharf had moved 9 inches to the westward. June 29th it had moved 3 inches further. July 15th inspection showed no further movement. July 19th a further movement of 2 inches. Inspection made July 22d and 29th and August 9th and 13th showed no further movement. The actual tying back began July 22d and was finished July 28th. The tying back evidently increased the security of the structure.

The respondent offers no explanation of these movements; and it seems a necessary conclusion that they were the beginning of the slide which culminated August 17th. Tysinger testified (cross-examination by Mr. Kirlin, continued):

"Q. Over what length, north and south of the angle dock, did the tying back extend? A. If I remember, it was about 125 feet. Q. Over what length did the tying back occur on berth No. 1? A. On berth No. 1? Q. Yes. A. About 120 feet—130 feet; I think, it would extend 130 feet. Q. Over what length did the tying back occur at the coal pier? A. I don't remember. It was not as much as that. Q. What was the aggregate movement outward on the canal dock, the most movement, the greatest extent of it? A. The dock movement? Q. Yes. A. In the center. Q. Did it move out; did the entire mass underneath the dock move out? A. Yes, sir; as far as I could observe. Q. Did the piles remain upright? A. Practically so. There was a place where they were a little bit inclined toward the water. Q. Did the movement extend to the dock piling? A. No, sir; not that you could notice; if it did, the piling stood upright. Q. What was the utmost movement at No. 1 berth?

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A. Fourteen inches. Q. Did the piling remain in an upright position at that movement? A. Practically so, as near as I could notice. Q. The whole mass? A. The whole mass moved. Q. Did it leave any marks of cleavage at the rear, the extreme rear position of the movement—any crack? A. The earth showed, the ground. Q. The earth dropped, did it? A. Yes, sir. Q. To what extent did it drop? A. I should judge at least 2 feet, or 2 feet 6, straight down."

Gen. Goethals says that they only tied back berth No. 1 and a little of berth No. 2 of the lumber dock, because no movement had been discovered south of the point where they stopped, and there was no reason to go to extra expense. This was evidently because the respondent intended to abandon the lumber dock in favor of a new concrete dock which was nearly completed at Balboa.

The gradual movement of the piles perpendicularly westward indicated that the earth holding them was moving bodily, and I think that, in presence of these warnings, ordinary care required the respondent to anticipate or to take precautions against such a slide as subsequently occurred. It could have tied the lumber dock back its whole length, or it could have abandoned the use of the dock. If tying back would not have prevented so large a slide as occurred, it might still have delayed it, and have given time to remove the steamer to a place of safety. I do not think the respondent has discharged itself of negligence in connection with the slide.

ROBINSON et al. v. UNITED STATES, on Behalf of and for Use of BROWN-KETCHAM IRON WORKS et al.

(Circuit Court of Appeals, Second Circuit. March 18, 1918.)

No. 196.

1. UNITED STATES ⊂=67(3)—BONDS OF CONTRACTORS FOR PUBLIC WORK—SUITS BY SUBCONTRACTORS—"SUIT SHALL NOT BE COMMENCED UNTIL AFTER COMPLETE PERFORMANCE."

In Act Aug. 13, 1894, c. 280, 28 Stat. 278, as amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811 (Comp. St. 1916, § 6923), relating to bonds of contractors for government work, and providing that persons furnishing labor or materials used in such work, who are unpaid, shall have a right of action on such bonds, subject to the prior right of the United States, the proviso that such a "suit shall not be commenced until after the complete performance of said contract and final settlement thereof" must be construed as meaning that the contract must be completed in the sense that the government is satisfied that enough has been done to discharge the surety as to the United States. The sole purpose of the proviso is to protect the United States in its prior right of suit, and where through its proper officers it has formally approved a final settlement with the contractor, the fact that it has retained a part of the contract price to cover the cost of completing certain items of work, or that the settlement is not agreed to by the contractor, cannot operate to postpone the right of unpaid subcontractors to begin suit on the bond until all items in dispute between the contractor and the government have been adjusted.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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2. UNITED STATES ⟸67(3)—BONDS OF CONTRACTORS FOR PUBLIC WORK—SUITS BY SUBCONTRACTORS—"COMPLETE PAYMENT."

Contracts for the furnishing of labor or materials to such a contractor are to be construed, so far as possible, consistently with the main contract, and under a provision in a subcontract that final payment shall be made thereunder "within ten days after the final approval and complete payment of the work by the government" the "complete payment" is the final payment to be made by the United States in accordance with its final settlement, whereby is meant the final amount acknowledged by the United States to be due.

3. UNITED STATES ⟸67(3)—BONDS OF CONTRACTORS FOR PUBLIC WORK—SUITS BY SUBCONTRACTORS.

Under a provision in the contract of a subcontractor on a government building requiring the work to be done to the full satisfaction of the supervising architect, made to conform to the conditions of the main contract and the statute, the subcontractor cannot recover on the bond of the principal contractor for items of work which have been condemned by the architect and for which the government has refused to pay.

4. APPEAL AND ERROR ⟸1022(2)—REVIEW—FINDINGS OF REFEREE.

Where an action at law has been referred by consent, findings of fact by the referee, supported by evidence and approved by the District Court, cannot be reviewed by the appellate court.

5. UNITED STATES ⟸67(2)—ACTION ON BOND OF CONTRACTOR FOR PUBLIC WORK—INTEREST.

In an action on the bond of a contractor for a government building by subcontractors for the furnishing of labor and materials for certain parts of the work, under contracts requiring the principal contractor to pay the reserved part of the contract price "within 10 days after the final approval and complete payment of the work by the government," under the law of New York a plaintiff is entitled to recover interest from the time of final settlement and payment by the government to the contractor for the work covered by his subcontract, provided the amount then due on the subcontract was definitely known or ascertainable by computation, or upon so much of his claim as was undisputed, while as to claims or items in dispute, and which were only liquidated at the trial, interest is allowable only from the date of the judgment.

In Error to the District Court of the United States for the Southern District of New York.

Action at law by the United States, on behalf of and for the use of the Brown-Ketcham Iron Works, with the Sykes Steel Roofing Company, Jacob H. Shaffer, as trustee for the creditors of the Robert C. Fisher Company, the George S. Holmes Company, the Winslow Bros. Company, the Tiffany Studios, Eastman Bros. & Co., the Long Island Sand Company, and the Philip Rinn Company intervening, against John C. Robinson and the Federal Union Surety Company, impleaded with the Empire State Surety Company. Judgment for plaintiffs, except the Philip Rinn Company, and defendants and said company bring error. Affirmed, subject to condition as to certain claims.

Writ of error to review a judgment entered on July 5, 1917, in favor of certain plaintiffs and intervening petitioners. Plaintiffs in error were defendants below, and will be referred to as defendants. Defendants in error were plaintiffs below, and will be referred to as plaintiffs. Following is a schedule show-

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ing the name of the successful parties and the total of principal, interest, and costs for which recovery was had:

Name	Total.
Brown-Ketcham Iron Works	$ 2,059.11
Sykes Steel Roofing Company	2,295.85
Jacob H. Shaffer, trustee, etc.	103,924.46
George S. Holmes Company	6,352.56
Winslow Bros. Company	19,930.56
Tiffany Studios	2,765.95
Eastman Bros. & Co.	15,747.36
Long Island Sand Company	1,141.63

One of the intervening plaintiffs, viz. Philip Rinn Company, was unsuccessful below, and as plaintiff in error here as against defendants below. The main question involved is whether a contract with the United States government had been completely performed at the time this action was begun, and the facts essential to an understanding of that question here follow. The facts in respect of other questions involved will be referred to in connection with the discussion of those questions in the opinion.

Under date of August 30, 1905, Robinson entered into a contract with the Secretary of the Treasury, acting on behalf of the United States, for the furnishing of all the labor and materials and the performance of all the work required for the interior finish of the new custom house then being erected in the city of New York. Under the provisions of Act Aug. 13, 1894, c. 280, 28 Stat. 278, as amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811, Robinson, as principal, and defendants Empire State Surety Company and Federal Union Surety Company, as two of the sureties, under date of October 18, 1905, executed a bond with the following condition:

"The condition of the above obligation is such that whereas, the said John C. Robinson has entered into a certain contract, hereto attached, with L. M. Shaw, Secretary of the Treasury, acting for and in behalf of the United States, bearing date the 30th day of August, A. D. 1905: Now, if the said John C. Robinson shall well and truly fulfill all the covenants and conditions of said contract, and shall perform all the undertakings therein stipulated by him to be performed, and shall well and truly comply with and fulfill the conditions of, and perform all of the work and furnish all the labor and materials required by, any and all changes in, additions to, or omissions from said contract which may hereafter be made, and shall perform all the undertakings stipulated by him to be performed in any and all such changes in or additions thereto, notice thereof to the said sureties being hereby waived, and shall promptly make payment to all persons supplying him labor or materials in the prosecution of the work contemplated by said contract, then this obligation to be void; otherwise, to remain in full force and virtue."

The main contract was subsequently modified, and the obligation of the bond was extended to cover the modified contract, by an agreement of all the original parties to the bond, dated November 16, 1906. The contract was large; the final amount exclusive of extras, being $1,237,325.70. Robinson sublet certain parts of the contract to the plaintiff's or their assignors. These plaintiffs, claiming that they had supplied labor and materials in the prosecution of the work contemplated by the contract, for which they had not been paid, brought this action on the bond. The parties consented in writing to waive a trial by jury and to an order referring the issues to Henry Melville, as referee, and the cause was thus tried.

The findings of fact and conclusions of law, found and recommended by the referee, were adopted by the court below, and judgment was ordered accordingly. A motion to dismiss was made before the referee, on the ground that the court had no jurisdiction, inasmuch as the action was begun prematurely; i. e., before "the complete performance of said contract and final settlement thereof." As to this the statute provides that, if no suit is brought by the United States within six months from "the completion and final settlement of the contract," those who furnish labor or materials may sue on the bond, and further specifies that, "when suit is instituted by any such creditors

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on the bond, it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract and not later."

The contract of Robinson with the Peoria Stone & Marble Works (hereinafter called the Fisher contract), later assigned by the subcontractor, the Robert C. Fisher Company, typifies the contracts with the subcontractors:

"In consideration of said party of the second part performing the work herein agreed upon by said party of the second part to the full satisfaction of the supervising architect, said party of the first part hereby agrees to pay said party of the second part the sum of five hundred and three thousand four hundred and seventy-seven ($503,477) dollars in manner following, to wit: As often as said party of the first part shall receive a payment from the government upon the work done by said party of the second part, he shall pay to said party of the second part upon receipt of their statement eighty-five per cent. (85%) of the value of the work done by said party of the second part on which said party of the first part received payment; the remaining fifteen per cent. (15%) to be paid by said party of the first part to said party of the second part within ten (10) days after the final approval and complete payment of the work by the government."

The main contract with the United States was proceeded with, and, as a necessary part thereof, the subcontractors did certain work and furnished certain material claimed by them to be in accordance with their subcontracts. On February 13, 1909, the government supervising architect wrote the following letter:

"Treasury Department,

"Washington, D. C., Feby. 13, 1909.

"New York—New Cu.

"Mr. John C. Robinson, 1 Madison Avenue, New York, N. Y.—Sir: Referring to your contract, dated August 30, 1905, for the interior finish in the new custom house, New York, N. Y., I have to advise you that the final settlement thereof was approved by the honorable Secretary of the Treasury under date of the 10th instant, on the following basis: That deductions be made from your contract to cover omissions, defects, etc., as follows: [Here follow details of the deductions.] That allowances be made to you on account of additional work as follows: [Here follow details.] That the sum of $12.000.00 be retained, with which to complete satisfactorily certain unfinished items existing in the work, with the understanding that the amount remaining, if any, be paid to you after the completion of said items. And that the provision in the contract stipulating the per diem amount of liquidated damages for delay in the completion of the work be enforced, in so far as to charge you for 109 days of the delay, at $420.00 per day, the amount specified in the contract, making a deduction on this account of $45,780.00. After making the deductions and allowances indicated above, there remains due you at this time a balance of $5.040.00 (and the architect for the building, Mr. Cass Gilbert, has this day been directed to prepare and issue a voucher in your favor for said amount), and the collector of customs at New York, N. Y., as disbursing agent, has been authorized to pay the same from funds in his hands appropriated for the building in question.

"Respectfully,

[Signed] J. K. Taylor,

"C. E. K. Supervising Architect."

Though the sum specified was tendered by a voucher, dated February 16, 1909, Robinson refused to take it, and always refused to accept payment on the foregoing basis, and therefore claimed below, and claims here, that the time of "the completion and final settlement" or "performance and final settlement" has not yet arrived.

The assignments of error may be grouped under four general subdivisions: (1) That the suit was prematurely brought, inasmuch as the contract had not been completely performed at the time this action was instituted. (2) That no cause of action had accrued to any of the plaintiffs, because, under the terms of their respective subcontracts with Robinson, except so far as the

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Brown-Ketcham Iron Works is concerned, there was no payment due them at the time this action was instituted. (3) That certain deductions made by the officials of the United States government in respect of the work performed by the Robert C. Fisher Company should have been deducted from the amount of the judgment entered in favor of Shaffer, trustee for the creditors of the Fisher Company. (4) That the claims of plaintiffs were unliquidated, and interest should only have been allowed from the date of the entry of judgment.

Eppstein & Rosenberg, of New York City (C. Y. Freeman and Dent, Dobyns & Freeman, all of Chicago, Ill., of counsel), for plaintiff in error Robinson.

John T. Easton, of New York City (Louis B. Eppstein and Harry A. Rosenberg, both of New York City, of counsel), for plaintiff in error Federal Union Surety Co.

Eidlitz & Hulse, of New York City (Frederick Hulse, of New York City, of counsel), for defendant in error Shaffer.

Curtis, Mallet, Prevost & Colt, of New York City (E. C. Kindelberger and Walter L. Worrall, both of New York City, of counsel), for defendant in error Winslow Bros. Co.

James J. Farren, of Albany, N. Y., for defendant in error Eastman Bros. & Co.

Burlingham, Veeder, Mastin & Fearey, of New York City (R. R. Allen, of New York City, of counsel), for defendant in error Brown-Ketcham Iron Works.

De Forest Bros., of New York City (William W. Robison and Robert Thorne, both of New York City, of counsel), for defendant in error Tiffany Studios.

Before WARD, Circuit Judge, and LEARNED HAND and MAYER, District Judges.

MAYER, District Judge (after stating the facts as above). [1] 1. The first question which arises is whether the action was brought "six months from the completion and final settlement of said contract." Defendants contend that there has never been any "complete payment for the work by the government," as required by the typical Fisher subcontract, and that until there is such complete payment the subcontractors have no claim against Robinson for the balance held out by him. The meaning of the phrase "final settlement" was settled in United States v. Robinson, 214 Fed. 38, 130 C. C. A. 432. We agree that in that case no point as to the meaning of the words "the completion" was raised or passed upon. In that case the statute was construed according to its purposes, and must be similarly construed here. The decisions of the Supreme Court "have made it clear that the statute and bonds given under it must be construed liberally in order to effectuate the purpose of Congress as declared in the act." Illinois Surety Co. v. John Davis Co., 244 U. S. 376, 37 Sup. Ct. 614, 61 L. Ed. 1206.

The limitation of time in the statute was intended for the benefit of the United States, and as soon as the rights of the United States on the bond were out of the way the subcontractors had the right to sue, assuming, of course, that their own contracts gave them rights against the main contractor. Illinois Surety Co. v. Peeler, 240 U. S. 214, 36

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Sup. Ct. 321, 60 L. Ed. 609. In other words, when it appears that the United States, through its proper officials, has indicated a determination not to sue on the bond by final settlement, and six months have elapsed, then the security becomes open to those who have trusted to the credit of the main contractor.

It appears from the letter of the supervising architect that final settlement was approved by the Secretary of the Treasury under date of February 10, 1909. It is true that a part of the contract price was reserved for the completion of certain unfinished work, but enough had been completed to satisfy the United States that a final settlement could be made, and such final settlement was in fact made, and if it should later appear that the United States, acting through its officials, was wrong in that regard, it was the United States and none other which took the risk that by intermediate recoveries the subcontractors might so deplete the fund that the United States would bear the loss, if any, if it erred in approving the contract as finally settled. The word "completion," in view of the purposes of the statute, and the attitude of the courts in giving those purposes effect, must be construed as meaning that the contract was completed in the sense that the United States was satisfied that enough had been done to discharge the surety as to the United States. Any other construction would inevitably lead to the defeat of some of the essential purposes for which the statute was enacted. A subcontractor who had performed his work would be compelled to wait for some indefinite period because some other subcontractor, or the main contractor himself by reason of some default or dispute, made necessary the reservation of a certain sum to make good that default or dispose of that dispute. It can readily be seen that in a contract involving, as did the contract at bar, over a million dollars, a subcontractor could be kept out of his money because of a dispute over a comparatively small sum, notwithstanding the fact that the government was satisfied to the point where it no longer looked to the surety bonds. Remembering that the purpose of the statute in this regard was to protect the United States, it follows that there is no merit in the contention that the subcontractor must wait to begin his action until disputes as to completion are finally settled, notwithstanding that the government on its part is entirely satisfied and approves the final settlement of the contract.

[2] After August 10, 1909 (i. e., after six months from the date of final settlement), the subcontractors had the right to begin an action to recover on the bond, assuming that the contractors had defaulted in payment to them under the terms of their own contracts with him. The subcontracts must be construed, so far as possible, consistently with the main contract, and were necessarily drawn with reference to the main contract. The "complete payment" mentioned in the subcontracts is the final payment to be made by the United States in accordance with its final settlement, whereby is meant the final amount acknowledged by the United States to be due. As between the United States and Robinson, the latter may not be satisfied, and may contest the position of the United States, as he is now doing in the Court of Claims; but such controversy on the facts in this case, the construc-

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tion of the statute, the main contract, and the subcontracts, does not in any manner affect the rights of the subcontractors as against Robinson.

So to hold is not to rewrite the contracts as between Robinson and the subcontractors, as counsel earnestly contend, but is merely to give the language of the parties the meaning which they intended it should have, for they were referring directly to the contract with the United States, with its necessary security, and it is clear that the language thus used in the subcontracts could never have been intended, in effect, to require the subcontractors to waive their rights upon the bond, or to be postponed indefinitely after the United States had so acted as to discharge all liability on the bond against it, and after the necessary six months had elapsed. We are therefore of opinion that the action was properly and not prematurely brought. Winslow Bros. Co. v. Robinson, 173 Ill. App. 84.

[3] 2. The marble work in the Robinson contract was sublet to the Fisher Company, and Robinson did not do any of that work. In the letter of final settlement, supra, the supervising architect, with the approval of the Secretary of the Treasury, made the following deductions relating wholly to the marble work done by the R. C. Fisher Company: For omission of protective coverings on interior marble work, $2,500; on account of inferior marble in rotunda and main hall, $3,000. Both of these items under the Fisher subcontracts with Robinson were to have been performed to "the full satisfaction of the supervising architect." These items, aggregating $5,500, were allowed by the referee and by the District Judge.

Documentary evidence showed that the supervising architect was not satisfied. Fisher & Co. introduced testimony to the effect that the work was fully and properly done. No testimony was adduced by Robinson to the contrary; his position being that, as the United States had deducted these amounts from him, he could not be called upon to pay the subcontractors the same amounts thus deducted. It also appears that in Robinson's petition to the Court of Claims, after enumerating these two items, with others, he alleged that the deductions were without warrant, in that the provisions of the contract relating thereto had been fully complied with. The referee held that the action of the supervising architect was not "conclusive evidence of dissatisfaction. Under the circumstances, it is consistent with a desire to get even with Robinson for trouble and annoyance," and found "as a matter of fact, the Fisher Company performed its work to the full satisfaction of the supervising architect, within the meaning of its contract." The supervising architect was not called as a witness, and the only testimony as to his attitude consisted of writings in which he demonstrated affirmatively that he was not satisfied. The most that the evidence amounted to was that the architect ought to have been satisfied, not that he was. In the Court of Claims Robinson naturally was insisting that the government wrongly deducted these items; but that position was not inconsistent with his resistance to the payment of items withheld by the government from him.

Whether or to what extent there is any conflict between the decisions of the United States courts and those of the New York courts,

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as to the circumstances under which the architect's certificate may be disregarded, we need not now consider. Kihlberg v. United States, 97 U. S. 398, 24 L. Ed. 1106; Sweeney v. United States, 109 U. S. 618, 3 Sup. Ct. 344, 27 L. Ed. 1053; Martinsburg & Potomac R. R. Co. v. March, 114 U. S. 549, 5 Sup. Ct. 1035, 29 L. Ed. 255; J. H. Sullivan Co. v. Wingerath, 203 Fed. 460, 121 C. C. A. 584; Thomas v. Fleury, 26 N. Y. 26; Nolan v. Whitney, 88 N. Y. 648; Crouch v. Gutmann, 134 N. Y. 45, 31 N. E. 271, 30 Am. St. Rep. 608. But where, as here, the main contract is for work and materials to be done and furnished for the government, and the subcontract is made in reference thereto, it must be assumed that the parties to the subcontract had in mind the relevant statute and applicable decisions of the United States courts. The Fisher Company knew that Robinson would not be paid in respect of any item until the supervising architect was fully satisfied. The supervising architect was not Robinson's selection, nor under Robinson's control, and therefore the provision as to "the full satisfaction of the supervising architect" was a necessary safeguard for Robinson, to which the Fisher Company agreed. Robinson, as against the United States, may assert his rights and seek his remedy; but Fisher & Co. (bearing in mind that the subcontract was made with reference to the statute and the main contract) cannot substitute for the fact of "full satisfaction" the conclusion of court or jury that the supervising architect ought to have been satisfied. In any event, if we go beyond the contract, the evidence fails to establish Fisher & Co.'s right to recovery, in view of such cases as Sweeney v. United States, supra, and J. H. Sullivan Co. v. Wingerath, supra. We conclude, therefore, that the award of $5,500 and interest was erroneous.

While, however, Fisher & Co. cannot recover for these two items, because of lack of the supervising architect's approval, the supervising architect did not have authority to fix the amount of the deductions as between Fisher & Co. and Robinson. If $5,500 is not the correct figure for the deduction, Fisher & Co. may prove the contract price of the rejected items, and thus the correct amount can be ascertained.

[4] 3. The claim of Rinn could be disposed of for the reasons just stated; but, in addition, there was evidence to support the referee's finding that the work was badly performed, and the action being at law, such a finding of fact, approved by the District Court, cannot be reviewed.

[5] 4. The question of interest: The various subcontracts contained clauses as to the date when the reserved payments should be made, substantially similar to that of the Fisher Company contract, as follows:

> "The remaining fifteen per cent. (15%) to be paid" by Robinson to Fisher "within ten days after the final approval and complete payment of the work by the government."

The referee allowed interest from such dates, and defendants contend that interest should be allowed only from date of entry of judgment, on the theory that the claims were unliquidated. In determin-

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ing this question we follow the New York decisions. Illinois Surety Co. v. John Davis Co., 244 U. S. 376, 37 Sup. Ct. 614, 61 L. Ed. 1206. The latest expression of the New York Court of Appeals on the question of the allowance of interest is found in Faber v. City of New York, 222 N. Y. 255, at page 262, 118 N. E. 609, at page 610, as follows:

"The question of the allowance of interest on unliquidated damages has been a difficult one. The rule on this subject has been in evolution. To-day, however, it may be said that, if a claim for damages represents a pecuniary loss, which may be ascertained with reasonable certainty as of a fixed day, then interest is allowed from that day. The test is not whether the demand is liquidated. Was the plaintiff entitled to a certain sum? Should the defendant have paid it? Could the latter have determined what was due, either by computations alone, or by computation in connection with established market values, or other generally recognized standards? Van Rensselaer v. Jewett, 2 N. Y. 135 [51 Am. Dec. 275]; McMahon v. N. Y. & Erie R. R. Co., 20 N. Y. 463; Gray v. Central R. R. Co. of N. J., 157 N. Y. 483 [52 N. E. 555]."

Going no further back than White v. Miller, 78 N. Y. 393, 34 Am. Rep. 544, the more important New York cases here relevant (in which many other cases are referred to) seem to be De Carricarti v. Blanco, 121 N. Y. 230, 24 N. E. 284, Sweeny v. City of New York, 173 N. Y. 414, 66 N. E. 101, and Bradley v. McDonald, 218 N. Y. 351, 389, 113 N. E. 340.

In Stephens v. Phœnix Bridge Co., 139 Fed. 248, 71 C. C. A. 374, the action was brought to recover the reasonable value of materials and labor. It appeared that the materials and labor were furnished under a contract between the parties, by which the plaintiff undertook to complete certain work at a specified date and "to be subject to a penalty of one hundred dollars per day for any time beyond that day." As performance was not completed within the time specified by the contract, but was subsequently made, and as the defendants accepted the work and paid all sums due, by the terms of the contract, except the reserved payment, the action was not brought upon the contract, but on a quantum meruit. Defendants contended that, the contract not having been performed by plaintiff within the specified time, plaintiff was not entitled to recover, and, in any event, that defendants were entitled to a deduction of $100 per day for delay. The trial judge ruled against these contentions, and allowed defendants to prove the amount of their actual damages caused by the delay. In such circumstances, the amount of damage caused by delay was uncertain, and the court stated:

"The sum owing from the defendants to the plaintiff was uncertain, and unascertainable by computation, at the time of the commencement of the action; it depended, not only upon what should be found to be the reasonable value of the material and services furnished by the plaintiff, but also upon the amount which it should be found ought to be deducted from the plaintiff's claim, and this amount was likewise uncertain, and unascertainable by computation."

On the facts in that case the decision of the court was not inconsistent with the New York decisions. In United States ex rel. Proctor Mfg. Co. v. Illinois Surety Company, 228 Fed. 304, 142 C. C. A. 596, it was stated:

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"Interest has been allowed on the various claims beginning May 1, 1914, that being the date of final hearing."

This sentence, if only read in the opinion and unexplained by an examination of the record, might be confusing. The record shows that on September 18, 1914, the court made a final decree, which was not printed, and was not any part of the record on appeal. On October 29, 1914, counsel for complainant and for defendant claimants moved to reopen the final decree and modify the same "by allowing to the complainant and each of the said defendants interest on their respective claims from the time the same became due, respectively." The court on November 12, 1914, made what is called in the record its "final decree as modified," and in that decree provided, inter alia, as follows:

"Ordered, adjudged, and decreed as of the 18th day of September, 1914, that the said final decree entered herein on that day be, and the same hereby is, in all things vacated and set aside. * * *"

In the decree of November 12, 1914, interest is accorded to the various claimants from different periods down to September 18, 1914, the date of the original decree, so that the total of principal and interest in favor of each claimant was the amount figured down to the date (September 18, 1914) common to all as the date of the original decree. The date, however, from which interest was allowed in the case of each claimant, was the date when payment should have been made, on the same principles as are applicable to the case at bar, and the result is that this case of United States ex rel. Proctor Mfg. Co. v. Illinois Surety Company, supra, is an authority precisely in point.

In determining the questions of interest in the case at bar, it is only necessary for us to apply the rules heretofore referred to as laid down by the New York Court of Appeals to the particular facts here presented. The District Court was clearly right in its allowance of interest to the Tiffany Studios, Brown-Ketcham Iron Works, and Sykes Steel Roofing Company.

Winslow Brothers Company: The District Court allowed interest on the Winslow Company's claim from March 30, 1909. At that date so much of the claim as was allowed by the court was liquidated, as the government had paid that amount to Robinson. At the hearing before the referee, the Winslow Company withdrew several of its claims for extras, but such withdrawal does not affect the good claims insisted upon. Spalding v. Mason, 161 U. S. 375, 395, 16 Sup. Ct. 592, 40 L. Ed. 738. The only items in dispute were four in number, the amounts claimed by the Winslow Company being as follows: Item 1, $8,552.50; item 2, $2,475; item 3, $4,895; item 4, $6,470—total, $22,392.50. On or before March 1, 1909, all work done, and material and labor furnished, by the Winslow Company was finally approved by the government, and complete payment made or tendered therefor by the government to Robinson. The government allowed Robinson items 1 and 3 at the same figures as claimed by the Winslow Company, but allowed $2,200, instead of $2,475, for item 2 and $3,715, instead of $6,470, for item 4—the total of the allowances as made

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by the government aggregating $19,362.50, instead of $22,392.50, as claimed by the Winslow Company. The referee allowed to the Winslow Company as against Robinson on these items the $19,362.50 which the government had allowed to Robinson. It is plain, therefore, that the amount on these items had been fixed and computed on or before March 1, 1909, and under the terms of the subcontract were payable from Robinson to the Winslow Company on March 30, 1909. Robinson could have tendered the sum of $19,362.50, or have allowed the same, and left for further controversy the additional amount claimed by the Winslow Company, for items 2 and 4. The facts bring the claim of the Winslow Company well within the Faber and other New York cases, and the interest on this claim was properly allowed.

The Fisher claim: This claim was made up of the contract price and two items liquidated by the architect prior to the date fixed by the referee for interest. The only possible question is of the allowances. Under date of October 14, 1917, the Fisher Company rendered Robinson a bill. There were certain of the extras on this bill which on the trial the Fisher Company did not undertake to prove; otherwise the bill stood as the amount of the Fisher Company claim and extras containing also a statement of the credits due Robinson. This bill shows a balance due the Fisher Company of $71,066.75. This bill was corrected by statement of counsel for the Fisher Company, on the trial, to the effect that Robinson was entitled to a further deduction of $478. The claim of the Fisher Company thus became a claim for $70,588.75. The referee found that the work done by the Fisher Company was in strict accordance with the architect's plans and specifications, and that the Fisher Company had performed all the terms and conditions of its contract. From the claim of $70,588.75 the referee deducted some small extras, amounting to $1,843.55, as follows: Item 1, $161.31; item 2, $4; item 3, $1,020; item 4, $304.95; item 5, $154; and item 6, $199.30—leaving due, according to the referee's figuring, $68,745.20, with interest from March 10, 1909. In the bill rendered by the Fisher Company to Robinson on October 14, 1907, were two items which Robinson contested on the ground that they were extras, and that the government architect had allowed Robinson less than the Fisher Company charged him. One item was for $661.86, and the government allowed Robinson for this item $500.55, and therefore the referee reduced this item to the extent of the difference, viz., item 1, $161.31. The other item was reduced for the same reason from $116.50 to $112.50; vide item 2, $4. The next two items which the architect allowed Robinson were counterclaims, one for the use of the elevator hoist, amounting to item 3, $1,020, and the other for miscellaneous items of labor and materials, amounting to item 4, $304.94. Neither the amount of these items nor the right of Robinson to counterclaim them was questioned at the trial. Two other items—item 5, $154, and item 6, $199.30, respectively—were ruled by the supervising architect as being within the plans and specifications, and were therefore deducted by the supervising architect from Robinson's bill, and consequently were deducted by the referee from the amount claimed by the Fisher Company. These various items

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make the total of $1,843.55 with which the referee credited Robinson, and which he deducted from $70,588.75, leaving the balance of $68,745.20. These items were all susceptible of computation and Robinson could have paid over this net amount on March 10, 1909, reserving for further controversy the small sum in excess thereof. This net amount was ascertainable "with reasonable certainty" as of March 10, 1909. From this amount, of course, should be deducted $5,500, with interest, referred to supra.

Eastman Brothers & Co.: This claim was allowed at $14,829.60, with interest from March 10, 1909, subject to two deductions: (1) For $3,488.80, with interest from March 30, 1907, the amount due the George S. Holmes Company, one of the intervening plaintiffs herein, for materials furnished and work done for the Eastman Company; and (2) for $658.90, with interest from July 3, 1906, found due the Long Island Sand Company, an intervening plaintiff, for sand furnished to the Eastman Company. In the amount in controversy between the Eastman Company and Robinson were some items which placed the dispute outside of the authority of the Faber Case, in that the true amount could not be ascertained, either with reference to the contract or to the market value of services and materials concerned. On January 20, 1909, however, an interview was had between Roy H. Robinson, as representing defendant Robinson, and one Avery, the assignee of the claim of Eastman Company. On that occasion a statement in detail was gone over, and all the items checked up, with the result that as of that date it was entirely clear that Robinson was indebted to the extent of $12,991.53. Under the terms of the contract between Robinson and the Eastman Company, payment of this amount should have been made in any event on March 10, and therefore interest should be allowed on $12,991.53 from March 10, 1909. Interest on the balance of $1,838.09 should be allowed from the date of filing the referee's report, to wit, April 4, 1917. The deductions for the amounts due George S. Holmes Company and Long Island Sand Company were properly made by the court below. If these modifications as to interest are accepted by the Eastman Company, the correct amount can readily be computed.

The judgment is affirmed, except as to the claims of Shaffer, as trustee, and Eastman Bros. & Co. If Shaffer, as trustee, deducts $5,500, with interest, as heretofore indicated, the judgment as to the Shaffer claim is affirmed; otherwise, reversed. If Eastman Bros. & Co. accede to the amount ascertained after recalculating interest as above set forth, the judgment as to the claim of Eastman Bros. & Co. is affirmed; otherwise, reversed. Judgment dismissing the Rinn claim is affirmed.

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COUNTY OF CULLMAN, ALA., v. VINCENNES BRIDGE CO.

(Circuit Court of Appeals, Fifth Circuit. April 16, 1918.)

No. 3149.

1. INDEMNITY ⇐=16—ASSUMPTION OF BUILDING CONTRACT BY GUARANTOR.
Rights of a guarantor to the surety on a contract for building a courthouse, which took over the work on its abandonment by the contractor, without further agreement with the county, are measured by the contract, and, where that provides for payment in warrants, the guarantor cannot recover a money judgment on the theory of an implied contract.

2. CORPORATIONS ⇐=657(3)—FOREIGN CORPORATIONS—COMPLIANCE WITH REQUIREMENTS—CONTRACTUAL RIGHTS.
Under the Constitution and statutes of Alabama, making it unlawful for any foreign corporation to transact any business in the state without having first complied with certain requirements, a corporation which has not so complied can acquire no contractual right as the result of anything done by it in that state.

3. COURTS ⇐=312(1)—JURISDICTION OF FEDERAL COURTS—SUITS BY ASSIGNEES.
An action by the assignee of a building contract, providing for assignment, to recover for work done after the assignment is not within Judicial Code, § 24(1) [Comp. St. 1916, § 991(1)], which denies jurisdiction of suits by assignees, unless the assignor could have sued in the same court.

In Error to the District Court of the United States for the Northern District of Alabama; William I. Grubb, Judge.

Action at law by the Vincennes Bridge Company against the County of Cullman, Ala. Judgment for plaintiff, and defendant brings error. Reversed.

A. J. Harris, of Decatur, Ala. (A. A. Griffith and F. E. St. John, both of Cullman, Ala., and Callahan & Harris, of Decatur, Ala., on the brief), for plaintiff in error.

Lawrence Cooper, of Huntsville, Ala., and Seymour Riddle, of Vinita, Okl. (Cooper & Cooper, of Huntsville, Ala., and Riddle & Riddle, of Talladega, Ala., on the brief), for defendant in error.

Before WALKER and BATTS, Circuit Judges, and FOSTER, District Judge.

BATTS, Circuit Judge. The Vincennes Bridge Company instituted suit against the county of Cullman, Ala., for a balance alleged to be due for the construction of a courthouse. The contract was made with Dobson & Free. The plaintiff became the guarantor to the insurance company, which made the bond of the contractors. Shortly after the beginning of the work it was abandoned by the contractors, and plaintiff undertook to complete the contract. Some changes were made in the plans and specifications, and a controversy arose as to the construction to be placed upon the plans as primarily prepared. A conference was had between the county commissioners, on the one hand, and the Vincennes Bridge Company and the original contractors, on the other, at which the parties undertook to agree as to the changes authorized, and as to the disposition which should be made of the mat-

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ters in controversy. During the course of this conference, the commissioners demanded of the Vincennes Bridge Company a statement as to its relationship to the contract, and, this statement being refused, the county commissioners declined to give further consideration to the matters. The bridge company continued until the building was almost complete, when the superintendent indicated dissatisfaction with some of the work. A representative of the bridge company undertook to secure a statement of what would be required for the completion of the work; but this was not given, and the county took possession of the building. Suit was instituted by the bridge company.

The county set up: (1) That the bridge company could not recover upon the assigned contract, because in violation of section 24, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1094 [Comp. St. 1913, § 991(1)]), regulating jurisdiction of the federal District Court in cases of assignment of promissory notes and choses in action; (2) that the bridge company had not complied with the Alabama statute with regard to securing a permit to do business within the state; (3) that the plaintiffs had not complied with the Alabama statute requiring the presentation to the county commissioners of claims against the county antecedent to the institution of suit on the claims.

[1] The trial judge ruled with the defendant upon its proposition with reference to the assignment of the contract, and confined recovery by the plaintiff to an implied contract arising from the execution of the work by the plaintiff and acceptance of and payment for part of the work by the county. The contention with reference to the invalidity of the claim, based upon the alleged failure of the bridge company to take out a permit to do business, was not sustained. The court submitted to the jury the question of whether or not the county had notice of the relationship of the plaintiff to the work, and whether the refusal to consider and determine the claims of the bridge company by the county commissioners was justifiable, and instructed the jury that, if it was unjustifiable, the refusal was a sufficient reason for not presenting itemized claims against the county before instituting suit.

The conclusion has been reached that it will be necessary to reverse the judgment. The plaintiff claimed the difference between the amount payable for work and material furnished under the contract, and the amount liquidated and for which the interest-bearing warrants of the county had been given. The contract is a part of the pleadings. The eleventh paragraph of the contract provides for the manner in which payments are to be made; it provides for the issuance to the contractor, as the work progresses, of warrants in the denomination of $500 each, bearing interest; it indicates the dates at which the warrants to the amount of $55,000 shall, respectively, be payable, and provides that any balance required in carrying out the contract should be payable on the 1st of February, 1934. The twelfth paragraph has a provision to the effect that the acceptance of the warrants shall not be considered as a waiver of the right of the contractor to institute suit against the county for the price of the building, if the warrants, or any portion of them, should not be paid at maturity.

The contract promised payment of a definite sum, and, in addition,

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contemplated and provided for changes which might increase the amount. The manner in which these increases were to be authorized was fixed by the contract. The relationship of the Vincennes Bridge Company to the county, whether it arose directly out of the contract or not, was determined by the contract; and the rights of the county with regard to the construction of and payment for the courthouse were measured by the contract. The effort to practically apply the provisions of the contract to the conditions which arose on account of the ambiguity of the plans, and on account of the changes desired by the county, was not successful. The contractors claimed certain rights measured by the contract, and the county commissioners, justifiably or otherwise, refused to consider them. But whether the conduct of the commissioners constituted estoppel or waiver or not, and whether the contentions of the bridge company with reference to the meaning of the contract, and the amount earned under it, were correct or not, the bridge company is not entitled to recover a money judgment for the amount which it claims to have earned in the construction of the building. It had no right beyond the right to have issued to it warrants of the county in the sums, and payable at the times, indicated by the contract. The bridge company, however, in view of the taking over of the property by the county, and the substantial refusal on the part of the county to permit it to complete the contract, and the claims of the county as to defective work, was justified in instituting a suit to determine the rights of the parties and the amounts, if any, for which warrants should issue.

[2] An exception was reserved to the refusal of the court to give the following charge requested by the defendant:

"If the plaintiff entered into any contract, agreement, express or implied, or undertaking, with Cullman county, prior to December 13, 1912, to erect or build the courthouse, then I charge you under the evidence in this case such contract, agreement, or undertaking was void, and you cannot find a verdict for the plaintiff thereunder."

The suit included a claim based upon the furnishing by the plaintiff of labor and material prior to December 12, 1912. There was evidence of dealings, both before and after that date, from which could be implied agreements to pay the plaintiff for labor and material in the manner stipulated in the contract between the county and Dobson & Free. There was a legal obstacle to a recovery on any contract made prior to December, 1912, to pay the plaintiff for such labor and material, because of plaintiff's failure, until that date, to comply with the condition on which its right to make a contract in Alabama was dependent. Alabama constitutional and statutory provisions make it unlawful for any corporation not organized under the laws of that state "to engage in or transact any business" in that state before filing an instrument in writing in the office of the secretary of state, designating at least one known place of business in that state and an authorized agent or agents residing thereat. Before a compliance with the requirement by such a corporation it is incapable of acquiring any contractual right as a result of anything done by it in Alabama. Alabama Western R. Co. v. Talley-Bates Construction Co., 162 Ala. 396, 50 South. 341; Chatta-

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nooga National Building & Loan Ass'n v. Denson, 189 U. S. 408, 23 Sup. Ct. 630, 47 L. Ed. 870; Diamond Glue Co. v. United States Glue Co., 187 U. S. 611, 23 Sup. Ct. 206, 47 L. Ed. 328. The evidence in the case was such as to entitle the defendant to an instruction to the jury to the effect that there could be no recovery on any contract, express or implied, which the evidence tended to prove was made or entered into between the plaintiff and the defendant prior to December 13, 1912. The court was in error in refusing a charge involving the legal proposition stated.

The question as to whether a contract, made after the permit, could include payment for labor done and material furnished prior to that date, is not involved. The matter of the presentation of the claims to the commissioners' court is governed by Talley v. Commissioners' Court of Jackson County, 175 Ala. 650, 39 South. 167, and specific consideration of the several assignments with reference thereto is unnecessary.

[3] With reference to the matter of assignment of the contract, the District Judge placed upon the plaintiff an obligation more onerous than the law requires. The bridge company could not (as charged by the court) have recovered upon any assignment of a claim by the contractors, Dobson & Free, for any amount earned prior to the assignment; but assignment was provided for by the contract, and, when made, that which was afterwards earned was due primarily to the substitute contractor, and did not arise out of the assignment of a chose in action.

For the reasons indicated, the judgment is reversed, and the cause remanded for further proceedings not inconsistent herewith.

Reversed.

LINN v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. April 10, 1918.)

No. 198.

1. CRIMINAL LAW ⊂=1156(4)—REVIEW—DISCRETION—NEW TRIAL.
 Where defendant insisted, on motion for new trial, that he did not have a fair trial, and that one of the jurors had knowledge of the facts of the case before he was chosen, and the trial court, in disposing of the motion, heard affidavits, etc., the denial of the motion cannot be reviewed on error.

2. CRIMINAL LAW ⊂=1129(1)—ASSIGNMENTS OF ERROR.
 Where the denial of a motion for new trial on the ground that defendant did not have a fair trial was not included in assignments of error, and was no part of the bill of exceptions, that question cannot be reviewed.

3. SEARCHES AND SEIZURES ⊂=7—CONSTITUTIONAL PROVISIONS.
 Despite Const. Amend. 4, prohibiting unreasonable searches and seizures, and Amendment 5, declaring that no one in a criminal case shall be compelled to testify against himself, a corporation may be required to produce its books and papers, though they tend to incriminate an officer thereof.

4. SEARCHES AND SEIZURES ⊂=7—PRODUCTION OF EVIDENCE—UNREASONABLE SEARCH.
 Where papers and books of a corporation of which defendant was an officer were produced before the grand jury, and later returned to defend-

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ant's counsel, defendant cannot, having been given an opportunity to remove his own private papers, object to the use of such records produced in obedience to a subpœna duces tecum; there being no unreasonable search, etc., in violation of Const. Amends. 4, 5.

5. Criminal Law ⟸776(2)—Instructions—Character.
In a criminal prosecution, a charge that the jury should consider all the testimony, including the testimony of character witnesses, and should take it into consideration, and give it such weight as the jury might think it ought to have as bearing on the question of guilt or innocence, is not erroneous.

6. Criminal Law ⟸776(5)—Instructions—Character.
Requests that good character is in itself sufficient to raise a reasonable doubt, whereas, without it, no reasonable doubt would exist, or that character is in itself enough to raise a reasonable doubt, etc., are erroneous, in omitting the word "good," and in stating too broadly the rule that evidence of good character may generate reasonable doubt.

7. Criminal Law ⟸1122(5)—Record—Instructions.
Requests to charge, as found in the stenographer's minutes, cannot be considered on writ of error, where not embodied in the record and the assignments of error.

8. Criminal Law ⟸826—Time for Requesting Instructions.
In the Southern district of New York it is the custom not to refuse requests after the charge has been delivered, but requests at that time cannot receive the careful attention they would receive if presented at the close of the evidence, and the trial judge should not be held to the same degree of accountability for erroneously refusing a request then presented as he must be for one presented at a more appropriate time.

9. Criminal Law ⟸826—Trial—Requests—Presentation.
It is within the province of the District Court to request counsel to present their requests to charge at or before close of the evidence, and before argument, and to announce that he will not entertain requests not made in apt time.

10. Criminal Law ⟸1153(4)—Review—Discretion—Leading Questions.
The propriety of leading questions is so largely a matter of discretion, and depends so much on the circumstances of each case, that it is unwise for an appellate tribunal to review the act of the trial court in allowing leading questions.

11. Criminal Law ⟸1186(4)—Appeal—Reversal—Trivial Error.
Prejudice will not be presumed from trivial errors, and in order to justify reversal, even in a criminal case, it must appear that the error was substantial.

12. Criminal Law ⟸1091(1)—"Bill of Exceptions"—What Constitutes.
A "bill of exceptions" is a written statement of objections to the decision of a court upon a point of law, made by a party to the cause, and properly certified; and a stenographic transcript of the entire proceedings of a criminal trial, including the colloquies of counsel, etc., is not a bill of exceptions, and should not be allowed as such.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bill of Exceptions.]

In Error to the District Court of the United States for the Southern District of New York.

Forrester A. Linn and another were convicted of violating Criminal Code, § 215, and the named defendant brings error. Affirmed.

The plaintiff in error, hereafter referred to as the defendant, was indicted for a violation of section 215 of the federal criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1130 [Comp. St. 1916, § 10385]). The indictment charged that

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the defendant, together with Joseph C. Lynch and Mason G. Worth, had unlawfully, willfully, knowingly, and feloniously devised a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations, and promises from certain persons named and unnamed in the indictment, who desired to rent rooms and apartments, and who for that purpose advertised in the daily newspapers in and about the city of New York. The case was brought to trial against defendants Linn and Lynch; the defendant Worth having died after indictment and prior to the trial. The false and fraudulent pretenses and representations which were alleged to have been made were set out at length in the indictment. The defendants were alleged to have carried on their operations under the name of the Reliance Leasing Company, Incorporated. The jury returned a verdict against Linn and Lynch. The former was sentenced to a term of three years' imprisonment and Lynch to two. Each sued out writs of error, but Lynch has withdrawn his and is now serving his sentence.

M. Michael Edelstein, of New York City, for plaintiff in error.

Francis G. Caffey, U. S. Atty., and Frank M. Roosa, Asst. U. S. Atty., both of New York City.

Before ROGERS and HOUGH, Circuit Judges, and LEARNED HAND, District Judge.

ROGERS, Circuit Judge (after stating the facts as above). [1] The defendant insists that he did not have a fair trial, and that one of the jurors had knowledge of the facts of the case before he was chosen as a juror. The allegation is that it was discovered after the trial was concluded that the wife of one of the jurors had herself been a client of the Reliance Leasing Company, having registered with it on June 28, 1915, for a period of six months, paying to it the sum of $15.

The trial began on February 21, 1917. The facts were brought to the attention of the trial court upon a motion for a new trial. At that time affidavits of the juror involved, and of his wife, were presented to the court. His affidavit stated that at the time he became a juror he had no knowledge that his wife had had any transaction with any person representing the Reliance Leasing Company, and that he did not know of it until some time after the trial was concluded; that during the trial he had not discussed the case with her, except to say that he was sitting as a juror in a case and regretted that it was taking so much of his time and causing him so much delay in his business; that he might have stated to her he was sitting in a mail fraud case, but that he had no recollection of that; that he was organizing a new company, and that by reason thereof he rarely returned home until about 10 o'clock in the evening; that the organization of the company was of such vital importance to him and his wife that neither of them had any interest in the case; that the first time he discussed the case with his wife was some ten days or two weeks after the trial, when a cartoon appeared in an evening paper which referred to the Reliance Leasing Company. The affidavit of the wife was to the same effect. The motion for a new trial having been denied, this court is not at liberty to review the matter. The law is so well established that the action of the trial court in refusing a new trial cannot be reviewed in this court on writ of error that no citation of the authorities is necessary.

The cases of Mattox v. United States, 146 U. S. 140, 13 Sup. Ct. 50,

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36 L. Ed. 917, and McDonald v. Pless, 238 U. S. 264, 35 Sup. Ct. 783, 59 L. Ed. 1300, do not assert a contrary doctrine. What the court held in the first of these cases was that on a motion for a new trial the decision of the District Court excluding certain affidavits of jurors was reversible error. In the latter case on a motion for a new trial one of the jurors was sworn as a witness to testify concerning certain matters transpiring in the jury room, and the question was whether a juror could impeach his own verdict. The two cases referred to simply show that the action of the trial judge in admitting or excluding affidavits presented in connection with a motion for a new trial may be considered on writ of error. But that is a very different matter from reviewing the discretion of the trial judge in granting or refusing a new trial. In the case at bar the affidavits were not excluded.

[2] But there is another and equally conclusive reason why this court cannot consider the objection raised, and that is that it is not included in the assignment of errors, and it is no part of the bill of exceptions.

[3, 4] The defendant also alleges that his constitutional rights were violated by the admission in evidence of papers produced under subpœna from the files of his corporation, the Reliance Leasing Company. He relies upon the Fourth Amendment of the Constitution, which provides as follows:

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

He also relies upon the Fifth Amendment, which provides in part as follows:

"Nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law. * * *"

The papers and records which were admitted in evidence were produced in obedience to a grand jury subpœna duly served upon an employé who was in sole charge of the office of the corporation at the time such service was made. Later the counsel for defendant requested the return of the papers, and they were returned by the United States attorney, and a receipt was signed by the defendant's counsel, which states that the papers belonged to the Reliance Leasing Company. A subpœna duces tecum, before the beginning of the trial, was served upon the defendant, who was the president of the corporation, requiring him to produce the papers in court, and they were so produced. The law is now well established that a corporation is not privileged from the production of its books and papers, even though they tend to incriminate an officer thereof. Johnson v. United States, 228 U. S. 457, 33 Sup. Ct. 572, 57 L. Ed. 919, 47 L. R. A. (N. S.) 263; Grant v. United States, 227 U. S. 74, 33 Sup. Ct. 190, 57 L. Ed. 423; Wheeler v. United States, 226 U. S. 478, 33 Sup. Ct. 158, 57 L. Ed. 309; Wilson v. United States, 221 U. S. 361, 31 Sup. Ct. 538, 55 L. Ed. 771, Ann. Cas. 1912D, 558.

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The trial judge advised the counsel for the defendant to examine all the papers that came from the office of the corporation and find whether any of them were the exclusive property of the defendant, and plenty of time was afforded him for the examination. None of the personal papers of defendant were either offered or received in evidence. If papers were originally taken from the office of the corporation without authority of law, they were returned upon demand being made, and if they had not been it would have been the duty of the court upon application made to it to have caused their return. Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177. That question is not now involved, the papers having been voluntarily returned. But counsel urged upon us at the argument that this case should be governed by the principle applied by this court in Flagg v. United States, 233 Fed. 481, 147 C. C. A. 367 (1916). In that case, as in this, the defendant was indicted for devising a scheme to defraud and using the mails in furtherance thereof; and in that case, as in this, the books and papers at the accused's place of business were seized and taken to the federal building, where they were examined by the federal authorities, who ultimately, upon demand having been made, returned them to his office. We held in that case that a conviction based upon evidence procured from the books and papers so taken without pretense of legal authority could not be sustained, and we placed our decision upon the broad ground that the constitutional rights of the defendant were violated by the unlawful seizure of his books and papers by the officers and agents of the United States, acting without warrant or pretense of legal authority. The wrong done in the seizure of the books was not cured by the idle ceremony of returning them after the authorities of the United States had obtained their desired information.

The similarity of the two cases has been noted. It remains simply to point out the dissimilarity between the two cases, a dissimilarity so great as to make it impossible to apply the principle involved in that case to the facts of this one. The books and papers seized in the Flagg Case were the private books and papers of an individual. The books and papers in this case were the books and papers of a corporation. While a person is privileged from producing his books in a prosecution against himself, a corporation is not privileged from producing its papers and books, even though they incriminate the officer who produces them. The distinction is clearly pointed out in Wilson v. United States, supra.

[5, 6] It is assigned for error that the trial judge erred in denying the request of the defendant to charge that good character in itself is sufficient to raise a reasonable doubt, whereas without it no reasonable doubt would exist. In his charge the judge had instructed the jury as follows:

"When I say that you should consider all the testimony in the case, that included the testimony of the witnesses who were called as character witnesses, and that you will take into consideration and give it such weight as you think it ought to have in the case as bearing upon the guilt or innocence of the defendants."

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We cannot say that the instruction as given was error. Whether it was error to decline to give the instruction as asked is quite another matter. The counsel for defendant did not present his requests to charge until after the conclusion of the charge, and the jury had been told that they might take the case. Then counsel stated that he had some requests, and the judge remarked that it was pretty late to request them. He added:

"If you have anything in writing, let me have it, although that is not the rule (presenting after the charge) that prevails anywhere. Requests that are to be presented should be presented in time, in order that they may be examined. From such a hasty examination as I have been able to make, I think the requests which ought to be given have been embodied in the general charge."

Counsel again stated that he requested the court to charge that:

"Character is in itself sufficient to raise a reasonable doubt, whereas without it no reasonable doubt would exist."

And the judge replied:

"I have charged the jury fully on that subject."

The last request, which omitted the word "good," clearly was not in proper form. As it was first made, however, we cannot regard it as proper. To have given it as requested would have required the jury to find that evidence of good character was in itself enough to raise a reasonable doubt. This, of course, cannot be true, for, if it were, no defendant could be convicted whose character was good.

The Supreme Court in Edington v. United States, 164 U. S. 361, 17 Sup. Ct. 72, 41 L. Ed. 467, held that evidence of good character may itself create a reasonable doubt, when without it there would on the other evidence be no reasonable doubt. The court in that case stated that "the decided weight of authority now is that good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it the other evidence would be convincing." To say that evidence of good character "*may* generate a reasonable doubt" is one thing. To say, as the trial judge was asked in this case to charge, that good character in itself "*is* sufficient to raise a reasonable doubt" is a very different proposition indeed, and the Supreme Court has certainly sanctioned no such doctrine.

[7] We have considered the above request to charge as we find it in the stenographer's minutes and as it is stated in the twenty-first assignment of error. Under the fifth request to charge it is stated in a manner materially different. It there reads:

"Good character, when considered in connection with the other evidence of the case, *may* generate a reasonable doubt."

We are, however, obliged to ignore the request as thus stated, as it is not so embodied in the record and in the assignments of error. For the same reason we are obliged to ignore the sixth request to charge, reading:

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"Good character alone may create a reasonable doubt, although without it the other evidence may be convincing."

[8] It has been remarked that the requests to charge were not made until after the jury had been instructed. Requests to charge should be made in proper time, and if so made the general rule in many jurisdictions is that error cannot be assigned to a refusal to give them, whether made too late or made prematurely. In most jurisdictions the time when such requests are to be preferred is regulated either by statute or by rules of court. In the Seventh circuit the Circuit Court of Appeals, in City of Chicago v. Le Moyne, 119 Fed. 662, 669, 56 C. C. A. 278, 285, commenting on requests to charge presented after the charge had been delivered, said:

"Instructions should be presented to the court before the charge to the jury. This is not only due to the court, but is owing also to the rights to the parties litigant, and is in the public interest. The office of such request is to call the attention of the court to propositions of law supposed to affect the cause, that deliberation may be had thereon, and, if they be approved, incorporated in the charge of the court. It is unfair, after the charge is delivered, to press upon the court a whirlwind of requests to charge, possibly artfully contrived to entrap the court, and to require decision upon them without time for reflection."

In the Southern district of New York it has been the custom not to refuse requests made after the charge has been delivered. But requests made at that time cannot receive the same careful consideration that they would receive, if presented at the close of the evidence and before the commencement of the argument, and it would seem that the trial judge should not be held to the same degree of accountability for erroneously refusing a request when it is presented at the conclusion of his charge as he must be when it is presented in proper time.

[9] It is quite within the province of a District Judge to request counsel to present their requests to charge at or before the close of the evidence and before argument, and to announce that he will not entertain requests not so made, not having been made in "apt time." Requests which are presented after the charge has been given, and even after the arguments have been concluded, are usually designed to lead a judge into error, and the practice of entertaining requests so presented is not deserving of encouragement.

[10] It is objected that the court abused its discretion in permitting leading questions throughout the trial to be propounded by the government. An examination of the record satisfies us that such leading questions as were allowed were within the sound discretion of the court. In Wigmore on Evidence, § 770, it is said of the rule relating to leading questions that:

"It follows, from the broad and flexible character of the controlling principle, that its application must rest largely, if not entirely, in the hands of the trial court. So much depends on the circumstances of each case, the demeanor of each witness, and the tenor of the preceding questions, that it would be unwise, if not impossible, to attempt in an appellate tribunal to consider each instance adequately."

We find ourselves quite in accord with this statement, and we do not find in the case now before us any such abuse of discretion as would

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warrant a reversal on that ground. The trial judge in a number of instances warned counsel for the government to avoid leading questions, and restricted the asking of such questions as much as possible.

[11] There are a number of other assignments of error which seem to us to be so trivial in their nature that we do not deem it necessary to prolong this opinion by a discussion of them in detail. We notice that defendant's counsel in his brief admits that "some of the errors assigned are technical," and we are told that the government cannot be permitted to speculate as to whether the defendant was injured by the conditions of which complaint is made. He tells us that error produces prejudice which cannot be disregarded, unless it appears beyond a doubt that the error could not have prejudiced the rights of the party who assigns it. Whatever the rule may be in some other circuit, it is not the rule in this that, no matter how trivial may be the error, prejudice must be presumed. That archaic theory we have several times repudiated, and we take this occasion to say again that we cannot accept it. We prefer to follow what seems to us the more rational view, that in order to justify a reversal, even in a criminal case, it must appear that the error is substantial. Prejudice will not be presumed in this court, when it is impossible to see that it could possibly have wronged the party who complains of it.

[12] In conclusion we desire to call attention to the fact that this case comes to us with a bill of exceptions which is such in name only. It is well understood what a bill of exceptions is. It is defined in Bouvier's Dictionary as:

"A written statement of objections to the decision of a court upon a point of law, made by a party to the cause, and properly certified to by the judge or court who made the decision."

In this case we have nothing of the sort. We have been presented with a copy of the stenographer's minutes, which contains all the evidence, the colloquies of counsel with each other, as well as their arguments to the court, all the remarks of the court, and in fact everything that was said and done at the trial, except the arguments of counsel before the jury. It includes the argument addressed to the court upon the motion for a new trial. At the end of everything we find the following:

"The within bill of exceptions and case, from page 1 to 861, is hereby settled and allowed"

—which is signed by the District Judge. This is not a true bill of exceptions which ought not to contain all the evidence, but only so much of it as is necessary for the presentation and decision of questions saved for review. Such a "bill" as we are presented with imposes an unnecessary burden on the court. We may say of it, as was said of a like "bill" in City of Chicago v. Le Moyne, supra, that:

"Such practice may be a saving of labor to counsel, but is neither lawyerlike nor just to the court or to client. This bill should never have been signed by the trial judge, and we would not be subject to just criticism if we declined to consider the errors assigned."

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When this court consented, because of the financial condition of the defendant, to dispense with the necessity of printing the record, and declared its willingness to accept a typewritten record, it had no intention of dispensing with a bill of exceptions in the proper form, and of taking upon itself the burden which has been imposed upon us of going through the record with which we have been presented.

Judgment affirmed.

In re INDEPENDENT MACHINE & TOOL CORPORATION, Inc.

(Circuit Court of Appeals, Second Circuit. April 24, 1918.)

No. 226.

1. BANKRUPTCY ⊂=474—RECEIVERS—APPOINTMENT—OBJECTIONS.

Where an alleged bankrupt, on the filing of an involuntary petition, consented to the appointment of a receiver without the bond required by Bankruptcy Act, § 3(e), having been given, it cannot, the petition having been dismissed, object to payment of necessary disbursements out of the funds in the receiver's custody, on ground that appointment was not warranted under section 2 (3).

2. BANKRUPTCY ⊂=474—RECEIVERS—APPOINTMENT.

The appointment of a receiver on an involuntary petition in bankruptcy cannot be treated as unauthorized, and rendering the receiver chargeable with expenses, etc., because the alleged bankrupt was adjudged solvent, for the rules governing ordinary receiverships are not applicable to such appointments under the Bankruptcy Act.

Rogers, Circuit Judge, dissenting.

Petition to Revise Order of the District Court of the United States for the Southern District of New York.

In the matter of the Independent Machine & Tool Corporation, Incorporated, alleged bankrupt. On an involuntary petition in bankruptcy against the alleged bankrupt a receiver was appointed. The alleged bankrupt having been found solvent, the petition was dismissed, and the receiver directed to turn over to the alleged bankrupt all its property, except so much as might be necessary to pay obligations incurred in performing the duties of the receivership; and the alleged bankrupt petitions to revise such order. Order affirmed.

Horace London, of New York City, for alleged bankrupt and petitioner.

A. H. Simon, of Brooklyn, N. Y., for petitioning creditors.

B. Rembaugh, of New York City (Mary R. Towle, of New York City, of counsel), for respondent.

Before WARD and ROGERS, Circuit Judges, and LEARNED HAND, District Judge.

WARD, Circuit Judge. October 3, 1917, a petition in involuntary bankruptcy was filed against the Independent Machine & Tool Corporation, Incorporated, and on the same day the petitioning creditors applied to the court for the appointment of a receiver, without giving any bond. An order on consent was made appointing Bertha Rem-

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baugh temporary receiver, reciting that the appointment was necessary to preserve the assets. October 9 the alleged bankrupt demanded a jury trial. December 22, the jury having found that the alleged bankrupt was solvent, Judge Manton entered an order dismissing the petition, with costs, and directing the temporary receiver to turn over to the alleged bankrupt all its property in her possession, except so much as might be necessary to pay obligations incurred by her in performing the duties of the receivership.

This is a petition to revise the order. The temporary receiver had come into possession of $812.56, had disbursed $178, owed $415, and was ready to pay over the balance of $219.56, without asking for any compensation, to the alleged bankrupt, who claimed that she should be required to turn over all the moneys that had come into her hands.

[1, 2] Receivers should not be appointed, unless it is "absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition until it is dismissed or the trustee is qualified." Section 2 (3) of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 545 [Comp. St. 1916, § 9586]); In re Oakland Lumber Co., 174 Fed. 634, 98 C. C. A. 388. This was the ground upon which the temporary receiver was appointed in this case. Section 3(e) (Comp. St. 1916, § 9587) provides an effectual protection for an alleged bankrupt as follows:

"Sec. 3. * * * (e) Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses, and damages occasioned by such seizure, taking, and detention of the property of the alleged bankrupt.

"If such petition be dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel fees, expenses, and damages occasioned by such seizure, taking, or detention of such property. Counsel fees, costs, expenses, and damages shall be fixed and allowed by the court, and paid by the obligors in such bond."

If the alleged bankrupt, instead of opposing or moving to vacate such an order, consents to the appointment of a receiver without bond, he cannot object if the petition be dismissed to the payment of necessary disbursements out of the funds in the receiver's custody. The provision of the act, being for his benefit, may be waived. As it consented in this case to the entry of the order made, it cannot complain either that a receiver was appointed or that she was appointed without bond.

Some authorities are cited which hold that in ordinary civil suits the receiver's rights depend upon whether the appointment was rightly made, and that if it is vacated he cannot look to the party whose property was wrongfully taken for his expenses or compensation. We think they do not apply. The Bankruptcy Act provides a system for insuring the equal distribution of a bankrupt's assets among his creditors. The specific case of an appointment continuing until the petition be dis-

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missed is covered. It expressly contemplates that the status quo in some cases where the person proceeded against has not been and may never be adjudicated must be maintained. The claims of creditors might be utterly defeated, unless the assets were taken out of the alleged bankrupt's possession. An appointment in such case cannot be described as unauthorized, or its propriety be made to depend upon the subsequent adjudication of the alleged bankrupt. The expense of the appointment should be imposed upon the petitioning creditors in the first instance (In re Lacov, 142 Fed. 960, 74 C. C. A. 130); but the receiver, who is acting as an officer of the court, should not be chargeable with expenses necessarily incurred in the performance of his duties. It cannot here be said, as it may be in ordinary civil actions, that the taking of a man's property from him is wrongful, unless finally adjudicated to be rightful, because the act expressly provides for a necessary taking, even if the petition be ultimately dismissed and the receivership vacated. Nevertheless the appointment and the taking are to carry out the purposes of the Bankruptcy Act, and are rightful, whether the alleged bankrupt be subsequently found to be solvent or insolvent.

The order is affirmed.

ROGERS, Circuit Judge (dissenting). I am unable to concur in the opinion of the majority of the court. In this case a receiver was appointed to take possession of the assets of a corporation upon the allegations of creditors that the corporation was insolvent, and it has turned out that the representations thus made were not true, and that the corporation was all the time solvent. It is, of course, apparent that a very serious error has been committed. This court (In re Oakland Lumber Co., 174 Fed. 634, 98 C. C. A. 388) called attention to the fact that the Bankruptcy Act limits the appointment of receivers to cases where "it is absolutely necessary" for the preservation of the estate. We then pointed out that the evidence justifying such an interference with the rights of property must be clear, positive, and certain. The power to interfere and deprive one of his property is not to be exercised except in the clearest cases.

The question which is herein presented, however, grows out of the claim which the alleged bankrupt makes that, since it has been determined that it is solvent, it is entitled to receive all the assets which came into the receiver's possession since the filing of the petition in bankruptcy, including any and all moneys that came into her possession, irrespective of what she had paid out or had obligated herself to pay out. In Matter of Lacov, 142 Fed. 960, 74 C. C. A. 130, this court had before it the question whether petitioning creditors are liable for the expenses of a receivership in a case where, upon commencing a proceeding against a debtor to have him adjudicated a bankrupt, they have applied to the court and obtained the appointment of a receiver of his property, and the proceeding is subsequently dismissed as unfounded; the receiver meanwhile having entered upon his duties, taken charge of the property, and incurred expenses. We then held that the petitioning creditors are so liable, notwithstanding the fact that there is no express provision in the Bankruptcy Act which authorized the court of bank-

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ruptcy to compel petitioning creditors to pay the costs of the receivership under such circumstances. The power of the court was based upon its implied authority to require the creditors to bear the expenses of a proceeding which they instituted without sufficient cause, and in the course of which they invoked the court's assistance, and asked it to put its machinery in motion for their benefit in such a way that expenses accrued, which had to be borne either by them or the adverse party.

The above case has determined that, as between the creditors and the party over whose property a receivership has been created wrongfully upon their application the expenses connected therewith must be borne by them. But the question now presented is whether under such circumstances, as between the receiver and the party wronged, the former's expenses and compensation shall be paid out of the funds which came into his possession. This is a very different question from that propounded in the Lacov Case. The alleged bankrupt has petitioned the court for the return of the entire property which came into the possession of the receiver. The creditors are not here, and no relief is asked as respects them. It is to be noted that there is not a word in the record which discloses whether the creditors upon whose application the adjudication was made and the receiver appointed are solvent or insolvent.

The Circuit Court of Appeals in the Seventh Circuit has held in Re Hill Co., 159 Fed. 73, 86 C. C. A. 263 (1907), that after a dismissal of the petition for adjudication of bankruptcy it is within the power of the court to award payment for expenses or compensation of the receiver out of the funds in the custody of the court. The facts were that creditors filed a petition in bankruptcy against the Hill Company and a receiver was appointed. Issues were raised only under the petition for involuntary adjudication, and the hearings were protracted before the master and the District Court, which finally resulted in a dismissal upon the ground that the corporation was not subject to adjudication as a bankrupt. This, upon appeal to the Circuit Court of Appeals, had been affirmed. The custody and service of the receiver had extended from September 21, 1905, to February 1, 1907, or a period of 16 months. The application for the receiver, as distinguished from the application for adjudication of bankruptcy, does not seem to have been resisted; and during the period the receiver was in possession several orders of the court, which recited the consent of the alleged bankrupt, were entered which sold certain of the property and leased certain other portions of the property. In February, 1906, and prior to the decision of the Circuit Court of Appeals adjudging that the company was not subject to adjudication as a bankrupt, it executed an assignment of all its property in accordance with a statute of the state in which it was incorporated; and an order was entered in the District Court which directed the receiver to turn over to the assignee the assets in his hands, less the expense incurred, as allowed, and the allowance for his compensation. The assignee contended that he was entitled to the assets, without any deduction for the expenses of the receivership. The Circuit Court of Appeals affirmed the order as entered. It declar-

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ed that the receiver upon his appointment became the officer and hand of the court in the performance of his duties, neither subject to the wishes or directions of the parties, nor dependent on the result of the controversy for payment of expenses or services, and it held that he was "clearly entitled to protection by the court, in the exercise of such jurisdiction, for all expenses rightly incurred and services rendered under its orders, either in allowances out of the funds committed to his charge, or through provision otherwise made by the court to that end." It also added that:

"Assuming that the court may ultimately charge such expenses, in whole or in part, against the petitioning creditors, on dismissal of the proceedings, and further assuming, for the argument, that they should be so charged in the case at bar, as contended, it is not the place of the receiver to move for relief of one or the other party, nor are his rights dependent upon the equities of the parties therein."

In 1910 we decided In re Charles W. Aschenbach Co., 183 Fed. 305, 105 C. C. A. 517, and adhered to the doctrine we announced in the Lacov Case. In commenting on the Hill Case, Judge Lacombe did not refer adversely to it, but declared that it could not—

"fairly be construed as holding that the bankruptcy court has no discretion to assess the expenses in the first instance against the person ultimately responsible, if it thinks that is the wiser and more efficient course to pursue in some particular case. In the case at bar it certainly seems that it is the better practice, settling the entire matter as in fairness and equity it should be settled, without requiring the injured party to bring an independent action against the petitioning creditor to recover the loss to his estate consequent upon payment of the receiver's expenses. In some other and different case, where there was doubt as to the petitioning creditor's solvency, or the value of his bond, or where it might be difficult to effect service upon him, the other course might be the only one which would secure the receiver against loss."

But this intimation that, if the petitioning creditors should be insolvent, the receiver could come upon the fund, is manifestly a dictum. We are not now called upon to determine whether that dictum is right or wrong, as the present record does not disclose that the petitioning creditors are insolvent.

In Beach v. Macon Grocery Co., 125 Fed. 513, 60 C. C. A. 577, the Circuit Court of Appeals in the Fifth Circuit declared it to be a principle of general application that if a receiver is erroneously appointed, and the adverse party successfully contests the appointment, the compensation due to the receiver and his expenses incurred in the administration of the estate should be taxed to the parties who have applied to have the appointment made. The question arose in that case in a bankruptcy proceeding, and the receiver took possession of certain cattle, horses, and hogs, and incurred expenses for caring for and feeding the stock while in his possession. The District Court directed the receiver to turn over the property. The question was whether the receiver could retain in his possession $325 paid to feed and care for the stock, and the right to retain that amount was denied.

"The property," said the court, "having been taken from the defendants against their consent under an erroneous order, which they resisted successfully in an appellate court, the only proper course is to return the property

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without charge of any kind against it or against the successful defendants. The defendants should be put in their former condition as nearly as possible. Instead of any sum being taxed against the defendants under such circumstances, they would be entitled in some jurisdictions to recover damages, in a proper action, for being deprived of the use of the property. The petitioners who instituted the proceedings and secured the appointment of a receiver are properly and equitably chargeable with the costs and expenses incurred by their wrongful application. In the event of their insolvency, any expenses incurred by the receiver should fall on him, and not on the defendants. He need not become receiver unless he chooses, or he may require a bond of indemnity before accepting the position. In a case, therefore, where the receiver has been wrongfully appointed, and the order subsequently vacated, it would be more equitable that the receiver himself should sustain the loss or expenses of the receivership paid by him than that they should be taxed to the successful defendants."

I see no reason why a different principle should be applied to the effect of an erroneous appointment of a receiver in a bankruptcy proceeding than is applied where the appointment is erroneously made in any other proceeding. The earliest case on the subject which has come to my notice is that of Verplanck v. Mercantile Insurance Co. of New York, 2 Paige's Ch. (N. Y.) 438 (1831). In that case a receiver over a corporation had been appointed on an ex parte application, and upon appeal the appointment was vacated as having been wrongfully made. The receiver was directed to turn over all the property which had come to his hands; no provision being made for compensation. This case has been frequently cited since, but the question of the receiver's compensation is not discussed in the chancellor's opinion.

In People ex rel. Port Huron, etc., R. Co. v. Judge of St. Clair Circuit, 31 Mich. 456 (1875), the Supreme Court of Michigan held that the management of a corporation was in its board of directors, and that such management could not be assumed by a court of chancery or vested in a receiver, except in a proceeding to wind up the corporation under the statutes. It held that the appointment of a receiver under such circumstances was beyond the power of the court and absolutely void. Then the question arose in People v. Jones, 33 Mich. 303 (1876), as to the compensation of the receiver whose appointment had been declared void, and the court then held that the lower court was right in directing the receiver—

"to restore such property to the parties from whom it had been taken, and to place them as nearly in statu quo as the nature of things would permit. * * * In so far as the respondent had expended the money of the company, which he had received in conducting the business, in the payment of expenses, and the salaries of employés for which the company would be holden, there being no objection urged to the allowance of these expenditures, it is proper he should be credited for them. But the charge for his own compensation was not a proper one to be allowed, to come out of the fund thus collected."

The opinion was a per curiam opinion, and was without dissent; the court being composed of Chief Justice Cooley and Judges Campbell, Marston, and Graves.

The question came before the First Department of the Supreme Court of New York in Weston v. Watts, 45 Hun, 219 (1887). In that case a receiver had been appointed of the property of a firm; the ap-

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plication having been made by certain members of the firm, who asked for an accounting. Upon appeal to the General Term the order appointing a receiver was reversed, and an order was entered directing the receiver to turn over to the defendant all the copartnership property which he held, and to render an account before a referee named in the order of reversal, who should fix his fees and compensation which those who had originally secured the receiver's appointment were ordered to pay. This order was taken on appeal to the Supreme Court, and there affirmed in an opinion written by Judge Daniels and concurred in by Judge Van Brunt. The court in its opinion, after stating that the appointment of the receiver was without the authority of the law, said:

"* * * There seems to be no legal ground upon which the receiver can be directed to withhold so much of the property from the defendant as may be required to pay his commissions and expenses; but those expenses should be paid, as they have been directed to be, by the plaintiffs, who obtained the appointment. * * * To take a person's property from him by an unauthorized proceeding, and place it in the hands of a receiver, and then subject him to the expenses of the proceeding, would be very transparently unjust, even if the courts had the power to do that. * * * For that there seems not to be, and probably will not be, any authority vested in the courts; for their duty is to right the wrong, when its existence may be made to appear and protect the injured party against its consequences; and that can be no otherwise done than by restoring to him the property of which he may have been divested by the unauthorized interference of the court. As little as that he certainly is entitled to, and the receiver who has acted under the appointment obtained upon the application of the adverse party must look to that party for his fees and compensation. If the court could impose upon the defendant, or the property ordered to be restored to him, the obligation first to pay the receiver, it might with the like reason apply the same principle to every case where one man may be deprived of his property through legal proceedings wrongfully instituted against him by another person. * * * It is sufficiently injurious for a person to have his property taken from him, or his person subjected to arrest, without right; and upon no legal principle can the wrong be aggravated in such a manner as to order him to pay the expenses of the proceeding. * * * The fundamental law of the state will not permit that to be done, for it has been provided by section 6 of article 1 of the Constitution of the state that no person shall be deprived of life, liberty, or property without due process of law. And a legal proceeding by which he may be divested of his property which is unauthorized, and afterwards set aside, cannot be such due process. * * * It may be a hardship upon the receiver himself, but it is one of the risks which he has voluntarily assumed. He could have avoided it by declining to accept the appointment, or protected himself against the loss of his commissions and expenses by first requiring security from the plaintiffs for their payment. If they cannot now be made to pay, it is more just and equitable that the receiver shall be deprived of his fees and expenses, than it would be to require the defendant to defray the expenses of an unauthorized proceeding and the cost of depriving him thereby of the possession of his property."

A concurring opinion was written by Judge Bartlett, who said:

"Indeed, even if the unsuccessful party were unable to pay the receiver, it may well be doubted whether any authority exists to enforce payment of his commissions out of any portion of the property or fund belonging to the party who has succeeded in vacating the receivership. It would be a pretty severe rule, even if constitutional, which should compel a litigant to pay the expense of having his own property illegally taken out of his custody for a while. There might be cases, where a receiver was erroneously appointed, but not under such circumstances as to make the appointment absolutely void, which would warrant an order that his disbursements be paid out of the

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fund, as, for example, where the property consisted of a herd of cattle for which the receiver had to buy fodder. In such a case it would be fair and just to charge the successful party with the cost of feeding, for he would have had to incur it, if the animals had remained in his own custody."

In Pittsfield National Bank v. Bayne, 140 N. Y. 321, 35 N. E. 630 (1893), the facts were as follows: An assignment for the benefit of creditors had been adjudged void and the assignee had been directed to turn over all the assigned property to a receiver and had complied with the order. The order was reversed on appeal, and a motion had been made and granted for restitution, but the order allowed the receiver to retain $450 for his commissions, counsel fees, etc. On appeal it was held that, as the receiver never had the legal right to receive the property when the order requiring its delivery was reversed, he ceased to have the right to retain the fund, or any part thereof, for commissions, but should return it undiminished. The opinion, which was unanimous, was written by Judge Peckham. He said that:

"It is the same in regard to this property as if the receiver ought not to have been appointed. In such case, if the receiver has taken possession of property, he must deliver it up and cannot have his own commissions deducted. Weston v. Watts, 45 Hun [N. Y.] 219. * * * We do not decide that in all cases where an order appointing a receiver, or an order directing funds to be placed in his possession, is reversed, no commissions can be allowed the receiver. There may be circumstances existing in any such case which would render it matter of discretion whether or not to permit commissions, etc., to the receiver, and with its exercise we would have no right of review, if not abused. Here, however, we think there was no discretion. * * * The receiver, never having had the right to take the moneys, as has been adjudged, should have been compelled to pay over the whole amount demanded," etc.

In French v. Gifford, 31 Iowa, 428, an order appointing a receiver was upon appeal vacated, as having been improperly made, and the receiver was directed to return the property. The court upon appeal charged the fund in the receiver's hands with one-third of his compensation, and the remaining two-thirds against those upon whose application the appointment was made.

In Beach on Receivers (Alderson's 2d Ed.) § 119, the author approves the doctrine laid down in Weston v. Watts, supra, and says:

"We conceive no reason to question the correctness of this opinion of the New York court, but appreciate that it is both logical and just. There is one feature of the question which the opinion does not cover, the payment of the expenses of the receivership when the plaintiff is insolvent. There cannot, of course, be any recourse on the court, and if the expenses are not paid out of the fund or property held by the receiver they must go unpaid. To guard against such an emergency the court could, and should, in proper cases impose on the plaintiff the giving of a bond as a condition to the appointment of a receiver, so that in the event the plaintiff ultimately fails to maintain the action the payment of the expenses attending the receivership may be properly adjusted."

And in Gluck & Becker's Receivers of Corporations (2d Ed.) § 100, it is said that:

"If his [the receiver's] appointment is not absolutely void, but is held to have been merely improperly made, it would be unjust and inequitable in all such cases to require the receiver's compensation to be paid from the fund in his hands without reference to the legality of his appointment."

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I have thus reviewed the authorities, and they show very clearly, I think, that upon principle and authority it is at best very doubtful whether a receiver wrongfully appointed is under any circumstances entitled to have his expenses and compensation paid out of funds which come into his hands as receiver. It seems to me that for a receiver's protection petitioning creditors, who ask for the appointment of a receiver, should be required as a condition of the receiver's appointment to give a bond sufficient in amount to reimburse him for expenses and commissions in case it is found necessary to revoke the appointment as having been made on erroneous grounds.

It is not necessary to consider whether there are any circumstances under which the expenses and commissions of a receiver erroneously appointed can be charged upon the funds which come into his hands. The present case is governed by In re Wentworth Lunch Co., 191 Fed. 821, 112 C. C. A. 335, decided by this court in 1911. In that case a receiver had been erroneously appointed in a bankruptcy proceeding; it not appearing that the appointment was "absolutely necessary" for the preservation of the estate as provided in the statute. The District Court directed the payment of the receiver's fees and the expenses of the receivership out of the proceeds of the property of the corporation which came into the hands of the receiver. On petition to revise that order this court reversed the court below, and held that the expenses should be charged upon the petitioning creditors, who procured it, and not upon the estate. We declared:

"That the creditors who rushed in and insisted upon an unnecessary receivership should pay the expenses rather than that they should be charged upon the corporation, which, as the event proved and as it always insisted, should not have been haled into the bankruptcy court at all."

There is no way of distinguishing that case from the case now under consideration. Neither in that case nor in this does it appear whether the petitioning creditors were solvent or insolvent.

The order of the District Court, in my opinion, should be reversed, with costs.

ASHLAND WATERWORKS CO. v. CITY OF ASHLAND et al.

(Circuit Court of Appeals, Sixth Circuit. May 7, 1918.)

No. 3075.

1. EQUITY ⇐42(1)—JURISDICTION—WAIVER OF OBJECTION.
Where a case is one of which either law or equity might take jurisdiction, and has been brought in equity without objection, the court is not required of its own motion to decline a hearing in equity.

2. CONSTITUTIONAL LAW ⇐121(2)—OBLIGATION OF CONTRACTS—WATERWORKS CONTRACT—"CONTRACT."
An ordinance granting a franchise to a water company for 20 years, and agreeing to pay a yearly sum for fire hydrants, and also before or at the end of the term to buy the waterworks at appraised value, or to extend the company's "rights and privileges" for 20 years, constituted a

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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contract, binding the city to either buy or extend, which was protected from impairment by the federal Constitution.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contract.]

3. MUNICIPAL CORPORATIONS ⟸864(1)—CONTRACT—CONSTITUTIONAL LIMITATION ON INDEBTEDNESS.

Const. Ky. § 157, prohibited a city from incurring indebtedness in any year beyond the year's income unless authorized by vote, from granting any franchise except to the highest bidder, and from incurring indebtedness beyond a fixed limit "except when authorized under laws in force prior to the adoption of this Constitution." In 1890 the city by ordinance granted a franchise to a water company for 20 years, and agreed to pay a yearly sum for fire hydrants, and also before or at the end of the term to buy the waterworks at appraised value, or to extend the company's "rights and privileges" for 20 years. *Held*, that the ordinance constituted a contract binding the city to either buy or extend; that, having elected to purchase and had the property appraised, its contract to purchase was within the exception as "authorized" under prior laws, and enforceable, although it increased the indebtedness beyond the constitutional limit.

4. MUNICIPAL CORPORATIONS ⟸867(2)—INDEBTEDNESS—CONSTITUTIONAL LIMITATION—SUBMISSION TO VOTE.

A constitutional provision prohibiting a city from incurring any indebtedness beyond a certain limit, unless authorized by a two-thirds vote at a special election, does not require such an election, where for any reason the proposed indebtedness is not within the prohibition.

5. PLEADING ⟸247—AMENDMENT—DEPARTURE FROM ORIGINAL PLEADING.

A complainant is not estopped from adopting a different theory of his case in an amended bill, to meet an authoritative decision rendered after the suit was commenced.

6. WATERS AND WATER COURSES ⟸183(4)—WATER SUPPLY—CONTRACT WITH CITY—VALIDITY.

The fact that a water company, with the consent of the city granting its franchise, had extended a branch pipe line beyond the city limits, does not invalidate a contract by the city to buy the entire system.

Appeal from the District Court of the United States for the Eastern District of Kentucky: Andrew M. J. Cochran, Judge.

Suit in equity by the Ashland Waterworks Company against the City of Ashland and others. Decree of dismissal, and complainant appeals. Decree vacated, and cause remanded.

For opinion below, see 230 Fed. 254.

The waterworks system in Ashland (a Kentucky city of the fourth class) was installed by appellant's predecessor pursuant to the city ordinance of July 10, 1890. The presently pertinent provisions of the ordinance follow:

"Sec. 2. The rights and privileges herein granted to continue for a term of 20 years from and after the passage of this ordinance, unless sooner terminated by purchase as provided herein.

* * * * * * * * * *

"Sec. 6. The city of Ashland hereby agrees to and does rent from the said grantee or assigns for the term of 20 years, unless sooner terminated by purchase as provided herein, 90 double discharge frost proof fire hydrants, to be located in the city and set by the grantee or assigns on the aforesaid pipe system. * * * The city at any proper season of the year may require the said grantee or assigns to make extensions of the pipe system of said works with hydrants placed thereon, * * * but, as a condition of making such extension, the city agrees to pay rent for public fire service upon such exten-

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sion at the rate of $40 per annum for each hydrant for the unexpired term of this franchise and contract.

* * * * * * * * * *

"Sec. 8. The city of Ashland hereby * * * agrees and promises to pay an annual rental of $4,000 for the furnishing of water herein specified to all public fire hydrants located on the aforesaid original pipe system for the term of 20 years, unless sooner terminated by purchase as provided herein, which rental the city agrees to pay in quarterly installments.

* * * * * * * * * *

"Sec. 12. In consideration of the benefits which shall be derived by the said city and its inhabitants from the construction and operation of said waterworks, and in further consideration of the water supply hereby secured for public use, and as an inducement for said grantees or assigns to enter upon the construction of said waterworks, the franchise and license hereby granted shall remain in full force and effect for a term of 20 years, and for the same consideration and as the same inducement the city of Ashland hereby rents of the said grantees or assigns for the use hereinmentioned the hydrants hereinbefore described for and during the term of 20 years from the completion of said works unless sooner terminated by purchase as provided herein.

"Sec. 13. At the expiration of 10 years after the completion of said works, and at the expiration of each succeeding period of one year thereafter, the said city shall have the right and privilege to purchase said system of waterworks, provided they notify said grantees or assigns of their intention so to do at least 6 months before the expiration of said period of years. The value of said system shall be ascertained as follows: * * * In case the city of Ashland shall fail or decline to exercise its option to purchase said works, the rights and privileges hereby granted to the said grantees or assigns shall be extended to said grantee or assigns for a further period of 20 years. The said city shall within 60 days after said board has rendered its decision, pay the amount awarded in cash, and upon such payment said grantee or assigns shall transfer to the city all their said rights and privileges and property including the said appraisement.

"Sec. 14. In the event that said grantees or assigns shall issue mortgage bonds secured by mortgage or deed of trust upon said waterworks, rentals, rights and properties, so much of the hydrant rent payable under the terms of the contract as will discharge the interest upon said bonds as shown by coupons thereon as it will mature from time to time, shall be paid from time to time by the city to the trustee or trustees of such bonds, when and as such hydrant rentals are payable by said city, and such sums shall be paid so long as interest on such bonds shall remain due and unpaid. * * *

In 1900, or a little later, the waterworks company enlarged and extended the system under an amendatory ordinance adopted October 4, 1900, which it accepted and which provided: "That there is reserved to the city of Ashland the right and privilege of purchasing the plant, property and franchise of the Ashland Water Company, * * * to be exercised at the expiration of 10 years after this ordinance shall go into effect, or at the expiration of every year thereafter during the term of the contract of said Ashland Water Company with the city of Ashland, or at the expiration of the term of said contract, the price of said plant to be fixed by appraisement, as is provided in § 13 of said ordinance of July 10, 1890."

On July 3, 1911, by ordinance duly adopted, the city elected to purchase the "plant, property and franchise" pursuant to the original and amendatory ordinances, appointed its member of the appraisement board, and gave the company notice to proceed. Pending appraisal, there was a city election at which it was decided, by a vote of 1,231 to 178, to issue not more than $175,000 of city bonds with which to make the purchase. The appraisal by the majority of the board fixed the price at $276,000, and the city then refused to go further.

In 1890 there was no limitation on the right of a city in Kentucky to contract to buy waterworks. By the Constitution of 1891, it was provided:

"Sec. 157. The tax rate of cities, towns, counties, taxing districts and other

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municipalities, for other than school purposes, shall not, at any time, exceed the following rates upon the value of the taxable property therein, viz.: * * * For all towns or cities having less than ten thousand, seventy-five cents on the hundred dollars; * * * unless it should be necessary to enable such city, town, county, or taxing district to pay the interest on, and provide a sinking fund for, the extinction of indebtedness contracted before the adoption of this Constitution. No county, city, town, taxing district or other municipality shall be authorized or permitted to become indebted, in any manner or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, without the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose; and any indebtedness contracted in violation of this section shall be void. Nor shall such contract be enforceable by the person with whom made; nor shall such municipality ever be authorized to assume the same.

"Sec. 158. The respective cities, towns, counties, taxing districts and municipalities shall not be authorized or permitted to incur indebtedness to an amount, including existing indebtedness, in the aggregate exceeding the following named maximum percentages on the value of the taxable property therein, to be estimated by the assessment next before the last assessment previous to the incurring of the indebtedness, viz.: * * * Cities and towns of the fourth class, five per centum: * * * Provided, any city, town, county, taxing district or other municipality may contract an indebtedness in excess of such limitations when the same has been authorized under laws in force prior to the adoption of this Constitution, or when necessary for the completion of and payment for a public improvement undertaken and not completed and paid for at the time of the adoption of this constitution. * * * Nothing herein shall prevent the issue of renewal bonds, or bonds to fund the floating indebtedness of any city, town, county, taxing district or other municipality."

The waterworks company filed this bill in equity to compel the city to pay the price awarded. The city answered by alleging certain facts said to justify its action, which facts were later denied by replication. The answer also alleged that the amount demanded was more than one year's revenue and (when added to existing debts) more than 5 per cent. of the assessed valuation, and hence insisted that the city's election to purchase, made July 3, 1911, was invalid. The company thereupon amended its bill, so as to state in full the facts from which it appeared that the purchase would be invalid if it was to be considered as made after the adoption of the constitution. The court below thought it should be so considered, and dismissed the bill without taking proofs.

Geo. B. Martin, of Catlettsburg, Ky., and Ed. C. O'Rear, of Frankfort, Ky., for appellant.

John T. Diederich, City Atty., Proctor K. Malin, and S. S. Willis, all of Ashland, Ky., for appellees.

Before KNAPPEN and DENISON, Circuit Judges, and SATER, District Judge.

DENISON, Circuit Judge (after stating the facts as above). [1] 1. The bill was said to be for specific performance. Since the main performance sought is merely the payment of money, and since this result can be accomplished by legal remedies, the jurisdiction of equity on this ground alone would not be clear. However, the record suggests matters of accounting, and perhaps of equitable cross-conditions to be prescribed, which make the case not wholly unfit for a court of equity to consider. The plaintiff has chosen, and the defendant has not objected to, this forum; and under such conditions it is not required that the court of its own motion should decline a hearing in equity.

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[2, 3] 2. It is plain enough that if the city had, in 1890, assumed a contractual duty, to be performed at the end of 20 years, the Constitution of 1891 would not interfere with its execution. Section 158 does not undertake to affect debts "authorized under laws in force prior to the adoption of this Constitution"; and section 157 cannot be permitted to impair the obligation of a contract. It is equally clear that if, when the Constitution was adopted, there was nothing but an option reserved to the city, which it might or might not exercise when the specified time came, there would be no such contract as would be protected against section 157; and whether the proviso of section 158 should be construed as contemplating such an optional liability is not important in this case, because, if the liability here existing was of a merely optional character, the 1911 purchase would be absolutely prohibited by section 157, while, if the liability was of the contractual character, no construction put upon either section could defeat it. These conclusions are sufficiently developed by the Kentucky cases hereafter cited, and by the Eighth Circuit Court of Appeals and the Supreme Court in the Denver Water Co. Case, 187 Fed. 890, 110 C. C. A. 24, 229 U. S. 123, 33 Sup. Ct. 657, 57 L. Ed. 1101. We must, therefore, examine the ordinance to ascertain the true nature of the liability resting on the city in July, 1911, when it undertook to purchase.

We must think that the ordinance of 1890 did more than give the city an option to buy at the end of the stated period; it imposed an absolute duty and liability to do at that time one of two things—buy the plant or extend the franchise. The language is:

> **"In case the city of Ashland shall fail or decline to exercise its option to purchase said works, the rights and privileges hereby granted to the said grantees or assigns shall be extended to said grantees or assigns for a further period of 20 years."**

This contemplates that the city will then be presented with the alternatives between which it must choose. One may be burdensome, one beneficial; but which character either will have cannot be foretold. The city will select the one it deems more beneficial; but select one or the other it must. There is no escape. The option to buy, considered alone, is not a contract; the option to extend is not a contract; but the two together, presented as alternatives, one of which must be accepted, make a perfected obligation. The city agrees that after 20 years it will do one of two acts as it may then prefer; this is not an option, it is a promise.

It makes no difference which branch of the alternative is first considered. The right to extend for 20 years was taken away by the Constitution of 1891 just as much as the right to buy, for section 164 forbids the granting of any franchise, except to the highest bidder. Hence we find that, if the Constitution of 1891 applies in full force to the mutual rights existing under this ordinance, it is destructive of all of them. Unless acting in a manner not contemplated by the contract, the city cannot buy, however good a bargain it may get; it cannot demand an extension of the franchise, however favorable the existing rates may be; and the company cannot get either the sale or the extension, upon the faith of having one or the other of which it invested its money and

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built the plant. The right of the company to have the obligation of this contract kept unimpaired is clear. It is not necessary to go into the authorities further than to say that the facts of this case exclude it from the class in which the franchise of the Denver Company was placed by the Supreme Court (229 U. S. 136–138, 33 Sup. Ct. 657, 57 L. Ed. 1101) and put it within the class where that same franchise was thought to belong by the Circuit Court of Appeals (187 Fed. 896, 897, 110 C. C. A. 24).

We cannot see how it is material that the extension of the franchise will be automatic if the purchase is not made. It cannot make any difference in the nature of the obligation—optional or contractual—whether the selection of one alternative or the other is to be by express words or by the agreed result of conduct. If the city let the time go by for exercising its right to buy, it thereby made its election to extend, just as perfectly as if made in express words. The character of the choice is the same, whether made by words or by implication, by action or by inaction.

What we consider the precise question involved has been decided by the Kentucky Court of Appeals, and it is needless to say that, in determining whether the ordinance of a Kentucky municipality constituted a contract protected by the federal Constitution, we should differ from that court with great reluctance, even in cases where the matter was not so wholly one of construction that we would be bound to follow. In Benjamin v. Mayfield, 170 Ky. 446, 186 S. W. 169, the ordinance, granted before the Constitution of 1891, provided that at the end of the franchise period the city would re-rent the fire hydrants, at the stated price, or would buy the plant, at a price to be agreed on or be fixed by arbitration. At the end of the period and after the new Constitution, the city elected to buy the plant pursuant to its contract. In a careful opinion, the Kentucky Court of Appeals held that the contract obligation to re-rent the hydrants, though contingent, could not be impaired, and that the alternative option to buy was indissoluble from the contract to re-rent and stood upon the same basis, and hence concluded that the city's later election and promise to buy were valid. It is sought to distinguish this case from the present one because of the affirmative form in which the obligation to re-rent was put. We think there is no distinction, either in form or substance. In the present case, the ordinance, as it had developed, imposed upon the city an obligation to pay fire hydrant rentals of about $6,000 per year, and the right of the company to receive the rental was one of the most important, if not the chief, of the "rights and privileges" which the city agreed to extend for 20 years, if it did not buy. Certainly an extension of "rights and privileges" must extend the correlative duties, and the city would not have intended to deprive itself during the extended term of the right to have fire hydrant protection. It is equally sure that the city must pay for what the company must furnish. We can see no substantial difference between that form of words which says that the city shall re-rent the fire hydrants or buy the plant, and that other form of words which says that if the city does not buy the plant the hydrant rentals shall be extended.

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Our conclusion is also supported, if not required, by the earlier decision of the Kentucky Court of Appeals in Slade v. Lexington, 141 Ky. 214, 132 S. W. 404, 32 L. R. A. (N. S.) 201. The facts are somewhat variant, but the point of the case is that a municipal contract, not permissible under the Constitution of 1891, but contemplated by an earlier ordinance, is not reached by the constitutional prohibition. The ordinance provided that at the expiration of the franchise there should be a renewal upon terms then to be agreed upon by the company and the city. It was held that to prevent the city from entering into negotiations and agreeing upon terms of an extension, if it could do so, would be to impair the obligation of the existing contract. The ordinance thus construed in the Lexington Case certainly imposed an obligation no more perfect than was created by the Ashland ordinance; indeed, the former was contingent upon the ability of the parties to reach an agreement, while, in the latter, the liability was not contingent upon anything; there was only a privilege that the city might cast its liability in either one of two specified forms.

3. It is assumed by appellant's counsel that all 20-year periods fixed by the ordinance of 1890 began to run from the completion of the installation, which, in the last amended bill, is said to have been shortly after December 30, 1891. We have considered the case on the assumption stated. Obviously, if the 20 years had expired before July 3, 1911, so that the 20-year extension had already taken effect and so that the action of July 3 could be interpreted only as the exercise of an option given by the ordinance of 1900, a different question would be presented. We do not see that the annually recurring option during each of the second 10 years of the term (if this recurrence survived the ordinance of 1900) affects the character of the city's duty, as we have discussed it.

[4] 4. It is urged that, even if the right of the city to elect to buy is superior to the 5 per cent. limitation and the annual income limitation of the Constitution, yet that by section 157 the method of exercising the option was changed, and that the city could decide to make the purchase only by the public vote prescribed in that section rather than by the ordinary method of city action. It is said that since there was no election to buy, perfected in the only permissible method of making an election, the alternative extension of franchise took automatic effect. It is a sufficient answer to this position that, in our judgment, the two-thirds vote method of escaping section 157, prescribed by that section, was not intended to refer to cases which were not reached at all by its prohibition.

[5] 5. When the waterworks company filed its original bill, it propounded the theory that the ordinance of 1890 granted a franchise of 40 years, with the privilege of purchase at the end of 20 years. Obviously, this theory is inconsistent with the basis upon which we have thought the water company's rights depended. After the decision in the Mayfield Case, the company amended its bill and declared the theory upon which it now relies. In so doing it merely adopted the construction which the Kentucky Court of Appeals had put upon an ordinance substantially similar in this respect; and there is no element

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of estoppel which can prevent it from changing its ground to conform to the law as declared by the court of last resort. As said by Justice Holmes in Northern Co. v. Grand View Co., 203 U. S. 106, 108, 27 Sup. Ct. 27, 51 L. Ed. 109, the first action of the company in this matter was "not an election, but an hypothesis."

[6] 6. Under the ordinance of 1890, the company extended a branch of its system to the village of Keys Creek, then outside the Ashland city limits, and which, though it is said now to have been included within the city, we understand remained outside on July 3, 1911. The election to buy covered the entire system, including this branch. In this fact we see no obstacle to the exercise of any otherwise perfect power to buy. It may be conceded that as an independent question the city could not buy such extraterritorial property or engage in the business of supplying water outside the limits; but this particular extension is an incident which cannot be permitted to control the whole situation. It is to be assumed that the extension was made with the approval of the city; for at least the 10 years after 1900 the city had allowed the company to understand that the election to buy covered the extension, and this branch, cut off from the stem, would be utterly worthless to the company. So far as the facts are developed, the existence of this branch and its inclusion in the purchase are not controlling.

The decree of dismissal must be vacated, and the case remanded to the District Court for further proceedings.

ANA MARIA SUGAR CO., Inc., v. QUINONES.

(Circuit Court of Appeals, First Circuit. June 6, 1918.)

No. 1295.

1. APPEAL AND ERROR ⟸1170(13)—APPEAL INSTEAD OF ERROR—DISREGARDING MISTAKE.
 Under Act Sept. 6, 1916, c. 448, § 4 (Comp. St. 1916, § 1649a), requiring a reviewing court to disregard mistake in remedy as between writ of error and appeal, it will treat a case at law, erroneously brought by appeal, as brought by writ of error.

2. APPEAL AND ERROR ⟸549(1)—NECESSITY OF BILL OF EXCEPTIONS.
 While, on error from final judgment, errors of law appearing on the face of the record proper are available, without bill of exceptions or equivalent, not so as to errors in rulings of law in the course of the trial, which require exceptions at the time, and their incorporation into the record by such means.

3. SALES ⟸411—SELLER'S BREACH OF CONTRACT—ACTION—COMPLAINT.
 Complaint *held* to state cause of action for breach of contract of sale, by refusal to deliver, except on condition not in contract.

4. COURTS ⟸438—SUPREME COURT OF PORTO RICO—FINDINGS.
 Under Rev. St. & Codes Porto Rico, § 1141, providing that its Supreme Court on appeal may take cognizance of all the facts as they appear in the record and consider the merits, it may review the evidence in the record, and make such findings of fact as right and justice require, and such rulings of law as are applicable.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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5. COURTS ⊂=406(1)—SUPREME COURT OF PORTO RICO—DETERMINATION OF DAMAGES—REVIEW.

Under Rev. St. & Codes Porto Rico, § 5350, providing that, when its Supreme Court reversed a judgment, it shall render such judgment as should have been rendered, except when some matters of fact need ascertainment, or there is uncertainty as to the damages to be assessed or matter to be decreed, that court may in its discretion, review and determine the question of damages; that question having been tried in the court below and the evidence transferred.

6. SALES ⊂=418(2)—FAILURE TO DELIVER—DAMAGES.

Judgment for difference between contract price of sugar bought for speculation, and market price at end of week within which delivery was to be made, authorized on facts found.

Appeal from Supreme Court of Porto Rico.

Action by Tomas Quinones against the Ana Maria Sugar Company, Incorporated. From a judgment of the Supreme Court of Porto Rico, reversing a judgment of the district court for defendant, and rendering judgment for plaintiff, defendant appeals. Affirmed.

Curtis, Mallet-Prevost & Colt, of New York City (E. Crosby Kindleberger, of New York City, of counsel), for appellant.

Jorge V. Dominguez, of San Juan, P. R., for appellee.

Before BINGHAM and JOHNSON, Circuit Judges, and BROWN, District Judge.

BINGHAM, Circuit Judge. This is an action to recover damages for breach of contract. It was brought in the district court of Mayaguez, Porto Rico. In the complaint it was alleged that the plaintiff was a merchant doing business in the city of Mayaguez, and that the defendant was a corporation having a place of business in that city; that on August 4, 1914, in that place the plaintiff bought from the defendant 740 sacks of centrifugal sugar, second class, at the rate of $3.22½ per hundredweight, which, according to the custom of the market, was to be paid for cash on delivery, the same to be delivered on or before the 15th of August, 1914; that thereafter the defendant refused to deliver the sugar unless the plaintiff should previously deposit in the Royal Bank of Canada, at Mayaguez, the sum called for by the invoice for the sugar sold, amounting to $6,079; that the defendant failed to deliver the sugar either in part or in whole, and refuses to deliver the same as provided in said contract; that the plaintiff has always been ready and willing to receive the sugar, to pay the price agreed upon delivery of the same, and comply with all the stipulations of the contract; and that, by reason of the defendant's failure in the premises, plaintiff has suffered damages in the sum of $6,173.24, that being the difference in the price of the sugar due to the rise in the market.

The defendant in its answer denied each and every allegation stated in the complaint, and, as new matter, set forth that the contract of August 4, 1914, was for 748 sacks of cane sugar; that one of the terms of the contract was that the plaintiff was to make a deposit on that day in the Royal Bank of Canada, at Mayaguez, in favor of the defendant, for the purchase price of said sugar, to wit, the sum of $6,079, and that

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thereupon the defendant was to deliver the sugar to the plaintiff in partial lots of 160 sacks, the first by railroad upon receipt of the order of the bank to that effect, and the remainder by cartloads during the week next to the aforesaid date; that the provision as to deposit in the bank was a condition precedent to its obligation to deliver the sugar and was imposed and agreed to for the reason that the sugar was subject to a lien to the Royal Bank of Canada, and that the plaintiff failed to comply with this condition.

A trial was had before the district judge, who found that, on August 4, 1914, the plaintiff and defendant entered into a contract by telephone for the purchase and sale of 748 sacks of centrifugal sugar, second class, each sack to weigh 252 pounds, at the price of $3.22½ per hundredweight, to be delivered to the plaintiff in the following manner: One hundred and sixty sacks by railroad as soon as the defendant received the order for delivery from the Royal Bank of Canada, and the remainder to be delivered in cartloads during the week following the making of the contract; that it was agreed that the price of said sugar —$6,079—should be first deposited by the plaintiff in the Royal Bank of Canada, at Mayaguez, to the defendant's credit; that at the time of the execution of the contract the sugar was pledged to the bank; that the plaintiff, without excuse, on the day following the execution of the contract, notified the defendant that he was unwilling to accept the condition as to payment of the purchase price, and that the defendant, on August 6, informed the plaintiff that the above contract was terminated and rescinded for failure to comply with the condition as to payment, which it had a right to do. Having found these facts, the district judge entered judgment dismissing the complaint, with costs to the defendant. Thereupon the plaintiff appealed to the Supreme Court of Porto Rico.

The appeal record embodied the pleadings in the case, the entry of judgment, the opinion of the district judge embodying the findings of fact and rulings of law, a "statement of the case" setting forth the evidence, oral and documentary, introduced at the trial, which the district judge certified to be correct and ordered to form a part of the judgment roll for the appeal. There was also a bill of exceptions setting forth in detail the exceptions taken by the plaintiff to the rulings of the district judge at the trial, which was certified by him as correct, and ordered to form a part of the judgment roll on the appeal. In the Supreme Court the record was amended by the addition of certain documents which had been introduced in evidence, but omitted from the record sent up from the court below, through mistake.

The Supreme Court reviewed the evidence and found that the plaintiff had "clearly established the substantial allegations of his complaint"; that the district court had committed "such manifest error * * * as to require a reversal of its judgment"; "that they were thoroughly convinced by the whole record that in the conversation by telephone, on the 4th of August, which constituted the true contract between the parties, nothing whatever was said about a deposit of the money as a condition precedent to the delivery of the sugar"; that "the market was rising on the 4th and continued to rise"; that the "defend-

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ant knew when its letter of confirmation was written that conditions indicated a further advance in price"; that "every hour that passed made the contract more valuable to the purchaser and more disadvantageous to the vendor"; that "the first notice the plaintiff ever had of the proposed requirement as to the deposit of the purchase price was contained in defendant's letter confirming the agreement by telephone, and after the contract of purchase and sale had been consummated"; that it appeared "from the evidence that in the contract made between the plaintiff and defendant it was tacitly stipulated that the price should be paid, following the custom of the market, upon delivery of the article, which was to be transported by the defendant, at its own expense, from the [its] factory to the plaintiff's storehouse, in the city of Mayaguez, during the week next ensuing after the execution of the contract," and that "such delivery was never made by the defendant." Upon the question of damages the court found that the "plaintiff had been doing business in Mayaguez for many years, speculating in sugar and coffee, and had previously bought sugar of the defendant in the same way and upon the same terms and conditions as in the instant case, paying for it on delivery after weighing and inspecting the same"; that "the deal itself was based upon current quotations from the New York market in so far as known at the time, and the question of a fluctuating market was clearly in the minds of both parties"; that "the testimony as a whole leaves no room for doubt that prospective profit or loss according to the rise or fall of prices in the New York market was plainly within the contemplation of the parties," and that they were "inclined to accept the figures of the plaintiff based on the New York prices at the expiration of the period within which the defendant had agreed to deliver the sugar, less the customary discount." It ruled that, according to section 1073 of the Civil Code, indemnity for losses and damages included "not only the amount of the loss which may have been suffered, but also that of the profit which the creditor may have failed to realize"; and it further found and ruled that the "defendant actually sold during the month of August large quantities of sugar at $6.52, apparently including the lot already sold to plaintiff at $3.22½," and that, "whether the difference in price be regarded as damages or as the proceeds of a resulting trust, the profit thus actually obtained by the defendant on the sugar of plaintiff belongs to the latter and not to the former."

It also ruled that the complaint stated facts sufficient to constitute a cause of action. Having made these findings and rulings, judgment was entered for the plaintiff for $6,173.24.

From this judgment the defendant appealed to this court and produces here a transcript of the record as forwarded to the Supreme Court of Porto Rico, together with the opinion of that court embodying the findings of fact above set forth, and the judgment entered thereon, certified by the secretary and recorder of the Supreme Court as agreeing with their originals, and also an assignment of errors in which the defendant complains that the Supreme Court erred (1) in holding that the plaintiff's complaint states facts sufficient to constitute a cause of action; (2) that the plaintiff had proved the essential allegations of his

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complaint; (3) in finding that the contract did not provide for a deposit of the purchase price as a condition precedent to the delivery of the sugar; (4) in finding that the sugar was to be paid for upon its delivery, and not prior thereto; (5) in finding that the time of payment was fixed by local custom and impliedly agreed to by the parties; (6) in reviewing the evidence and reversing the finding of fact made by the trial court as to the payment being a condition precedent to the delivery; (7) in failing to consider and give due weight to a certain writing introduced in evidence; (8) in finding that the defendant made no delivery of the sugar; (9) in failing to consider and give due weight to the fact that the plaintiff made no tender of the price of said sugar to the defendant and that said sugar was pledged to the Royal Bank of Canada; (10) in holding that plaintiff was entitled to damages by way of compensation; (11) in finding that the profits arising out of the rise of the price of the sugar in the New York market was contemplated by the parties at the time of the making of the contract; (12) in awarding compensation to the plaintiff based upon the difference between the contract price and the price of the sugar in the New York market at the end of the term alleged to have been contracted for its delivery; (13) in holding that the plaintiff was not under obligation to make reasonable efforts to acquire sugar of the same kind in the locality where he was doing business, and from other parties; (14) in holding and finding that the defendant broke its contract with the plaintiff, and (15) in giving judgment for the plaintiff upon the facts proved in the record.

According to the act of April 12, 1900 (31 Stat. 85, c. 191, § 35 [Comp. St. 1916, §§ 1215, 3791]), known as the Foraker Act, writs of error and appeals from the final decisions of the Supreme Court of Porto Rico to the Supreme Court of the United States were allowed "in the same manner and under the same regulations and in the same cases as from the Supreme Courts of the territories of the United States," and it was held that, whether the method adopted was writ of error or appeal, the jurisdiction of the Supreme Court of the United States to revise the proceedings below was confined to determining whether the facts found by the Supreme Court of Porto Rico supported its judgment and whether there was material and prejudicial error in the admission or rejection of evidence, manifested by exceptions duly certified. In other words, upon appeal, as well as writ of error, its jurisdiction was limited to reviewing questions of law. Rosaly v. Graham, 227 U. S. 584, 589, 590, 33 Sup. Ct. 333, 57 L. Ed. 655; Monagas v. Albertucci, 235 U. S. 81, 35 Sup. Ct. 95, 59 L. Ed. 139. This act, was, however, in 1911, superseded by section 244 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1157 [Comp. St. 1916, § 1215]). Under the latter act, proceedings equitable in nature were required to be prosecuted from the Supreme Court of Porto Rico to the Supreme Court of the United States by appeal, and the jurisdiction of the latter court in such case was extended to include a review of questions of fact as well as law (Elzaburu v. Chaves, 239 U. S. 283, 36 Sup. Ct. 47, 60 L. Ed. 290), while its review of actions at law was by writ of

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error, the same as from a federal District Court. By the act of January 28, 1915 (38 Stat. 804, c. 22, § 3), Congress repealed section 244 of the Judicial Code, and by section 2 of that act amended section 246 of the Code (Comp. St. 1916, § 1223) by providing that:

"Writs of error and appeal from the final judgments and decrees of the Supreme Courts of * * * Porto Rico, wherein the amount involved, exclusive of costs, to be ascertained by the oath of either party or of other competent witnesses, exceeds the value of $5,000, may be taken and prosecuted in the Circuit Courts of Appeals."

[1] The cause of action stated in the complaint is, in its nature, an action at law, and properly should be prosecuted here by writ of error, and not by appeal (Metropolitan R. R. Co. v. District of Columbia, 195 U. S. 322, 25 Sup. Ct. 28, 49 L. Ed. 219); and prior to September 6, 1916, would probably have been dismissed for want of power in this court to review a matter on appeal not of equitable cognizance. But on that date Congress in 39 Stat. 727, c. 448, § 4 (Comp. St. 1916, § 1649a), provided:

"That no court having power to review a judgment or decree rendered or passed by another shall dismiss a writ of error solely because an appeal should have been taken, or dismiss an appeal solely because a writ of error should have been sued out, but when such mistake or error occurs it shall disregard the same and take the action which would be appropriate if the proper appellate procedure had been followed."

We will therefore treat the case as though it had been brought here by writ of error instead of by appeal.

[2] On writ of error from a final judgment, errors of law appearing on the face of the record proper (Kansas City Ry. Co. v. Carlisle, 94 Mo. 166, 7 S. W. 102; Loeb v. Columbia Township Trustees, 179 U. S. 472, 482, 21 Sup. Ct. 174, 45 L. Ed. 280; Eldorado Coal & Mining Co. v. Mariotti, 215 Fed. 51, 54, 131 C. C. A. 359; 2 Cyc. pp. 1053, 1055; 3 C. J. p. 899) may be availed of without resorting to a bill of exceptions or other equivalent proceeding (Nalle v. Oyster, 230 U. S. 165, 33 Sup. Ct. 1043, 57 L. Ed. 1439; Denver v. Home Savings Bank, 236 U. S. 101, 35 Sup. Ct. 265, 59 L. Ed. 485; Young v. Martin, 8 Wall. 354, 357, 19 L. Ed. 418; Macker v. Thomas, 7 Wheat. 530, 532, 5 L. Ed. 515; Mitsui v. St. Paul Fire & Marine Ins. Co., 202 Fed. 26, 28, 120 C. C. A. 280; Moline Plow Co. v. Webb, 141 U. S. 616, 623, 12 Sup. Ct. 100, 35 L. Ed. 879; Aurora City v. West, 7 Wall. 82, 91, 19 L. Ed. 42; Evans v. Stettnisch, 149 U. S. 605, 607, 13 Sup. Ct. 931, 37 L. Ed. 866; Wilmington v. Ricaud, 90 Fed. 212, 32 C. C. A. 578; United States v. Parrott, Fed. Cas. No. 15,998; 2 Cyc. 1076). But errors in rulings of law occurring in the course of a trial are not a part of the record proper, and in order that they may be reviewed on writ of error by an appellate court must be excepted to at the time they are made (Walton v. United States, 9 Wheat. 651, 657, 6 L. Ed. 182; Railway v. Heck, 102 U. S. 120, 26 L. Ed. 58; Newport News & Mississippi Valley Co. v. Pace, 158 U. S. 36, 15 Sup. Ct. 743, 39 L. Ed. 887), and incorporated into the record by a bill of exceptions or other equivalent proceeding (Suydam v. Williamson, 20 How. 427, 432, 433, 15

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L. Ed. 978; England v. Gebhardt, 112 U. S. 502, 505, 5 Sup. Ct. 287, 28 L. Ed. 811; Fisher v. Cockerell, 5 Pet. 248, 253, 8 L. Ed. 114; Ghost v. United States, 168 Fed. 841, 842, 94 C. C. A. 253; Stewart v. Wyoming Ranch Co., 128 U. S. 383, 390, 9 Sup. Ct. 101, 32 L. Ed. 439; Preston v. Prather, 137 U. S. 604, 11 Sup. Ct. 162, 34 L. Ed. 788; Hildreth v. Grandin, 97 Fed. 870, 38 C. C. A. 516; Rio Grande Irrigation Co. v. Gildersleeve, 174 U. S. 603, 19 Sup. Ct. 761, 43 L. Ed. 1103; Rodriguez v. United States, 198 U. S. 156, 164, 25 Sup. Ct. 617, 49 L. Ed. 994).

In this case no requests for rulings of law were submitted by appellant (plaintiff in error) to the Supreme Court of Porto Rico, and no exceptions were taken to the rulings made. This being so, no exceptions were preserved by it which could have been embodied in a bill of exceptions, and, as a consequence, no bill of exceptions was filed and made a part of the record. Such being the case, the only questions presented for our consideration and assigned as error are whether the plaintiff's complaint states a good cause of action, whether the Supreme Court exceeded its jurisdiction in making findings of fact and entering judgment thereon, and whether the facts so found support the judgment which it rendered.

[3] I. As to the first question, we think there is no doubt but that the complaint states a good cause of action for a breach of contract.

[4, 5] II. In an act entitled "An act establishing the Supreme Court of Porto Rico as a court of appeals," approved March 12, 1903, it is provided:

"Section 1. That the Supreme Court of Porto Rico shall hereafter be a court of appeals and not a court of cassation. In its deliberations and decisions, in all cases, civil or criminal, said court shall not be confined to the errors in proceeding [procedure] or of law only, as they are pointed out, alleged or saved by the respective parties to the suit, or as set fourth [forth] in their briefs and exceptions, but in furtherance of justice, the court may also take cognizance of all the facts and proceedings in the case as they appear in the record, and likewise consider the merits thereof, so as to promote justice and right and to prevent injustice and delay." Compilation of Revised Statutes and Codes of Porto Rico, p. 241, § 1141.

This statute vested the Supreme Court with authority to review the evidence contained in the record transferred from the district court of Mayaguez and make such findings of fact as right and justice required and such rulings of law as were applicable to the case, and it was no doubt under the authority here conferred that the Supreme Court acted in making the findings and rulings that it did. And in the same compilation it is further provided:

"(5350) Sec. 306 (as amended by Act of March 8, 1906, page 164). When the judgment, order or decree of the court below shall be reversed, the court shall proceed to render such judgment, order or decree as the court below should have rendered, except when it is necessary that some matters of facts be ascertained, or the damage to be assessed or the matter to be decreed is uncertain, in any of which cases the cause shall be remanded for a new trial in the court below."

As the question of damages had been fully tried in the court below, and the evidence relating thereto, together with the other evidence in-

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troduced at the trial, had been included in the record and transferred to the Supreme Court, we think that it was within the power of that court to examine the evidence and say whether the question of damages could properly be determined therefrom, and, if it concluded that it could, to pass upon the question of damages itself without sending the case back for a new trial upon that issue, and, as said in Burnet v. Desmornes, 226 U. S. 145, 148, 33 Sup. Ct. 63, 57 L. Ed. 159:

"There being no question of the power of the Supreme Court, we should be slow to control its discretion on this point."

[6] III. The facts found support the judgment. It is unnecessary to restate them; they sufficiently appear in what has been above set forth.

The judgment of the Supreme Court of Porto Rico is affirmed, with costs to the appellee (defendant in error).

SANDUSKY PORTLAND CEMENT CO. v. DIXON PURE ICE CO.

(Circuit Court of Appeals, Seventh Circuit. April 9, 1918.)

No. 2475.

1. WATERS AND WATER COURSES ⊂=297—ICE—INJURIES TO—MEASURE OF DAMAGES.

Where the owner of ice fields sought to recover because an upper riparian owner discharged hot water into the river, which melted his ice, *held*, that the yearly damages could not be determined by ascertaining the net value of a ton of ice harvested and multiplying this sum by the total ice tonnage in the field, less the amount actually harvested, for the amount harvested would depend on the owner's facilities, etc.

2. WATERS AND WATER COURSES ⊂=297—ICE—INJURIES TO—MEASURE OF DAMAGES.

Where the owner of ice fields sought to recover because an upper riparian proprietor discharged hot water into the river and melted the ice, *held*, that the lessened rental value of the property occasioned by hot water being emptied into the river was not an applicable measure of damages.

3. DAMAGES ⊂=62(3)—ICE—MEASURE OF DAMAGES.

Where an upper proprietor discharged hot water into a stream, so that it melted the ice and injured the property of the owner of the lower ice fields, held, that the owner of such fields was not bound, for the purpose of minimizing its damages, to make a pontoon bridge across the open space in the field melted by the water.

4. WATERS AND WATER COURSES ⊂=297—ICE—INJURIES TO—MEASURE OF DAMAGES.

Where an upper proprietor discharged hot water, which melted the ice in a stream and injured a lower proprietor, who owned the ice fields, *held*, that the damages of the owner of such ice fields should be computed on the difference in value of the amount of ice which the owner might have harvested and the amount which it actually harvested.

In Error to the District Court of the United States for the Western Division of the Northern District of Illinois.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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Action by the Dixon Pure Ice Company against the Sandusky Portland Cement Company. There was a judgment for plaintiff, and defendant brings error. Modified and affirmed.

Suit to restrain future trespasses and to recover damages for past trespasses committed by appellant, a corporation engaged in manufacturing cement and owning land and operating its factory thereon at a point near Dixon, Ill., on the Rock river, and just above appellee's ice fields. Appellee's rights were established by the decree of this court on a previous appeal. 221 Fed. 200, 136 C. C. A. 610, L. R. A. 1915E, 1210. The only question for consideration is one of damages.

William H. Burges, of Chicago, Ill., and E. H. Brewster, of Dixon, Ill., for plaintiff in error.

Clyde Smith, of Dixon, Ill., for defendant in error.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVAN A. EVANS, Circuit Judge. Such widely differing rules of damages are urged by the parties to this litigation that a statement of details is necessary. Appellee secured control of the ice fields and the icehouses a short distance below Dixon in 1905, and operated its business since that date to the day of the trial. Its location is advantageous, but it appears that ice seasons in this vicinity are uncertain and variable. Uncertainty attends the business, both as to the quantity and quality of the ice, and the length of the season during which the merchantable ice may be harvested. Appellant's manufacturing plant, located just above the ice fields, required the use of heated water, which was secured from and emptied into the Rock river, and which heated water followed the channel of the river and entered the ice fields before entirely cooling. The channel thus affected was near the center of the stream, and the cut-off portion of the pond, it was contended, contained the best ice. This channel, varying somewhat in width, was at times entirely open, while at other times the ice forming thereon was so thin as to render travel across the stream dangerous or impossible.

Many interesting statistics are presented, tending to establish the amount of damages on various theories, and nearly every possible theory for computing such damages has been advanced. No warm water was turned into the stream or affected the ice business during any of the seasons of 1905–06, 1906–07, 1907–08, 1911–12, 1913–14, and 1915–16. Appellant turned its hot water into the river during each of the other five years, to appellee's damage. No allowance for damages is made for the season of 1913–14, because no damages traceable to appellant's conduct is shown. Appellant turned no warm water into the river in this year after February 11th. No ice had been put up prior to this date. None had formed in or outside the channel of sufficient thickness to justify its harvest. In a few hours, at most, the influence of the heated water previously poured into the river would have disappeared. The cold and ice-forming weather occurred shortly thereafter, and on February 16th appellee began cutting its ice, and continued until February 28th, without interference from appellant. These 12 days completed its season. Appellee's superintendent frankly admits: "No trouble with hot water was experienced this season."

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The total amount of ice housed and shipped out of the city and the profit or loss of appellee's business appears from the following table:

	Year.	Amount Housed.	Amount Shipped.	Total.	Profit or Loss.	
	1905-6	4600	548	5148	Profit	$4660.62
	1906-7	3000	614	3614	Loss	1562.32
	1907-8	6000	3733	9733	Profit	921.92
Hot Water	1908-9	2000	1966	3966	Loss	1715.04
Hot Water	1909-10	9300	2091	11391	Loss	3433.08
Hot Water	1910-11	9300	5655	14955	Profit	8829.74
	1911-12	10950	6031	16981	Loss	1137.74
Hot Water	1912-13	2500	1684	4184	Profit	2333.49
	1913-14	1800	3827	5627	Profit	423.37
Hot Water	1914-15	1400	5625	7025	Loss	164.24
	1915-16	1000	670	1670	Not Known	

Appellee introduced proof tending to establish the length of the season, the depth of the ice, and the value per ton of the ice, from which we prepare the following table:

Season.	Average Thickness of Ice.	Length of the Harvest Season, Number of Days on Which Ice Could Have Been Harvested.	Net Value per Ton.
1908-9	11 in.	13	18.5 cents
1909-10	12 in.	49	18.5 cents
1910-11	11 in.	34	17.0 cents
1912-13	11 in.	26	23.5 cents
1913-14	12 in.	12	23.5 cents
1914-15	11 in.	25	22.0 cents

It was claimed that in normal years the field held about 125,000 tons of ice. A careful study of all the figures justifies the conclusion that the average per day capacity of appellee's plant was 470 tons. These figures are reached by taking appellee's statistics, showing total harvest and the number of days actually devoted to harvesting the crop, covering a period of six years.

[1] Appellee contends that the damages each year may be determined by ascertaining the net value of a ton of ice harvested and multiplying this sum by the total ice tonnage in the field in any season, less the amount actually harvested during such season. It is apparent at once that such a contention must be rejected, because of its failure to take into consideration the length of the season, thickness of the ice, demand for product, ability to house or care for the entire tonnage, and other important factors. Assuming the average annual tonnage in the field, when unaffected by appellant's hot water, to be 125,000 tons, the injustice of applying the rule contended for by appellee is at once apparent, when we examine the above tables. The largest tonnage ever harvested was less than 17,000 tons. The capacity of appellee's icehouses was 10,500 tons. During the entire six years from

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1905 to 1915, when no heated water whatever affected appellee's business, the total tonnage harvested was only 42,770 tons. More than this, it appears that appellee, in order to have harvested the entire 125,000 tons, would have been required in some seasons to harvest over 9,000 tons per day. This rule of damages is therefore rejected.

[2] Appellant, on the other hand, advances in the alternative several rules for measuring the damages in this case. It contends that the differences in the rental value of appellee's property, occasioned by the hot water being emptied into the river, represents the true and correct measure of damages. Whether such difference in rental value of an ice field may ever be safely adopted as a correct rule of damages we need not determine. In view of the facts in this case, we are certain such a rule would be inapplicable and unjust.

[3] Appellant submits as the second rule that appellee was required to keep its loss at the lowest possible point and to do so should have built a pontoon bridge across the channel (which it asserts could have been built at a cost of $465), and the part of the field south of the channel could then have been harvested. The value of the small amount of ice, represented by the few feet of the channel, impaired by the hot water, could be separately determined and added to the cost of the pontoon bridge.

The rule which requires the aggrieved party to keep its loss to the lowest possible figure, while enforced by the courts wherever practicable, should not be enforced in a case like the present. In order to reduce its loss, appellee was not required to so increase the hazards of its business as to endanger the life of any of its employés. The uncertainty surrounding its business, as well as the uncertainty connected with the appellant's trespassing, furnishes added reason why this rule of damages should not be applied. Chicago Bonding & Surety Co. v. Augusta-Savannah Navigation Co., 250 Fed. 616, — C. C. A. —, decided by this court at this term.

[4] A third rule advanced by appellant as a possible measure of damages in this case meets with our approval and appeals to us as just and fair. It tends to eliminate speculative damages, and yet fully compensates appellee. This rule requires us to consider the average daily capacity of appellee's plant, and the number of days in the ice-harvesting season. We may then determine the annual capacity of appellee's plant. We have concluded to limit the total tonnage in a single year to the largest yield appellee was able to show in its history. The largest harvest was during the season of 1911–12, when appellee was unvexed by any hot water, when the ice was one inch thicker than during any other year covered by this entire period, and the ice season was the longest and most favorable to a big yield. In fixing this maximum, we also take into consideration the fact that appellee's housing capacity was but 10,500 tons, while the outside demand never equaled in any other year the amount sold during this season of 1911–12.

Assuming the average daily capacity of the plant to be 470 tons and the average value of a ton of ice to be 18 cents, and limiting the total capacity for any season to 16,981 tons, the result becomes a mere mat-

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ter of computation. The following table furnishes the basis for our decree:

Year.	Days of Harvesting Season.	Tonnage Harvested.	Tonnage That Might Have Been Harvested.	Tons Lost.
1908-9	13	3966	6110	2114
1909-10	49	11391	16981	5590
1910-11	34	14955	16981	2026
1912-13	26	4184	12220	7036
1914-15	25	7025	11750	4725
				21501

This total tonnage, figured at 18 cents per ton, produces a total damage of $3,870.18. We see no reason why interest should not be allowed from March 1, 1915, at 5 per cent. The use of the average in determining quantities, price, etc., as the basis for the computation, makes it impossible for the court to allow interest prior to this date.

The decree, which was for a sum considerably larger, is modified, so that appellee is awarded the sum of $3,870.18, together with interest at 5 per cent. from March 1, 1915, besides the costs and disbursements of this action in the lower court. So modified, the decree is affirmed. Appellant is to recover its costs in this court.

INVESTMENT REGISTRY, Limited, v. CHICAGO & M. ELECTRIC R. CO. et al. WESTERN TRUST & SAVINGS BANK et al. v. SAME. FILER & STOWELL CO. v. WESTERN TRUST & SAVINGS BANK et al.

(Circuit Court of Appeals, Seventh Circuit. April 9, 1918.)

No. 2521.

1. RECEIVERS ⟸173—RECEIVERSHIP PROCEEDINGS—REVOCATION OF PERMISSION TO SUE IN ANOTHER STATE.

Where the federal District Court, through its receivers, was in complete possession of all of the property of a railroad company against which a creditors' bill had been filed, that court, after having granted permission to a party to sue in the state court, may, it appearing that such litigation would not be for the benefit of the res, which was in the possession of the federal court, revoke the permission; there being no question of comity.

2. RECEIVERS ⟸173—PERMISSION TO SUE IN STATE COURT—REVOCATION.

Where one claiming to be an unpaid vendor obtained permission from the federal court, in which receivership proceedings against the purchaser corporation were pending, to sue in the state court, *held*, that revocation of the permission was not an abuse of discretion; it appearing that the alleged unpaid vendor had received bonds from the purchaser and that the validity of such bonds was involved in a proceeding consolidated with the receivership.

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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Bill by the Investment Registry, Limited, against the Chicago & Milwaukee Electric Railroad Company and others, consolidated with proceedings by the Western Trust & Savings Bank and others and by the Filer & Stowell Company. From an order vacating a previous order allowing the Filer & Stowell Company to sue in the state court, that company appeals. Affirmed.

The appeal is from an order of the District Court restraining appellant from further prosecution of an action it had commenced in the Wisconsin state court against certain receivers theretofore appointed in the District Court in an action there pending, and vacating an order of the District Court authorizing the state court suit. The District Court suit was a general creditors' bill against the Chicago & Milwaukee Electric Railroad Company, filed January 28, 1908, by the Sovereign Bank of Canada, asking for the administration of the assets of that company for the benefit of creditors, the determination of liens, and appointment of receivers, and accordingly on that day receivers were duly appointed, who took possession of all the property of the railroad. The suit in the state court was brought by leave granted appellant by the District Court March 27, 1908, to bring an action in the state court against the receivers, to establish an alleged vendor's lien on certain described real estate theretofore sold by appellant to the railroad company, and which had passed to the receivers by virtue of their appointment. In the petition for leave to sue in the state court it was represented that the petitioner (appellant) had sold the real estate to the railroad company for the sum of $160,000, which amount was unpaid, and that it was entitled to an equitable vendor's lien therefor upon the property it so sold.

The suit in the state court was promptly begun, but shortly thereafter the receivers moved in the District Court for vacation of the leave which had been granted to begin the suit. The motion to vacate was denied, and thereupon the receivers filed their answer in the state court proceeding, wherein it was alleged that the railroad company had fully paid appellant the consideration for the property. Appellant then filed in the state court suit an amended complaint wherein it set up for the first time that in purported payment of the consideration the railroad company had given it $160,000 of its bonds of an issue of $10,000,000 theretofore given by the railroad company and secured by a mortgage upon its property, and it was further alleged that the bonds so received by it were accepted as the result of fraudulent misrepresentations on the part of the railroad company, and it was further alleged that such entire bond issue, including the bonds so turned over to appellant, was void because in transgression of the statute of Wisconsin which made it essential to the validity of corporate bonds that they represent in actual money or property passing to the corporation on account of this issue, not less than 75 per cent. of their par value, and in such amended petition lien was asked not only upon the property conveyed, but upon the entire railroad property then in the possession of the District Court. The receivers and the trustee under the $10,000,000 mortgage filed answers to the amended petition.

In 1908, after the filing of the amended petition in the state court, the Investment Registry, Limited, a Canadian corporation, a holder of others of these bonds, filed its bill in the District Court alleging default in the payment of interest on the bonds, asking foreclosure of the mortgage, and praying that the receivership then pending be extended to include the matters which its bill involved. Shortly afterwards there was an order of the District Court consolidating these causes there pending, and in April, 1909, the trustees under the mortgage filed in the District Court their cross-bill in said consolidated action for foreclosure of the mortgage. In December, 1908, appellant began taking depositions in the state court suit, and this continued at intervals till February, 1910, when the receivers presented a petition to the District Court in the alternative, asking for the vacation of the order of March 27, 1908, giving leave to sue in the state court, or enjoining appellant from offering evidence in the state court suit on the question of the validity of the bond issue. It seems this petition was not passed upon, but that later, in April, 1911, the trustees under the mortgage presented their petition to

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vacate the order giving leave to sue the receiver in the state court, and to enjoin appellant from further prosecuting any suit to establish its lien, elsewhere than in the District Court. This petition was heard in 1913, and was granted March 19, 1917. In the meantime the consolidated suits and cross-suits in the District Court had proceeded to hearing and decree, in which a sale of the property was ordered, and the sale had taken place and was approved. One of the questions litigated and determined in the District Court was that of the validity of the $10,000,000 bond issue, the decree finding it valid. The order of March 19, 1917, which is the one appealed from, vacated the previous order granting appellant leave to sue in the state court, and enjoined appellant from prosecuting its suit there, or its claim for a lien, in any court other than the District Court, gave appellant permission to file its claim for its alleged vendor's lien or other claim it may have, nunc pro tunc as of March 28, 1908 (the date of commencement of its suit in the state court), and provided that all depositions taken for use in the state court suit might be used as evidence in the District Court, and that stipulations of counsel entered into in that court would be deemed stipulations in the federal court. Aside from the taking of the depositions, no proceedings were had in the state court suit.

The decree under which the property was sold provided that the sale be made subject to the priority of various claims, which were reserved for the future consideration and determination by the court, in case any such claims should hereafter be sustained, and so far as the court shall adjudge and decree, among them the claim of appellant.

George P. Miller and J. Gilbert Hardgrove, both of Milwaukee, Wis., for appellant.

Lessing Rosenthal, of Chicago, Ill., for appellees.

Before KOHLSAAT, ALSCHULER, and EVANS, Circuit Judges.

ALSCHULER, Circuit Judge (after stating the facts as above). In our view this controversy presents two questions: First, did the commencement of the suit in the state court pursuant to the order of the District Court granting leave to that end, preclude the District Court from thereafter recalling its leave to sue there, and taking jurisdiction of the subject-matter of that suit; and, second, in case the first proposition is negatively determined, was there any such impropriety in the action of the District Court vacating the order for leave and enjoining appellant from prosecuting its claim for lien elsewhere than in the federal court, as would require reversal of the order of vacation and restraint?

[1] It must be conceded that the District Court was, through its receivers, in complete possession of all the property of the railroad company, and had exclusive jurisdiction of the res. The prime end to be served is the due and proper conservation of the property in the hands of the court, in order that there may be prompt and proper administration thereof for the benefit of all having any interest therein. If at any stage of the proceedings the court deems it proper and advisable that any demand or question be litigated elsewhere than in the federal court, it can authorize such litigation to be elsewhere instituted. But neither on principle nor authority does it follow that the court granting the leave to sue may not recall it, if before adjudication in such other tribunal the court granting the leave shall consider, either because of facts subsequently arising, or of new light coming to it as to then existing conditions, it would best subserve the due administration of the estate to recall the granted leave.

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Under such circumstances there is involved no question of comity between different courts, but only that of the best interest of the estate which the court is administering. In New York Security, etc., v. Illinois, etc., R. R. Co., 104 Fed. 710, 44 C. C. A. 161, this court referring to an order for leave to sue in the state court said "such an order is discretionary and administrative, and therefore, in the opinion of the court, is not appealable." The order granting leave is not final in the sense that thereby a definite status is fixed. In Board of Com'rs v. Peirce (C. C.) 90 Fed. 764, it appears leave was granted by the federal court to sue its receiver in the state court. The receiver petitioned to remove the suit from the state court to the federal court which had granted the leave. In retaking and holding jurisdiction of the action Taft, Circuit Judge, said:

"If he [the receiver] deems it wise, in the interest of the trust, to remove the suit to the jurisdiction to which the law gives him the right to remove it, there is nothing in the preliminary consent of the court appointing him which will prevent his taking such a course."

The Supreme Court of Florida passed upon a somewhat similar situation, where leave to sue elsewhere than in the court of the receiver's appointment had been revoked. It said:

"It seems to be well settled that the power to appoint a receiver and to grant leave that he shall be sued as a defendant in the forum of his appointment, or in that of any jurisdiction, carries with it as a necessary concomitant the authority to revoke such leave to sue him." Ray v. Trice, 53 Fla. 864, 42 South. 901.

If it appeared that any issue in the litigation had been determined by the state court in which the action was brought, pursuant to the leave granted, a different question might be presented. We are of opinion that under the circumstances the order granting leave to sue the receiver in the state court was revocable at the discretion of the court which granted it, and that the order revoking the leave and enjoining appellant from prosecuting the lien elsewhere than in the District Court was a proper order to be entered, unless from all the facts appearing the District Court abused its discretion in that regard.

[2] From the statement of facts it is apparent to us, not only that there was no such abuse of discretion, but that the course pursued was advisable under the circumstances. The petition upon which the order appealed from was entered was filed after it developed by amendment of the state court action, and depositions taken therein, that in the state court it was undertaken to invalidate the mortgage and all the bonds it secured, an issue which was the very essence of the controversy pending in the District Court. In the District Court the validity of the mortgage and the bonds was attacked, and was the subject of a fierce contest there; and it was proper that all issues and all litigation directly or indirectly involving such questions should be settled in the court which had possession of and was administering the property itself.

If in the matter of expense or convenience appellant is prejudiced by the order, the District Court is empowered to make such adjustment as equitable considerations would suggest; but we are aware

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of no complaint as to the fairness and equity of the conditions imposed by the order, under which, if appellant desires to avail itself thereof, no apparent hardship can accrue to it, beyond the substitution of one court for another to hear and determine its rights.

The order is affirmed.

NEW YORK TRUST CO. et al. v. DETROIT, T. & I. RY. CO. (two cases).

Appeal of HALLEY COAL CO. et al. Appeal of TRIPP.

(Circuit Court of Appeals, Sixth Circuit. June 4, 1918.)

Nos. 3099, 3100.

1. INTEREST ⟸1—NATURE OF RIGHT—CLASSIFICATION.

There are two classes of interest, one arising out of express or implied contract to pay it, and the other usually fixed by legislation in allowing damages for breach of contract or violation of duty.

2. DAMAGES ⟸67—INTEREST—NATURE OF RIGHT—WHEN GIVEN AS DAMAGES—DISCRETION AS TO ALLOWANCE.

When interest is expressly reserved in the contract, or is implied by nature of a promise, it is not given as damages, but becomes a substantive part of the debt itself, and is recoverable as of right; but when given in money demands, as damages for delay in payment, it is but just compensation to claimant for the debtor's default, and its allowances is often a matter of discretion.

3. INTEREST ⟸26—CREDITOR'S ACCEPTANCE OF PRINCIPAL AS AFFECTING RIGHT.

Where interest is contractual and the creditor accepts the principal, the right still remains to recover accrued interest as a part of the debt.

4. INTEREST ⟸29—STATUTES REGULATING RATE—EFFECT.

Gen. Code Ohio, §§ 8303–8305, and Howell's Ann. St. Mich. (2d Ed.) § 2869, allowing stipulation of a certain rate, and declaring what shall be the rate otherwise, are intended merely to regulate the legal rate, and do not mean that interest at the same stated rate necessarily enters into and becomes a part of the instruments and contracts specified, and payable in any event.

5. DAMAGES ⟸68—INTEREST STATUTE—ALLOWANCE FOR WITHHOLDING PAYMENT.

In absence of statute, interest will be allowed as damages for improperly withholding payment of a sum certain after it becomes due.

6. INTEREST ⟸26—PAYMENT OF CLAIMS—RIGHT TO INTEREST.

Where the manner in which parties conducted their business indicated interest on overdue bills against receivers was not contemplated, and payment of part thereof was accepted without agreement or reservation as to interest, recovery of interest thereon must be denied.

7. RECEIVERS ⟸163—PAYMENT OF CLAIMS—RIGHT TO INTEREST.

Where payment by receivers of the principal of a debt is accepted on condition that right to interest shall not be prejudiced, but shall be determined by the court, the creditor's right to recover interest is not barred.

8. RECEIVERS ⟸163—INSOLVENCY—INTEREST ON CLAIMS.

Under the general rule that interest on debts of an insolvent corporation in the hands of a receiver will be calculated only to the date of his appointment, holders of six months claims are entitled to interest down to that time.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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9. RECEIVERS ⊂=161—INSOLVENCY—PREFERRED CLAIMS.
Debts incurred by a railroad receiver and claims for materials and supplies for operation furnished within six months prior to his appointment are payable out of the earnings of the receivership, or even in a proper case from the corpus of the company's property, in preference to mortgages foreclosed.

10. RECEIVERS ⊂=163—INSOLVENCY—INTEREST ON CLAIMS.
The general rule, which allows interest on six months claims from their maturity to the appointment of receivers, disallows interest thereon after that date and also on debts incurred by the receivers, as against a fund arising from the sale of the insolvent's property.

11. RECEIVERS ⊂=163—INSOLVENCY—INTEREST ON PREFERRED CLAIMS.
Where the property of an insolvent railroad company was converted into cash to satisfy debts whose equitable priority was recognized, and, when so converted, proceeds of sale were insufficient to pay any part of the mortgage debt, interest on six months and receivership claims will not be allowed subsequent to the appointment of the receivers; there being no diversion of income from payment of current debts, and the mortgagees not having delayed the proceedings.

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Suits by the New York Trust Company and others against the Detroit, Toledo & Ironton Railway Company, wherein receivers were appointed for defendant. Interest on six months and receivership claims by the Halley Coal Company, W. E. Tripp, and others were disallowed, and claimants appeal. Judgment modified and affirmed.

These cases are here on appeal from judgments denying the right to interest on six months and receivership claims. On February 1, 1908, the Knickerbocker Trust Company, as trustee named in a junior mortgage given by the Detroit, Toledo & Ironton Railway Company, instituted foreclosure proceedings on its entire line, and prayed the appointment of receivers. The appointing order authorized them in their discretion to pay out of the funds coming into their hands the expenses of operating the company's property and all approved claims arising from its previous operation, incurred at any time within six months prior to such date. About three months later a creditors' bill was filed by Courtney and others against the company. Lisman & Co. intervened to prosecute an alleged indebtedness, whose disallowance by the District Court was affirmed on appeal. Lisman v. Knickerbocker Trust Co., 211 Fed. 413, 128 C. C. A. 85. A third bill was filed on June 20, 1910, by the New York Trust Company, as trustee under a prior mortgage, which was a first lien on the Northern and Southern divisions of the company's road and a second mortgage on its Central division. In both of the last-named cases the same receivers were appointed as in the first suit, and the three cases were consolidated. On May 12, 1911, decrees of foreclosure were entered. After publication of sale had been made, the sale was adjourned for reasons satisfactory to the court on the application of the Knickerbocker Trust Company. Other adjournments were subsequently ordered. In the summer of 1912, the Central Trust Company of New York, trustee, filed a bill in the federal court for the Southern district of Ohio for the foreclosure of the mortgage covering the Central division of the road and being a first lien thereon. The same receivers were appointed as in the cases pending at Detroit. The pendency of the Ohio case compelled an amendment of the decrees theretofore rendered. As the property had been operated as an entirety, a reference to a master was necessarily made to apportion the receivership expenses on the different divisions of the road and to determine the portion of the same to be borne by the purchasers. Further amended decrees were entered about December 9, 1912. An upset price of $1,650,000 was fixed

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for the Northern and Southern divisions of the road and of $1,550,000 for the Central division. The road and certain stocks owned by it were offered for sale on April 17, 1913. The last-named division of the road was sold at the upset price. The other divisions were sold at the upset price on June 28, 1913. No sale of the stocks, acceptable to the court, was effected until January, 1914, their selling price being $45,140. The receivership indebtedness and the six months claims aggregated on December 31, 1913, about $3,800,000, and at the time the receivership terminated over $4,000,000. The road was continuously operated by the receivers at a loss.

The purchasers at the foreclosure sales co-operated with a reorganization committee and transferred their bids to a new company, known as the Detroit, Toledo & Ironton Railroad Company. The decrees rendered in both the Michigan and Ohio courts provide that the funds arising from the sale of the railway company's property shall be applied, prior to payment on any of the mortgages, to the satisfaction of (a) costs, disbursements, allowances, receivers' fees, and trustee's compensation; (b) receivers' certificates (subject to the right to question the priority of the lien of those of a specified issue); (c) claims for expenses incurred by and obligations of the receivers in maintaining and operating the company's property; and (d) claims, liens or charges set up by intervention against such property, its proceeds or its income arising during the receivership, whether they accrued during the receivership or within six months prior thereto. The court reserved the right to resume possession of and resell the company's property or any part thereof for the payment of any and all such claims adjudged to be superior to the mortgage liens, and ordered that, if any such indebtedness or obligations of the receivers should not be paid on such distribution, the purchaser should pay the same, and that the property or such portion of it as the court might determine should stand charged therewith. The excess of the items (a), (b), (c), and (d) over the selling price of the property was paid out of funds contributed by such holders of bonds and receivers' certificates as entered the reorganization scheme and whose contributions varied from 10 per cent. to 35 per cent. of their holdings. The reorganization scheme and all decrees and orders entered by the court provided for the payment of interest on the receivers' certificates but not on any other indebtedness or claims. The Public Utilities Commission of Ohio, in authorizing the new company to issue bonds, also directed the payment of the six months claims, but made no mention of interest on the same. On June 19, 1911, a special master was appointed to ascertain and report all claims, liens, and charges upon the company's property, the proceeds of its sales, or its income pending the receivership. Some of the claims, set up in case No. 3099, were incurred by the receivers; others prior to their appointment. The Tripp claims, set up in case No. 3100, arose during the receivership. The contracts with the Foundry Company were made in Michigan; all others in Ohio. On May 29, 1915, the master reported, allowing the appellants' claims, but denying interest on them. Payment of the principal sum due was accepted by each appellant with a reservation and agreement, excepting in the case of the Tripp claims, that such acceptance was without prejudice to the right to demand interest, or to invoke the court's action thereon. All of the claims matured in a short specified time after delivery of the supplies furnished. In so far as the record shows, none of the claimants demanded interest until after the master was appointed. The District Court overruled the exceptions to the disallowance of interest and affirmed the master. Hence the appeals.

Beaumont, Smith & Harris, of Detroit, Mich., Keifer & Keifer, of Springfield, Ohio, Charles Wright, Jr., of Detroit, Mich., and Johnson & Jones, of Ironton, Ohio, for appellants.

Alfred A. Cook, of New York City, and Leo M. Butzel, of Detroit, Mich. (Emil Goldmark, of New York City, of counsel), for appellee.

Before WARRINGTON and DENISON, Circuit Judges, and SATER, District Judge.

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SATER, District Judge (after stating the facts as above). The Detroit, Toledo & Ironton Railroad Company (the new company) resists the appellants' claims for interest. The question as to whether any of such claims was improperly given an equitable priority by the trial court, as between its owner and the bondholders, need not be considered, as no issue is made on that point.

[1-3] There are two well-defined classes of interest. In the one, it arises out of some contract, express or implied, to pay it. In the other, it is allowed as damages for some breach of contract or the violation of some duty, and is usually fixed by legislation. Jones v. Mallory, 22 Conn. 386, 392; County of Redwood v. Winona, etc., Co., 40 Minn. 512, 522, 41 N. W. 465, 42 N. W. 473; Perley on Interest, 5; Sanders v. L. S. & M. S. Ry. Co., 94 N. Y. 641; Sedgwick on Damages (9th Ed.) §§ 282, 295. When it is expressly reserved in the contract, or is implied by the nature of a promise, it is not given as damages, but becomes a substantive part of the debt itself, and is recoverable as of right; but, when it is given on money demands as damages for delay in payment, it is but just compensation to the plaintiff for a default on the part of his debtor, and its allowance is often a matter of discretion. Redfield v. Ystalyfera Iron Co., 110 U. S. 174, 176, 3 Sup. Ct. 570, 28 L. Ed. 109; Redfield v. Bartels, 139 U. S. 694, 701, 11 Sup. Ct. 683, 35 L. Ed. 310; Jourolmon v. Ewing, 80 Fed. 604, 607 et seq., 26 C. C. A. 23 (C. C. A. 6); Perley on Interest, 5, 6; Sedgwick on Damages, § 282; Daniel, Neg. Inst., § 919. When interest is contractual and the creditor accepts the principal, the right to recover interest (if any has accrued) still remains for the reason it is as much a part of the debt as the principal itself. See cases last above cited and King v. Phillips, 95 N. C. 245, 59 Am. Rep. 238; 2 Edwards on Bills and Notes, § 1012; Southern Central R. Co. v. Town of Moravia, 61 Barb. (N. Y.) 180; Fake v. Eddy, 15 Wend. (N. Y.) 76.

[4] The foregoing statement of the law has been deemed advisable because the appellants contend that their contracts for supplies must be read as if the state statutes relating to interest were imported into them, and that, so read, their respective contracts provided for interest upon any default of payment, and that therefore their right to interest is contractual. The Ohio General Code provides that parties may stipulate for the payment of interest at any rate not exceeding 8 per cent. per annum, payable annually (section 8303), and that all judgments upon contracts made as provided in that section shall bear interest at the stipulated rate (section 8304). Section 8305, which deals with cases other than those mentioned in sections 8303 and 8304, provides inter alia that the owners of claims, such as the appellants have, when the same become due and payable, "shall be entitled to interest at the rate of six per cent. per annum, and no more." Section 2869, Howell's Michigan Stat. Anno. (2d Ed.) declares that the interest rate shall be 5 per cent. per year, but parties may stipulate for the payment of any rate not exceeding 7 per cent. A fair interpretation of decisions touching the interest laws of such states warrants the conclusion that the legislative intent, in the enactment of the above-mentioned statutes, was merely to regulate the legal rate of interest.

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McClelland v. Sorter, 39 Ohio St. 12; Bunn v. Kinney & Lodwick, 15 Ohio St. 40, 42; Samyn v. Phillips, 15 Ohio St. 218, 222; Graveson v. Odd Fellows Temple Co., 4 Ohio N. P. 112; Hogg v. Zanesville Canal & Mfg. Co., 5 Ohio, 410, 424; Miller v. Tiffany, 68 U. S. (1 Wall.) 298, 310, 311, 17 L. Ed. 540; Cameron v. Merchants' & Mfrs.' Bank, 37 Mich. 239; Eaton v. Truesdail, 40 Mich. 1, 8; Sedgwick on Damages, § 293. In Herman H. Hettler Lumber Co. v. Olds, 242 Fed. 456, 458, 155 C. C. A. 232, after consideration of Kermott v. Ayer, 11 Mich. 181, and Tousey v. Moore, 79 Mich. 564, 44 N. W. 958, in each of which it was said that interest in that state is purely statutory, this court concluded that no more was meant than that the rate is to be determined by the terms of the Michigan statute. The statutes mentioned cannot be held to mean that interest at the stated rate necessarily enters into and becomes a part of the instruments and contracts therein specified and shall in any event be paid. Contracting parties are still at liberty to designate any rate that is not usurious or to agree that no interest whatever shall be paid, and their course of dealings may be such as wholly to debar the recovery of interest in the absence of a stipulation to the contrary.

[5] Were there no statute on the subject, interest would be allowed in a proper case by way of damages, in accordance with the practice in the United States, for improperly withholding the payment of a sum certain after the same becomes due. Young v. Godbe, 82 U. S. (15 Wall.) 562, 565, 21 L. Ed. 250; United States v. North Carolina, 136 U. S. 211, 216, 10 Sup. Ct. 920, 34 L. Ed. 336; Herman H. Hettler Lumber Co. v. Olds, supra. In American Iron Co. v. Seaboard Air Line, 233 U. S. 261, 264, 34 Sup. Ct. 502, 58 L. Ed. 949, reliance was placed on the Virginia statute fixing the rate of interest, but it was said the statute threw no light on the right to recover interest for the period of the receivership. It follows that no contractual right to interest exists in favor of any of the appellants on account of state statutes; nor is it shown or claimed that any of them at any time stipulated that interest should be paid on the amount of any bill or invoice of goods sold and delivered, if payment of the same should be delayed. If, therefore, interest should be allowed to the appellants, it must be in the way of damages.

[6] Between March 30, 1909, and November 1, 1912, the appellant Tripp made 112 sales of cross-ties to the receivers. No payments were made on the due dates of the invoices, the delay in payment being from 4 to 11 months. Prior to the entry of the decrees of foreclosure on or about December 9, 1912, all of the ties had been furnished and 88 payments had been made and accepted without any demand for interest on any invoices. The sums called for in the remaining 24 claims respectively were paid December 24, 1912. The manner in which the parties conducted their business indicates that an interest charge on overdue bills was not contemplated, and it is not to be presumed that when the court decreed the payment of "all claims for expenses incurred by, and obligations of, the receivers, * * * which the court shall adjudge to be valid claims against the said receivers," it intended to adjudge, as valid, claims which had already

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been paid, or, in view of the course of business pursued, to hold the owner of such alleged but actually paid claims or of the 24 remaining unpaid to be entitled to interest on them for any period whatsoever. As the principal sum of the several Tripp claims (all of which are asserted in case No. 3100) was accepted by him without any agreement or reservation that such acceptance should not affect the question of the payment of interest or his right to demand the same, recovery of interest on them must be denied. Southern Ry. Co. v. Dunlop Mills, 76 Fed. 505, 22 C. C. A. 302 (C. C. A. 4); Tredegar Co. v. Seaboard Air Line R. Co. 183 Fed. 289, 293, 105 C. C. A. 501 (C. C. A. 4); Stewart v. Barnes, 153 U. S. 456, 14 Sup. Ct. 849, 38 L. Ed. 781; Thomas v. Cincinnati, N. O. & T. P. Ry. Co. (C. C.) 81 Fed. 911, 917; King v. Phillips, 95 N. C. 245, 59 Am. Rep. 238; Talbot v. Bay City, 71 Mich. 118, 38 N. W. 890; Sedgwick on Damages, § 339a; Thompson, Corp. (2d Ed.) § 6616.

[7, 8] Disposition cannot be thus made, however, of the claims set up in case No. 3099, for the reason that the payment of the principal sum of each of them was accepted on the condition that the appellants' right to interest should not be prejudiced thereby, but should be determined by the court. Tredegar Co. v. Seaboard Air Line Ry. Under the general rule that interest on debts of an insolvent corporation in the hands of a receiver will be calculated only to the date of his appointment, the holders of the six months claims are entitled to interest down to that time. Thomas v. Western Car Co., 149 U. S. 95, 116, 117; 13 Sup. Ct. 824, 37 L. Ed. 663; Grand Trunk Ry. Co. v. Central Vermont R. Co. (C. C.) 91 Fed. 569; Tredegar Co. v. Seaboard Air Line Ry. Co., supra; New York Security & Trust Co. v. Lombard Inv. Co. (C. C.) 73 Fed. 537; Malcomson v. Wappoo Mills (C. C.) 99 Fed. 633; Thompson, Corp. (2d Ed.) §§ 6446, 6616; Solomons v. Am. Bldg. & Loan Ass'n (C. C.) 116 Fed. 676; Huff v. Bidwell, 218 Fed. 6, 9, 133 C. C. A. 646 (C. C. A. 5); Spring Coal Co. v. Keech, 239 Fed. 48, 51, 152 C. C. A. 98, L. R. A. 1917D, 1152 (C. C. A. 4). The rule is analogous to that in bankruptcy which allows interest on claims down to the filing of the petition only, excepting in certain cases claims of the highest dignity. Loveland, Bank. (4th Ed.) 628–630, 1110; Barton v. Barbour, 104 U. S. 126, 134, 26 L. Ed. 672; American Iron & Steel Mfg. Co. v. Seaboard Air Line Ry. Co., 233 U. S. 261, 34 Sup. Ct. 502, 58 L. Ed. 261.

[9] There remains, however, for decision, the question: Should the unsecured claims asserted in case No. 3099, under the facts of record, bear interest from their due date to the present time? In this circuit the rule prevails that debts incurred by a receiver of a railroad company and claims which accrued for materials and supplies furnished within six months prior to the receiver's appointment for carrying on its operations are payable out of the earnings of the receivership, or even, in a proper case, from the corpus of the company's property in preference to the mortgages foreclosed. Central Trust Co. v. East Tennessee V. & G. R. Co., 80 Fed. 624, 630, 26 C. C. A. 30; International Trust Co. v. T. B. Townsend Brick & Contracting Co., 95 Fed. 850, 857, 37 C. C. A. 396. The reason assigned for the displace-

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ment of prior mortgage liens by the court declaring an equitable priority in favor of such debts and claims is so well stated by Judge (later Mr. Justice) Lurton in the last-named case (95 Fed. 858, 859, 37 C. C. A. 396), with a pertinent citation of leading authorities, and in the Central Trust Co. Case, 95 Fed. 628, 37 C. C. A. 396, that a restatement of the same is deemed unnecessary. The trial court acted on the theory at the time the receivers were appointed that the earnings of the railway company would exceed the legitimate operating expenses incurred pending the receivership and within six months prior thereto, or that in any event the proceeds arising from the sale of the road would exceed the aggregate of all liabilities thus incurred. There were, however, no net earnings. Indeed, the cost of operating the railway company so far exceeded its income that its selling price was less than the sum required to satisfy the cost of litigation, taxes, receivers' certificates, necessary receivers' expenditures and liabilities, and six months claims. Not only did the bondholders lose their entire investment, but such of them and of the holders of receivers' certificates as entered the plan of reorganization, by contributions made in the hope of improving their condition and ranging from 10 per cent. to 35 per cent. of their holdings, provided the necessary funds to purchase the insolvent company's property, and also the further sum of about $800,000 to satisfy the claims given a priority by the court and ordered by it to be paid.

[10] The right to payment of the principal sum of appellants' claims is conceded and, as we have seen, the six months claims under the general rule bear interest from their maturity to the date of the receivers' appointment; but the same rule disallows interest on them after that date and also on debts incurred by the receivers, as against the fund arising from the sale of the insolvent's property, for the reason the delay in distribution is the act of the law and a necessary incident to the settlement of the estate. Thomas v. Western Car Co., 149 U. S. at pp. 116, 117, 13 Sup. Ct. 824, 37 L. Ed. 663. An analysis of that case shows that disposition was made of the question involved on the ground that the unsecured claim of the car company for car rentals was against a fund in the hands of the court, that the delay in distribution was the delay of the law, and that the fund brought into court fell short of paying the mortgage debt (Nashua & Lowell R. Corp. v. Boston & Lowell R. Corp., 61 Fed. 237, 250, 9 C. C. A. 468 [C. C. A. 1]), all of which features are present in each of the present appeals. The general rule there stated applies, however, only to a case where the fund is insufficient to pay all of the claims and the creditors are all of the same rank. Richmond & I. Const. Co. v. Richmond N. I. & B. R. Co., 68 Fed. 105, 116, 15 C. C. A. 289, 34 L. R. A. 625 (C. C. A. 6). Had there been any claims of the standing of receivers' certificates considered in that case, as in this, on which, before liability therefor was incurred, the court had directed that interest should be paid, it would doubtless have been allowed. The rule announced in the Thomas Case still subsists—American Iron Co. v. Seaboard Air Line Ry., 233 U. S. 261, 266, 267, 34 Sup. Ct. 502, 58 L. Ed. 949; Pennsylvania Steel Co. v. New York City Ry. Co., 216 Fed. 458, 471, 132 C. C. A. 518 (C. C. A. 2)—and binds the appellants unless they come within some

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exception to it. They appeal to the announcement in National Bank v. Mechanics National Bank, 94 U. S. 437, 439, 24 L. Ed. 176, that interest lawfully accruing upon a claim is as much a part of it as the original debt and that a creditor has the same right to the payment of the one as of the other. That was a case in which the debts were against an insolvent national bank and were all of the same footing and funds were available for the payment of interest. But cases arising out of the settlement of insolvent national banks are inapplicable. They have proceeded according to the construction placed by the courts on the national banking act and not in accordance with the general principles of equity. Spring Coal Co. v. Keech, 239 Fed. 48, 50, 51, 152 C. C. A. 98, L. R. A. 1917D, 1152 (C. C. A. 4).

[11] It is urged, however, that this court is committed to the allowance of interest on claims, such as appellants have, by the decisions rendered by it in Central Trust Co. v. Condon, 67 Fed. 84, 98, 14 C. C. A. 314, Richmond & I. Const. Co. v. Richmond N. I. & B. R. Co., 68 Fed. 105, 114, 15 C. C. A. 289, 34 L. R. A. 625, and Jourolmon v. Ewing, 85 Fed. 103, 29 C. C. A. 41. These cases on their facts and in the character of the claims considered in them on which interest was allowed are readily distinguishable from the cases made by appellants. Each of the three cases had been before the court on a prior occasion. An examination of the first of the cases in connection with Central Trust Co. v. Bridges, 57 Fed. 753, 6 C. C. A. 539, and of the second in connection with Central Trust Co. v. Richmond N. I. & B. R. Co., 68 Fed. 90, 15 C. C. A. 273, 41 L. R. A. 458, discloses that in each instance the debt on which interest was allowed was a mechanic's lien arising out of the construction of the road, which, in the first case under the statute of Tennessee and in the second under the statute of Kentucky, was prior and superior to that of the mortgage whose foreclosure was sought. Debts contracted for original construction do not fall within the same class as preferential claims necessarily incurred to keep the road a going concern—Thompson, Corp., § 6450, and cases cited; First Nat. Bank v. Ewing, 103 Fed. 168, 186, 43 C. C. A. 130 (C. C. A. 5)—and it was due to statutory provisions that in the two above-mentioned cases priority was given to construction claims with interest (Cook, Corp. [7th Ed.] vol. 4, §§ 859, 860, at page 3260). The rule applied in those cases was approved in American Iron Co. v. Seaboard Air Line Ry. Co., 233 U. S. 261, 267, 34 Sup. Ct. 502, 58 L. Ed. 949, and Spring Coal Co. v. Keech, 239 Fed. 50, 62, 152 C. C. A. 98, L. R. A. 1917D, 1152 (C. C. A. 4). The notes on which interest was allowed in the Jourolmon Case, the first report of which is found in 80 Fed. 604, expressly called for interest and were secured by a prior lien on the premises sold, and, as appears from Judge Severens' statement (85 Fed. at page 106, 29 C. C. A. 41), disposition of all three of the cases was made in accordance with the rule that, where there are claims with liens of different priorities, the holders of such liens are entitled to interest down to the date of the decree. The lien involved in each of the three cases on which interest was allowed was not merely an equitable priority declared by the court, but had an absolute priority over other existing liens.

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The American Iron Co. case, on which much stress is laid by the appellants, is not helpful to them on account of the dissimilarity of situations. In that case the road was so profitably operated by the receivers that it was returned to its owners. Interest was paid out of the earnings on much of its floating indebtedness and all interest due at the time of the appointment of the receivers and accruing during the receivership on the bonded indebtedness was also paid. The claim considered was protected by a mechanic's lien secured under the laws of Virginia and given a priority over the mortgage bonds and was termed a debt of the highest dignity, as were those involved in the Condon and the Richmond & I. Const. Co. cases. As a result of good fortune or good management the railway company's estate proved sufficient to discharge valid claims against it in full, and creditors were therefore entitled to interest as well as principal. Nor are the appellants aided by the Tredegar Co. case. The mechanic's lien there considered was also perfected under the Virginia statute, but was not superior to that of the mortgage on the company's property. Interest was allowed down to the date of the receivership, but, in consequence of the general rule stated in the Thomas case, not thereafter. The interest was contractual, else it could not have been recovered after payment of the principal had been made.

The case of Pennsylvania Steel Co. v. New York City Ry. Co., reported in 208 Fed. 168, and again after it reached the Circuit Court of Appeals, in 216 Fed. 458, 132 C. C. A. 518, throws no light on the question for decision. The holders of claims for material and supplies bought shortly before the receivership for use in operating the road did not ask the displacement of any prior lien or for payment out of other than unmortgaged property (208 Fed. 183), and the fund was sufficient to pay them in full, with interest, and leave a balance over for general creditors (216 Fed. 471, 132 C. C. A. 518).

The appellants cannot, for the recovery of interest, avail themselves of the doctrine first formulated in Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339, and applied in Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257, 20 Sup. Ct. 347, 44 L. Ed. 458, that, where there is a diversion of income, restoration of the income so diverted must be made for the payment of six months claims and expenditures for supplies during the receivership. There is no evidence that any such diversion occurred or that any appellant has in that manner been deprived of any of his equitable rights. If there has in reality been no diversion, there can be no restoration directed for any purpose. Fosdick v. Schall, 99 U. S. 254, 25 L. Ed. 339.

The contention that the mortgagees delayed the receivership proceedings, the sale of the railway company's property and the distribution of the proceeds arising therefrom must also fail. The court proceedings were protracted, for which none of the appellants was responsible; but there is no evidence that the mortgagees, or any of them, provoked a vexatious, unreasonable or unnecessary delay and thereby postponed the payment of claims. The several postponements were for satisfactory reasons sanctioned by the presiding judge, and the distribution of the railway company's estate was thereby in each instance quite as effectually stayed as were the proceedings in Grand

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Trunk Ry. Co. v. Central Vermont Ry. Co. (C. C.) 91 Fed. 569, by the orders made in that case, in which the allowance of interest on six months claims on account of such stays was denied. The litigation in the instant case was not without complications and was inaugurated at a time when the country was in financial stress and when financial relief for large embarrassed enterprises was with difficulty obtained. At the inception of the receivership, in subsequent orders and decrees, in the plan of reorganization and in the order made by the Public Utilities Commission of Ohio, the costs, taxes, receivers' fees, trustees' compensation, receivers' certificates, expenses incurred by and obligations of the receivers, and six months claims, were ordered paid, but not in the same order. The aggregate amount of the different issues of the receivers' certificates is not shown by the record, but the inference is warranted by statements of counsel that the major part of the funds realized by the sale of the company's property was necessary to their satisfaction. Had they not been made interest-bearing, it is not likely they could have been sold; and had any of the appellants, prior to the master's appointment, asserted a right to interest, his request in that behalf, under the circumstances of this case, would necessarily have been rejected, except as to interest down to the time of the appointment of the receivers on such claims as had previously matured. If the court at the inception of the receivership had foreseen the course the administration of the insolvent estate would take and that the claims of appellants would have to be paid, not from the earnings but from the corpus of the estate, it might have dealt less generously regarding them. Cook, Corp. (7th Ed.) § 861, p. 3274; Gregg v. Metropolitan Trust Co., 197 U. S. 183, 25 Sup. Ct. 415, 49 L. Ed. 717.

It was said in Redfield v. Ystalyfera Iron Co., 110 U. S. 176, 3 Sup. Ct. 570, 28 L. Ed. 109, that the allowance of interest as damages is often a matter of discretion, and in Jourolmon v. Ewing, 80 Fed. 604, 607, 26 C. C. A. 23, 27, Judge Severens, speaking for this court regarding the rule that interest, when not stipulated, will generally be allowed as damages, said:

"The rule has its exceptions, and as in other cases where there are reasons founded on the conduct of the plaintiff, or other special circumstances existing in the case, and the justice of the situation requires it, interest will be denied."

See, also, New Orleans v. Fisher, 180 U. S. 185, 198, 21 Sup. Ct. 347, 45 L. Ed. 485.

The property of the insolvent railway company passed into and was retained in the hands of the court's receivers until it could be converted into cash to satisfy the debts whose equitable priority was recognized, and, when so converted, the proceeds of the sale were insufficient to pay any part of the mortgage debt. The strong equity mentioned in Nashua & Lowell R. Corp. v. Boston & Lowell R. Corp., 61 Fed. 251, 9 C. C. A. 468, which will stop the running of interest in exceptional cases, even where it is ordinarily given as a matter of right, was present.

In case No. 3099, the judgment of the District Court is modified, to the extent that interest may be computed on claims due prior to the

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appointment of the receivers down to that date; otherwise, it is affirmed, and a mandate may issue directing the lower court to proceed in accordance with the foregoing. Each side will pay the costs and expenses incurred by it. In case No. 3100, the judgment is affirmed, and costs are taxed against the appellant.

NATIONAL LIFE & ACCIDENT INS. CO. v. CRAIG, Internal Revenue Collector.

(Circuit Court of Appeals, Sixth Circuit. June 4, 1918.)

No. 3108.

1. INTERNAL REVENUE ⟸9—CONSTRUCTION—MEANING OF TERM "RESERVE FUND."

When a word which has a known legal meaning is used in a statute, it must be assumed that it is used in its legal sense, in the absence of an indication to the contrary; therefore the term "reserve funds," used in Excise Tax Law Aug. 5, 1909, § 38, must be given the signification known in the general law of insurance.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Reserve Fund.]

2. INTERNAL REVENUE ⟸9—CORPORATION EXCISE TAX.

Under Acts Tenn. 1895, c. 160, §§ 1, 8, 16, relating to insurance companies, reserve funds are not required by law to be so maintained as to include additional sums reserved to satisfy unpaid losses accrued or prospective, and no deductions for amounts so reserved, though required by the insurance commission, can be allowed under Excise Tax Law Aug. 5, 1909, § 38, in computing a Tennessee company's net income for taxation, though the act provided for deduction of any additions to reserve funds required by law.

In Error to the District Court of the United States for the Middle District of Tennessee; John E. McCall, Judge.

Action by the National Life & Accident Insurance Company against E. B. Craig, Collector of Internal Revenue. There was a judgment for defendant, and plaintiff brings error. Affirmed, save as to one uncontested item.

Thomas J. Tyne, of Nashville, Tenn., and J. M. Peebles, of Rupert, Idaho, for appellant.

Lee Douglas, U. S. Atty., and Marvin Campen, Asst. U. S. Atty., both of Nashville, Tenn., for appellee.

Before WARRINGTON and DENISON, Circuit Judges, and SATER, District Judge.

SATER, District Judge. The plaintiff, a Tennessee corporation doing a life, health, and accident insurance business in that state, brought this action against the defendant, as collector of internal revenue, to recover a part of the excise tax exacted of it for the years 1911, 1912, and 1913, under Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 11, 112. Paragraph 1 of that section provides that every insurance company, organized under the laws of the United States or of any state, shall be subject to pay annually a special excise tax with

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respect to the carrying on or doing business by such company, equivalent to one per centum upon the entire net income in excess of $5,000 received by it from all sources during such year, exclusive of certain amounts received by it as dividends, which for want of pertinency need not be noted. The controversy turns upon the italicized portion of the following excerpt from the second paragraph of such section:

"Such net income shall be ascertained by deducting from the gross amount of the income of such * * * insurance company, received within the year from all sources, * * * all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and *the net addition, if any, required by law to be made within the year to reserve funds.*"

The Tennessee statute (Act 1895, c. 160), which is applicable to the plaintiff company, confers on the insurance commissioner of Tennessee, as the chief executive and administrative officer of the state insurance department, large discretionary or quasi judicial functions and comprehensive supervisory control over all insurance companies. Section 16 of such act (section 3299, Shannon's Anno. Code) required the plaintiff, as well as other insurance companies, to file with the commissioner on blank forms furnished by him a statement or report exhibiting its financial condition on the 31st day of December, and also its business, for each of the above-mentioned years. The plaintiff and other companies engaged in like kinds of business were compelled to set forth in their annual reports and to reserve for the years above mentioned sums sufficient to meet their following accrued and unpaid liabilities: Death losses in process of adjustment or adjusted and not due; weekly losses; death losses and other policy claims resisted by the company; premiums paid in advance or unearned premiums; due or accrued salaries, rents, bills, agents' commissions, and legal and medical fees; unpaid taxes and interest on agents' bonds; and reserve for weekly disability. Plaintiff paid the excise tax for each of the years in question, excepting on the sums set apart to meet whatever liability it might have on the above-mentioned items. In 1915, the commissioner of internal revenue held that such sums were not required by law to be reserved for the purposes shown in its report to the commissioner of insurance and were not legally deductible from plaintiff's gross income, and compelled the plaintiff on account of them to make payment (which was properly protested) of the additional sum of $151.23 for 1911, $205.31 for 1912, and $460.55 for 1913.

Plaintiff's claim for a refund of the tax having been refused, this suit was thereupon brought. In the course of the hearing it was agreed that $278.74 of the sum paid represented a tax on the net addition to the reserve for premiums paid in advance and had been unlawfully exacted of the plaintiff. This item is therefore dismissed from further consideration. The District Court, relying on Insurance Co. of North America v. McCoach, 224 Fed. 657, 140 C. C. A. 167 (C. C. A. 3), awarded plaintiff judgment for the full amount

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asked. Subsequently that case was reversed under the title of McCoach v. Insurance Co. of North America, 244 U. S. 585, 37 Sup. Ct. 709, 61 L. Ed. 1333, after which, on a rehearing, the District Court gave plaintiff judgment for the conceded amount of $278.74, with interest from the date of its payment, but denied its right to recover the residue of $538.35. The case was then brought here on petition in error.

[1, 2] Congress did not attempt to define the term "reserve funds," as used in the Excise Tax Law of 1909. The rule is familiar that when a word which has a known legal meaning is used in a statute, it must be assumed that it is used in its legal sense, in the absence of an indication of a contrary intent. 26 Am. & Eng. Ency. Law, 607; Apple v. Apple, 1 Head (Tenn.) 348; State v. Smith, 5 Humph. (Tenn.) 394; Grogan v. Garrison, 27 Ohio St. 50, 63. It is clear, from Mr. Justice Pitney's opinion in the McCoach Case, 244 U. S. p. 586, 37 Sup. Ct. 709, 61 L. Ed. 1333, that the term "reserve funds," within the meaning of the act of Congress, bears the signification known to the general law of insurance. It necessarily follows that, unless "reserve funds" are in Tennessee "required by law" to be so maintained as to include the additional sums reserved to satisfy the items, accrued, unpaid or contingent, as indicated in the plaintiff's report to the insurance commissioner, recovery must be denied to the plaintiff.

Section 1 of the Tennesse act of 1895 (section 3274, Shannon's Anno. Code) provides that:

"The terms 'unearned premiums,' and 'reinsurance reserve,' and 'net value of policies,' or 'premium reserve,' severally intend the liability of an insurance company upon its insurance contracts other than accrued claims computed by rules of valuation established by" sections 3288–3291, Shannon's Anno. Code.

Section 8, which prescribes the method of valuing policies, is shown in the margin.[1] Subsequent to the enactment of that statute the Ten-

[1] "The insurance commissioner shall each year compute the net value on the 31st day of December of the preceding year of all outstanding policies of life insurance in companies authorized to make insurance on lives in this state upon the basis of the 'Combined Experience,' or 'Actuaries' Table' or 'American Experience Table' rate of mortality, with the interest at four per cent. per annum; and the aggregate net value so ascertained of the policies of any such company shall be deemed its liability on account of its policy obligations, other than accrued claims, to provide for which it shall hold funds, in secure investments, of an amount equal to such net value above all its other liabilities. * * * To determine the liability upon its contracts of insurance of an insurance company other than life, the insurance commissioner shall require such company to charge, as the liability for reinsurance of outstanding policies, fifty per cent. of the premium received on policies or risks having not more than one year to run, and a pro rata of all premiums received on policies or risks having more than one year to run. The insurance commissioner shall allow the credit of an insurance company in the account of its financial condition only such assets as are or can be made available for the payment of losses in Tennessee, but may credit any deposits of funds of the company set apart as security for a particular liability. He shall not allow stockholders' obligations of any description as part of the assets or capital of any insurance company, unless the same are secured by competent collateral."

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nessee Court of Chancery Appeals, in Fry v. Provident Sav. L. Assur. Soc., 38 S. W. 116, 126, adopted the following as a correct definition of the term "reserve fund":

"When the word or term is applied to a level rate policy, it means a sufficient per centum of the annual premiums to meet when invested at a given rate of interest, all present and prospective liability on account of the particular policy. When applied to term insurance, it means the entire mortuary premiums collected for a particular term."

In Insurance Co. v. Heidel, 8 Lea (Tenn.) 488, 495, 496, and Insurance Co. v. Mathews, 8 Lea (Tenn.) 499, it is said that a part of every premium on a life policy is absorbed in the running expenses of the business; a part is the compensation of the insurers for the risk during the period for which the premium is paid, to be used for the payment of loss on other policies or divided as profits; and the remainder is accumulated on interest as a reserve fund, to respond to the demands of the particular policy and constitutes its equitable value. See also Ewing v. Coffman, 12 Lea (Tenn.) 79, 83, 84; Smith v. St. Louis Mut. L. Ins. Co., 2 Tenn. Ch. 729, 741. The method of determining the reserve fund and the definition of it given in the Fry Case are in effect the same as obtains elsewhere. State v. Vandiver, 213 Mo. 187, 213, 214, 111 S. W. 911, 15 Ann. Cas. 283 (which adopted the above-quoted language in the Fry Case); New York L. Ins. Co. v. Statham, 93 U. S. 24, 34, 23 L. Ed. 789; Nielsen v. Provident L. Assur. Soc., 139 Cal. 332, 73 Pac. 168, 96 Am. St. Rep. 146, 149; Detroit Fire & Marine Ins. Co. v. Hartz, 132 Mich. 518, 520, 521, 94 N. W. 7; Bankers' L. Ins. Co. v. Howland, 73 Vt. 1, 48 Atl. 435, 57 L. R. A. 374; New Haven Trust Co. v. Gaffney, 73 Conn. 480, 485, 47 Atl. 760; Prudential Ins. Co. v. Chestnut, 8 Ga. App. 781, 68 S. E. 952; Vance, Insurance, 39; Bacon, Life and Acc. Ins. (4th Ed.) § 77.

As we understand the plaintiff's position, reliance is not had on any Tennessee statute (and none is named) which specifically requires that funds, other than the reserve fund as above defined, shall be set apart to satisfy unpaid expenses and liabilities in conformity to the state's practice, but rather on the general tenor and policy of the act of 1895. A résumé of its provisions would unduly prolong this opinion, but briefly its paramount object is the protection of policy holders (Insurance Co. v. Craig, 106 Tenn. 621, 62 S. W. 155), and it casts upon the insurance commissioner the duty of seeing that insurance companies transacting business in the state are solvent and comply with its laws. One of the purposes of the annual statements submitted to him by insurance companies is to determine their net assets or funds available for the payment of their obligations in the state, which funds, by the terms of section 1 of the act, include uncollected and deferred premiums, not more than three months due on policies actually in force, after deducting from such funds all unpaid losses and other debts and liabilities, inclusive of policy liability and exclusive of capital. Section 16 provides that such annual statements shall be in the form designated and as specified by the commissioner, and that assets and liabilities shall be computed and

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allowed in accordance with the rules mentioned in the act. The commissioner is empowered to examine in detail into all the affairs and transactions of such companies for the purpose of determining their financial condition. He is given exclusive authority in the first instance to grant or refuse the requisite permission to do business in the state and he is clothed with power to withdraw that permission after it has been granted. If he is of the opinion that a foreign insurance company is financially unsound, or has failed to comply with the law or to perform its legal obligations, or that the actual funds of any life insurance company, exclusive of its capital, are less than its liabilities, he is required to revoke its permission to engage in business within the state, and without giving notice to the company, if the ground of revocation be financial unsoundness or deficiency in assets. For like reasons he may through the state's Attorney General seek injunctive relief against a domestic company's further prosecution of business.

It is asserted that in view of the foregoing and other kindred statutory provisions the commissioner of insurance is authorized to fix and require the additional reserves to meet the heretofore mentioned liabilities, actual and contingent, shown in the annual statements submitted to him, and that his power so to do is sanctioned in Insurance Co. v. Craig, 106 Tenn. 640–642, 62 S. W. 155, 159, in which it is said:

"Where the official is authorized by an effective law to do or not to do a given thing upon his own investigation or otherwise, the courts cannot coerce or restrain his action in reference thereto, but must permit him, in the sphere in which the law has assigned to him, to exercise a free and untrammeled judgment and discretion. It is even his prerogative, in the first instance to construe the laws under and within which he acts, and the courts, although of the opinion that his construction is incorrect, will not interfere by mandamus or injunction. * * * The rule of noninterference, on the part of the courts, with the free exercise of discretionary functions by public officials has been applied in cases too numerous to mention (citing High's Extra. Leg. Rem. § 44c). * * * But it must always be remembered that the public functionary of the class under consideration can act independently of the courts only to the extent that the law gives him that power. The law is the source of his authority, and he has no discretion beyond that conferred. All of his acts must be within the limits of that authority, and of this the courts must finally judge. Though he may undoubtedly and in every instance construe the law for himself as to discretionary matters actually within the law, he cannot by interpretation, however conclusive to his own mind, bring within his discretion any matter that is not in fact so placed by the law when rightly interpreted by the courts."

A fair interpretation of the act in question does not warrant the conclusion thus pressed upon us. The commissioner, to protect the policy holders of his state and to maintain in a secure financial condition the insurance companies reporting to him, may well prescribe the extent and forms of reports to be made by them. The only "reserve funds" "required by law" are those mentioned and for which provision is made in sections 1 and 8. We find no provision in the statute which requires the reserving of other and additional funds to meet unpaid losses and liabilities, accrued or prospective. Regarding the law as a whole and considering its minute and comprehensive de-

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tails, the omission of all allusion to any other "reserve funds" and of any provision for their creation is significant. Had the Legislature intended to require others, it must be presumed that its will would have found appropriate expression.

Nor do we think Insurance Co. v. Craig is helpful to the plaintiff. The existence of a statutory provision for the creation of "reserve funds" other than those known to the general law of insurance and mentioned in sections 1 and 8, which is the immediate question before us, was not there involved or considered. The plaintiff in that case was an incorporated English company. Its recognition in Tennessee was purely a matter of comity. It could transact business in that state only on such terms and conditions as the state saw fit to impose, and its license to do business within its borders could be revoked whenever the state chose and upon whatever grounds and through whatever agency the Legislature might prescribe. After reinsuring the risks and policies of a New York company and giving notice of that fact to that company's general agency and policy holders and to the insurance commissioner, it repudiated its contract on the ground that the New York company had failed to perform. The commissioner demanded that the English company, as to Tennessee policy holders, retract its action declaring the reinsurance contract null and void and resume its former relation to them, whatever such relation may have been, else its permission to transact business in the state would be revoked for noncompliance with the law. Injunctive relief was sought, but denied, for the reason (as appears from the opinion and from the explanation of it found in State v. Standard Oil Co., 120 Tenn. 86, 143, 110 S. W. 565) the statute empowered the commissioner, without proceedings in any of the courts, to exclude a foreign insurance company for certain violations of law, even after it had been duly licensed to transact business in the state. The Craig Case makes it clear that the commissioner's interpretation of the law as to other than discretionary matters is not binding upon, but in an appropriate case is subject to review by, the courts. The practice indulged by the commissioner has not been sanctioned by any decision of the Supreme Court of his state.

The deduction from the gross amount of an insurance company's income, of funds to be reserved, is specifically limited by the federal Excise Tax Law to the net addition required by law to be made within the year from such income to the company's reserve funds. The exercise of abundant caution to maintain such companies in a solvent condition is not within its purview. As said in the McCoach Case, 244 U. S. 589, 37 Sup. Ct. 711, 61 L. Ed. 1333, by which this case is ruled:

"The act of Congress * * * deals with reserves not particularly in their bearing upon the solvency of the company, but as they aid in determining what part of the gross income ought to be treated as net income for purposes of taxation. There is a specific provision for deducting 'all losses actually sustained within the year and not compensated by insurance or otherwise.' And this is a sufficient indication that losses in immediate contemplation, but not as yet actually sustained, were not intended to be treated as part of the reserve funds; that term rather having reference to the funds ordinarily held as against the contingent liability on outstanding policies."

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Our conclusion is that the reserves, held against liabilities and losses, incurred and contingent, shown in the plaintiff's annual statements, are not "required by law" in Tennessee within the meaning of the act of Congress, and the judgment of the District Court is therefore affirmed.

WOOD v. TODD et al.

(Circuit Court of Appeals, Third Circuit. June 14, 1918.)

No. 2342.

1. RECEIVERS ⇐69—INSISTENCE ON RIGHTS.
 If the receiver of a corporation, substantially benefited by the unauthorized acts of its chief owner and manager in operating the business, prefers still to insist on the enforcement of the legal consequences of such acts, the court can merely administer the law as it is, without regard to considerations beyond its sphere.
2. PARTNERSHIP ⇐258(8½)—CONTINUANCE AFTER DEATH—QUESTION OF FACT.
 Whether a partnership was dissolved by the death of one member, or continued for a time in accordance with certain written articles of copartnership, is purely a question of fact.
3. PARTNERSHIP ⇐258(8)—CONTINUANCE ON DEATH—SUFFICIENCY OF EVIDENCE.
 In suit by receiver of a partnership against the receivers of subsidiary companies and a surviving partner, evidence *held* insufficient to show that the partnership was not dissolved by the death of the other member of the firm, on account of the existence of an agreement that it should continue for liquidation.
4. PARTNERSHIP ⇐248—LIQUIDATING PARTNER—POWER TO MAKE NOTE.
 A liquidating partner of a firm dissolved by the death of a partner cannot make a firm note, whether it be a new contract or a renewal of a pre-existing firm indebtedness; a rule applicable only when not differing from the law of the place where the partnership business is done and note given.
5. PARTNERSHIP ⇐255(1)—LIQUIDATING PARTNER—AUTHORITY TO ISSUE NOTES.
 By the law of Pennsylvania, a liquidating partner, acting in good faith and for liquidation, has authority to execute notes in renewal of obligations made before dissolution, and to borrow money on new notes to pay firm debts incurred before dissolution, but no authority to issue notes and contract in continuation of the business.
6. PARTNERSHIP ⇐255(1)—LIQUIDATING PARTNER—AUTHORITY TO CONTINUE BUSINESS.
 A surviving partner of a corporation dissolved by death, in liquidating partnership assets, has authority in some cases to continue the business to complete existing contracts and work up unused materials.
7. PARTNERSHIP ⇐255(1)—LIQUIDATING PARTNER—LIABILITY ON NOTES.
 Where a liquidating partner makes notes without authority in the course of continuing the business, not to liquidate it, he, and not the firm, is liable for their payment.
8. PARTNERSHIP ⇐258(8)—DISSOLUTION—TERMINATION OF CONTRACT—SUFFICIENCY OF EVIDENCE.
 In suit by receiver of a partnership against the receivers of subsidiary companies and a surviving partner, evidence *held* insufficient to show agreement between partnership and one of subsidiary companies, whereby the firm shared in its profits and losses, did not terminate by death of partner.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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9. PARTNERSHIP ⊂=255(1)—DISSOLUTION BY DEATH—LIABILITY FOR LOAN.
Money loaned partnership by subsidiary corporation after partner's death, used in paying obligations of firm incurred prior to dissolution by death, constitutes valid obligation of firm, and its receiver must repay amount; but money so loaned and used by surviving partner in improperly conducting business of firm after dissolution is only an obligation of the surviving partner.

10. PARTNERSHIP ⊂=255(1)—DISSOLUTION BY DEATH—CONDUCT OF LIQUIDATING PARTNER—LIABILITY OF FIRM UNDER CONTRACT.
No conduct of surviving partner as liquidating or continuing partner could make firm dissolved by death of other partner liable for losses of subsidiary company incurred after latter's contract with firm had become extinct by firm's dissolution, just as no conduct of his would entitle firm to half profits company might have made after contract had ended, nor is surviving partner himself liable.

11. PARTNERSHIP ⊂=255(1)—DISSOLUTION—ASSUMPTION OF CONTRACT WITH SUBSIDIARY.
If a surviving partner assumed his firm's contract with a subsidiary company after dissolution of the firm by death of the other partner, he assumed the whole of it, entitling him to reimbursement for expenses, as well as rendering him liable for half losses.

Appeal from the District Court of the United States for the District of New Jersey; Thos. G. Haight, Judge.

Suit in equity by M. H. Todd, receiver of the liquidating partnership of Walter Wood and Stuart Wood, deceased, late trading in the name, style, and firm of R. D. Wood & Co., and the Provident Life & Trust Company and Edward R. Wood, Jr., executors under the last will and testament of Stuart Wood, deceased, against the Florence Iron Works, Harold B. Wells, its receiver, the Camden Iron Works, Heulings Lippincott, its receiver, and Walter Wood. From the decree, Walter Wood appeals. Affirmed in part, and case remanded, with instructions to modify the decree in accordance with the opinion.

J. H. Brinton and W. A. Glasgow, Jr., both of Philadelphia, Pa., for appellant.

Norman Grey, of Camden, N. J., and J. Henry Radney Acker and William F. Norris, both of Philadelphia, Pa., for appellees.

Joseph H. Gaskill, of Camden, N. J., for Florence Iron Works and Harold B. Wells.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. The difficulties in this case arose out of the business relations of the three concerns here present by their receivers, which were complicated by cross property interests and liabilities and by the informality with which each did business with the others. A statement of these relations and of the conduct of the parties, somewhat in detail (but without regard so far as possible to matters settled by the decree and not raised on appeal), is necessary before the questions involved can be presented and understood.

For two generations or more there have been many partnerships bearing the firm name of R. D. Wood & Co. They comprised in each

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instance members of the Wood family and changed in their personnel only as partners died or withdrew and others were admitted. In the succession of one firm by another, it frequently happened that one firm of R. D. Wood & Co. would be actively doing business when at the same time other firms of R. D. Wood & Co., differently composed, were in process of liquidation. All the firms were engaged in substantially the same business, which, while embracing varied enterprises, had to do mainly with the purchase and sale of iron and steel products, more particularly iron pipes, lamp posts, hydrants, and related foundry castings. Of the different partnerships we are concerned perhaps with only three. The first is that of December 31, 1887, composed of Richard Wood, George Wood, Walter Wood, and Stuart Wood, under an agreement, which, as the evidence shows, was the last articles of co-partnership formally entered into by writing. Richard withdrew from the firm in 1894, whereupon another partnership followed composed of George, Walter and Stuart. This partnership was dissolved in 1911 by the withdrawal of George, leaving Walter and Stuart to compose the firm of R. D. Wood & Co., whose receiver is the complainant in this action.

The members of the Wood family, comprising at different times the different firms of R. D. Wood & Co., controlled by stock ownership, either individually or as partners, Florence Iron Works and Camden Iron Works, corporations engaged in the manufacture of iron and steel products of the kind in which the firms dealt. The principal business of all firms of R. D. Wood & Co. in recent years was that of acting as financial, purchasing and selling agents for these two manufacturing corporations under an arrangement contractual in character but not reduced to writing, which, with respect to Florence had existed for thirty years. The firms, howsoever composed, bought the raw material and sold the finished product for Florence—in fact, transacted all its business save that of manufacturing—and received in return a sum equal to the firm's expenses incurred in conducting the business of Florence and one-half of its profits, being liable for one-half of its losses. The same arrangement maintained with respect to Camden, with the exception that there was no division of profits and losses.

This relation of agency between the firm composed of Walter and Stuart Wood and the two corporations, existed on March 2, 1914, when Stuart died. The cross property interests and liabilities of the firm, of the partners, and of the two corporations at that time, appear as follows:

Of the 1,250 shares of the capital stock of Florence, Walter owned 785, Stuart 314 and the firm 151. Of the 8,000 shares of the preferred stock of Camden, Walter owned 3,180, Stuart 1,848 and the firm 2,531; and of the 7,000 shares of its common stock, Walter owned 1,915, Stuart 1,256 and the firm 2,346, besides certain rights evidenced by scrip certificates. Of the issue of $750,000 bonds of Camden, the firm owned $660,000, besides its serial notes to an amount of $96,000. Camden was also indebted to the firm in the sum of about $170,000. Florence owed the firm about $21,000, and Camden owed Flor-

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ence about $200,000. Florence owed Walter about $500,000, and Stuart about $100,000. Camden owed Stuart about $70,000, and Walter about $3,000. The firm owed Walter about $409,000, and Stuart about $750,000. Walter's interest in the partnership was $^{42}/_{65}$ and Stuart's interest $^{23}/_{65}$.

It thus appears that the two corporations and the firm were not only closely related by property interests, but they were almost inextricably tied together by liabilities. It had long been the custom for one to loan money to the others as necessity required and as the ability of any one permitted, always at the will and direction of members of the firm, who were also officers, directors and the principal stockholders of the two corporations. There was a constant flow of cash between the three and a running debit and credit cash account with almost daily entries was maintained. Both corporations of late years had been losing money, thereby involving not themselves alone but also the firm of R. D. Wood & Co., their financial agent.

In carrying out the business of financing and managing the two corporations, the firm had largely extended its credit. Its obligations, aggregating a very large sum, had been sold through note brokers and were in the hands of many banks.

At the time of the death of Stuart, Walter was in Europe seeking business with which to span the period of depression in the steel industry at home. He hastily returned and found the affairs of the firm and of the two companies in a critical condition. The most pressing need was money with which to meet the firm's maturing obligations. The finances of each concern were quite insufficient to meet its own obligations, and the assets of each, being in the main illiquid, could not readily be used to help the others. But Florence, owing to its practice of manufacturing in one season for sale in another, had accumulated about one-half million dollars worth of finished products, which Walter promptly set about to sell at a sacrifice and convert into cash. Being the managing head of Florence as well as the surviving partner of the firm, he directed Florence to purchase with the moneys thus coming in the outstanding notes of the firm as they matured, thereby easing the firm but causing Florence to become the holder of the firm's notes in a considerable sum. He adjusted the balance between Camden and Florence and proceeded with the business of the firm with the object, as he maintains, of liquidating it, but with the effect of prosecuting the business as before the death of Stuart by making new contracts for the purchase and sale of materials for Camden and Florence and by creating firm obligations other than renewals of obligations which existed before Stuart's death.

Walter's efforts to meet the financial difficulties of the firm and to keep Camden and Florence going did not meet the approval or enlist concurrence of the executors of Stuart. Indeed, his efforts met their positive opposition, resulting in a controversy, both official and personal, of which much was made at the hearing, but which, we think, has little to do with the decision of the case. The result of it all was that the firm and the two corporations were thrown into receiverships and the controversy between Walter and the executors of Stuart sur-

vived to the receivers of the three concerns, who in this action ask a determination of their rights and liabilities growing out of Walter's conduct of the business after Stuart's death.

On the appointment of the receiver for Florence there came into his possession notes of R. D. Wood & Co. amounting to the sum of $202,991.66, together with collateral consisting of $452,000 first mortgage bonds of Camden with the coupons attached and $48,375 of overdue coupons which had been severed. The receiver of R. D. Wood & Co. and the executors of Stuart Wood filed the bill in this case against the receiver of Florence (joining the receiver of Camden, and Walter Wood), praying that the notes of R. D. Wood & Co. which were held by the receiver of Florence be cancelled and their accompanying collateral be surrendered on the ground that they were invalid as against the firm because issued by Walter, surviving partner, not in liquidation but in continuation of the firm's business, and praying in the alternative, that Walter be decreed to pay the same, alleging misconduct on his part in manipulating the affairs of the three companies to his own advantage in view of his larger interest in one than in another.

For defense, Walter denied the bad faith charged to him and justified his irregularities in shifting moneys and collateral from one concern to another by the exigencies of the situation and upon the legal contention that by the terms of the co-partnership entered into by Stuart and himself, the partnership continued for one year after the first of January following the date of the death of a partner, and, that, in consequence, the partnership had not been dissolved by the death of Stuart but its dissolution was deferred to the end of the period prescribed by its terms, which had not expired. In a word, Walter contended, and still maintains, that he was authorized by the terms of the contract of partnership to conduct the business of the firm in the same manner after Stuart's death as it had been conducted before his death, for a prescribed period of liquidation.

The decree entered by the trial court decided many matters not here on appeal. It disposed of the question of the alleged bad faith of Walter Wood by deciding, that in his conduct of the business of the several companies, irregular and involved though it was, there was nothing morally reprehensible, but, on the contrary, he was actuated by no motive other than to do the best he could for all concerned. The court recognized that the burden he assumed was not a light one, and that it was not made easier by the executors of his brother's estate standing unyieldingly on their legal rights in refusing aid when the giving of aid was within their power and demanding payment of the firm's debt to the estate at a time that made inevitable the collapse of the three concerns.

The court found no evidence of terms of partnership between Walter and Stuart whereby the partnership continued for a year after the first of January following the date of the death of a partner, and held, in the absence of testimony, that the partnership was terminable at will and was therefore dissolved upon the death of Stuart. The court further found, upon a like want of evidence, that the contract between the firm and Florence, whereby the firm became the purchasing, sell-

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ing and financial agent of Florence, was not a contract extending from year to year but similarly was a contract terminable at will and ended with the dissolution of the partnership. These two findings opened the question as to who is liable for the payment of the many notes bearing the firm name of R. D. Wood & Co (in the hands of the receiver of Florence) according as they were validly made in renewal of the debts of the partnership incurred before dissolution, or invalidly made by Walter in conducting business thereafter as though the partnership had not been dissolved.

For convenience, the notes in dispute, aggregating $202,991.66, were divided into five groups. The first consisted of 14 notes made by R. D. Wood & Co (the court found) during the lifetime of Stuart; the second, 6 notes in renewal of notes made during the lifetime of Stuart; the third, 2 notes in renewal of notes made during the lifetime of Stuart; the fourth, 5 notes made after the death of Stuart; the fifth, 2 notes, one for $24,377.99 and the other for $48,375 made by Walter Wood acting for the firm as liquidating partner in settlement of an open account of Florence against the firm. With all notes, collateral was originally pledged or subsequently given.

The court divided the notes and charged liability for their payment according to the purpose for which they had been given, namely, in payment of debts incurred by the firm before dissolution on Stuart's death, or, for debts incurred afterward, and accordingly held the receiver of the firm liable for the notes of the first three groups, for one of the four notes of the fourth group, and for a part of the open account closed by the two notes of the fifth group, and held Walter Wood liable for the remaining four notes of the fourth group ($20,000) and for the balance due on the open account closed by the two notes in the fifth group ($38,132.07), amounting with interest to $68,373.53.

The basis of the court's decision was that Walter Wood had no authority as liquidating partner to continue the business of the firm as distinguished from winding it up, and that he was therefore personally liable for notes representing debts incurred in prosecuting the business as a continuing partnership. Four notes of the fourth group are within this class.

The two notes of the fifth group embrace moneys loaned from time to time by Florence to the firm, and one-half of the losses of Florence charged to the firm under the purchasing and selling agency contract. The court held that as Walter Wood had assumed to continue the business of the firm in financing Florence under the financing contract, he must be charged individually precisely as the firm would have been charged had the partnership continued after the death of Stuart.

The part of the decree entered adversely to the receiver of the firm has been accepted by the receiver, the notes have been paid and the collateral returned. From the part of the decree charging Walter Wood individually with liability on four of the notes of group 4 and a portion of the notes of group 5, amounting in all to $68,373.53, Walter Wood has taken this appeal.

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Without discussing for the moment Walter's method of conducting the business of the partnership and of the two manufacturing corporations after Stuart's death, his method very certainly achieved two things: it prevented the failure of all three companies in the spring of 1914, when the depression in the steel industry preceding the outbreak of war was at its lowest, and it kept them alive and going until the end of that period. The collapse came just before the turn, with the result, that the newly appointed receivers of Camden, availing themselves of the tremendous stimulus which later the war gave the iron and steel industry, were enabled to operate its works so profitably that the large amount of money they made (much of which will pass to the receivers of R. D. Wood & Co and Florence) has transformed the clear insolvency of the three concerns into substantially more than solvency of two and perhaps of all of them. This controversy having at the beginning been a contest as to who should be liable for debts incurred by the irregular business management of Walter Wood, is now changed to a contest more directly for a division of large profits which would not have been made but for that very irregular business management, so vigorously attacked at the beginning of the litigation.

[1] The fortunate outcome of Walter's method of doing business is urged by him in justification of its irregularity and in defense to the claim of Stuart's executors, who, in this litigation, are insisting, none the less, on the full enforcement of their legal rights. Legality of conduct cannot be determined by its consequences. If a person who has been substantially benefited by the unauthorized acts of another prefers still to insist on the enforcement of their legal consequences rather than to accept gratefully the benefits arising from them, the court can do no more than administer the law as it is, without regard to considerations beyond its sphere. As the case is controlled by well established legal principles, our sole task is the application of those principles to facts, which in the main are not disputed.

[2, 3] As the case appears here on appeal, four questions are presented for review. The first is: Was the firm of R. D. Wood & Co. dissolved by the death of Stuart Wood on March 2, 1914, or did it continue for one year from the first of January after his death in accordance with certain written articles of copartnership?

This is purely a question of fact. There was a firm of R. D. Wood & Co. In that firm, Walter and Stuart Wood were partners. Manifestly, there was between them a contract of partnership. Its terms were not reduced to writing. The simple question is: What were its terms?

This question is made doubly difficult of solution because the contract of partnership was not only not reduced to writing but there is in the case no direct evidence of its terms affecting dissolution,—the only terms with which we are now concerned. If its terms in this regard are to be found, they are only to be bound by inference, and then not from facts, but from statements made by the partners when dealing with matters not affecting the terms of the partnership contract. Nor are they to be found from the conduct of the partners,

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because with respect to the critical terms of the contract having to do with the dissolution of the partnership on the death of a partner, the partners, of course, prior to the death of Stuart, never had occasion to act.

Walter Wood maintains that the partnership contract between himself and Stuart was the same partnership contract of another firm of R. D. Wood & Co. formally entered into in writing between Richard, George, Walter and Stuart on December 31, 1887. That contract expressly provided for dissolution of the partnership, (1) by agreement of the partners, (2) by the expiration of a three year term, and (3) by the death of a partner. In the last event, the contract deferred dissolution by the provision, that:

"The death of any partner during the partnership shall not work a dissolution of the firm until one year from the first of January next following his decease, or the termination of this agreement, either by notice as above provided or by the efflux of time, whichever first shall happen."

This was the last written contract of partnership of any firm bearing the name R. D. Wood & Co. Its importance to the case lies in the fact that it contains the only provision anywhere found by which a dissolution of partnership on death of a partner is postponed. In order to justify his continuing the business of the partnership after Stuart's death, Walter undertook to prove that this provision of the partnership contract of 1887 was in his partnership contract with Stuart in 1914. This he endeavored to prove from certain admissions made by Stuart in writings to which we shall refer.

In certain litigation in a Court of Common Pleas for the County of Philadelphia—which has nothing to do with this case—in which George, Walter and Stuart were parties, the cross-bill charged:

"That for many years prior to March 26, 1894, the said Richard Wood in association with his brothers, Walter, George, and Stuart Wood, defendants herein, carried on business as co-partners *under articles of agreement renewed from time to time* in which the business was described as [the manufacture, erection and sale of cast iron pipes, etc.].

"*The last articles entered into* by the partners were dated December 31, 1887 and provided for the carrying on of the business for the further term of three years. *They, however, continued the business without interruption after the expiration of this period until March 26, 1894* when Richard Wood as herein before stated made an assignment for the benefit of his creditors which transferred to his assignee his entire interest in the assets of the said co-partnership."

To the averments of this paragraph of the cross-bill, Walter and Stuart Wood stated, by their answer, that:

"*We admit the averments of the second paragraph of said cross-bill.* * * * *We aver also that said business* with the knowledge and consent of said Richard Wood and his then assignee *was continued after said assignment just as it had been before.*"

Walter Wood relies on Stuart's admission in these pleadings as proof that the partnership of 1894 between George, Walter and Stuart was the same as that of 1887 between Richard, George, Walter, and Stuart, and remained the same after 1894.

To carry the terms of the contract of 1887 past the partnership of

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1894 and into the contract of partnership of 1914, Walter offered an agreement (July, 1911) between George, Stuart and himself, partners of the firm of 1894, in which it appears that the firm of the last date had been dissolved and the firm of 1911–14 had been formed. It was provided that:

"Notice of dissolution of the firm of R. D. Wood & Co. shall be forthwith published in the following form:

"Owing to the death of Richard Wood and the prior withdrawal of George Wood the present firm of R. D. Wood & Co. is composed of

"Walter Wood
"Stuart Wood."

This is all the evidence there is upon the subject, excepting the testimony of Walter Wood in reply to the following question:

(Q.) Was there any other partnership agreement under which you were operating other than that of 1888 (87)? (A.) None.

We do not regard the provision in the will of Stuart Wood, conferring upon his executors uncontrolled discretion to aid in the liquidation of the firm for a period of two years, as evidence of a continuing partnership. That provision indicates rather that Stuart did not consider that the firm would continue after his death but that it would be dissolved by his death. The provision was made evidently in contemplation of the needs of the firm in liquidation, which Stuart doubtless knew would be frequent and perhaps immediate, not in contemplation of the needs of the firm in continuing its business.

The admissions of Stuart in the pleadings of the case in the Pennsylvania court do not appeal to us as showing in any way that the contract of 1887 between four partners was the same as that of 1894 between three partners. The averment simply was that articles of copartnership had been entered into in 1887, and that the *partners had continued in business* without interruption until 1894, when Richard Wood withdrew. This doubtless was true, but when Richard withdrew there was a new partnership formed between the three survivors. As to this, Walter and Stuart averred "that the said *business* * * * was continued after the said assignment just as it had been before." This also was true, because the business of each firm of R. D. Wood & Co. was substantially the same as that of every other firm bearing the same name but differently composed. This averment does not prove that the terms of the new partnership after 1894 were the same as those in the written articles of 1887. In some respects they were not and could not be the same, because the partners were different in number and in persons and correspondingly the interests of the new partners were different. Later, when George dropped out, there was still another partnership formed with another change of partners and of partnership interests without anything to indicate whether terms as to dissolution were brought into it from the preceding partnership or from the partnership preceding that one.

Walter's answer in the negative to the question: Was there any other partnership agreement under which you were operating other than that of 1888 (7)?—if taken literally, is untrue, for he was a member of two firms after that of 1887, each having its own partnership

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agreement (though not in writing) under which he operated; if taken as doubtless he intended, namely, that he operated under no written partnership agreement, other than that of 1888 (7), then his statement sheds no light on the unwritten contract of partnership of 1914 between him and Stuart.

A very careful study of this record causes us to observe again that the trouble in this case arose out of the informality with which different partners formed and dissolved different partnerships, and carried on one while winding up another, without an attempt to state with an approach to legal formality the terms of a partnership and without very much regard as to what the terms really were. The partners just went on and did business in a way satisfactory to themselves but in a way that would very certainly produce trouble of this kind. In it all, we cannot find out what Walter and Stuart Wood agreed upon—if they agreed upon anything—with respect to the dissolution of their firm. The record simply does not tell us. Nor does it give us anything substantial from which we might infer the terms, were we disposed to find a contract by inference. In what we regard as a record silent upon the subject, we cannot make a contract for Walter and Stuart. We cannot hold, therefore, that the deferred dissolution provision of the contract of 1887 is a part of the contract existing in 1914. Such being the case, we are of opinion that the learned trial judge was clearly right in holding that the contract of partnership between Walter and Stuart was one terminable at will, and that, in legal consequence, the partnership was dissolved by the death of Stuart.

[4, 5] The second question is: Is Walter Wood liable to the receiver of Florence Iron Works to the amount of $20,000 with interest upon four certain promissory notes of what is known in the case as group 4?

This question turns on well established principles of law as applied to the circumstances under which the notes were given. The general rule is, that a liquidating partner of a firm dissolved by the death of a partner, cannot make a firm note, whether it be a new contract or in renewal of a pre-existing firm indebtedness. Cases quoted in 32 L. R. A. (N. S.) 255; 30 Cyc. 668. But this general rule is applicable only when not differing from the law of the place where the partnership business is done and the partnership note is given. The law of the place which controls this case is the law of Pennsylvania. By that law, the general rule is modified, and a liquidating partner, acting in good faith and for the purpose of liquidation, has authority not only to execute notes in renewal of obligations made before dissolution but to borrow money upon new notes to pay firm debts incurred before dissolution; but under the Pennsylvania law as under the general rule, the liquidating partner is given no authority to issue notes and make contracts in the continuation as distinguished from the liquidation of the firm's business. Estate of Davis and De Sauque, 5 Whart. (Pa.) 530, 34 Am. Dec. 574; Robinson v. Taylor & Co., 4 Pa. 242; McCowin v. Cubbison, 72 Pa. 358; Lloyd v. Thomas, 79 Pa. 68; Fulton v. Central Bank of Pittsburgh, 92 Pa. 112; Siegfried v. Ludwig, 102 Pa. 547; Meyran v. Abel, 189 Pa. 215, 42 Atl. 122, 69 Am. St. Rep. 806.

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[6] To both the general rule and the Pennsylvania rule there is, of course, the well recognized exception that a surviving partner of a dissolved partnership in liquidating partnership assets has authority in some cases to continue the business for the purpose of completing existing contracts and in working up unused materials. Within this exception Walter Wood seeks to bring his conduct of the business after the death of Stuart. But this contention is inconsistent with his first position, that by the terms of the contract itself, the partnership was not dissolved until more than a year after Stuart's death, and it is inconsistent also with the manner in which he conducted the business, for, manifestly, he did not limit the business to the execution of existing contracts or to the manufacture of materials on hand, but continued as before in obtaining new contracts and in financing them to completion.

[7] Agreeing with the learned trial judge that the firm of R. D. Wood & Co. was dissolved by the death of Stuart, we hold with him that under the evidence the four notes in question were made without authority in the course of continuing the business, not in liquidation, and that, in consequence, Walter, and not the firm, is liable for their payment.

The third question is: Was the agreement between R. D. Wood & Co. and Florence Iron Works, by which the firm shared in the profits and losses of Florence, terminated by the death of Stuart Wood?

[8] This question like the others has arisen out of the informal way in which buisness between the firm and Florence was carried on. So far as the evidence discloses, there was never an express agreement as to the duration of the contract of agency between the firm and Florence. The only things the evidence shows about the contract are that Florence reimbursed the firm for expenditures in its behalf and the two shared its profits and losses; the former was done by direction of the firm according to its needs or to the ability of Florence to pay, the latter was done at the end of the calendar year. It is urged that the annual settlement is evidence that the contract ran for a year and was therefore not ended by the dissolution of the firm. We do not think that this business habit is evidence of the contract's terms, and, in default of any other evidence, we hold with the trial judge that the contract between the firm and Florence terminated with the firm's dissolution. Walter Wood conducted the business with Florence after the death of Stuart as though the partnership continued—with two results: First, money in substantial sums was loaned from time to time by Florence to the firm, and second, there was a settlement on August 31, 1914, of the amount due Florence by delivery of the firm's notes, which included not only the money balance due by the firm but one-half the losses incurred by Florence from March 2 to June 30, 1914. These results gave rise to the last question, which is: Is Walter Wood liable to the receiver of Florence Iron Works on the notes of R. D. Wood & Co. closing the open account between Florence and the firm for money loaned the firm and also for one-half the losses of Florence (under the contract of agency) between the date of

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the firm's dissolution on Stuart's death and the date of settlement, amounting to $38,132.07 with interest?

This question relates to liability for the two notes of group 5.

[9-11] Money loaned the firm by Florence after Stuart's death was used for two purposes, a proper and an improper purpose in point of law. So much of it as was used in paying obligations of the firm incurred prior to its dissolution by Stuart's death constitutes a valid obligation of the firm, and the receiver must pay it. The portion of it that was not used in liquidation but was used in improperly conducting business after the firm's dissolution is not an obligation of the firm but is an obligation incurred by Walter, and he must pay it. To this extent, we agree with the learned trial judge in his decision on the last group of notes. But we do not find ourselves in accord with him in holding Walter liable also for one-half the losses incurred by Florence under the contract of agency. He held, and we think correctly, that the partnership was dissolved by the death of Stuart and that the firm's contract of agency ended with the dissolution of the partnership. No subsequent conduct of Walter as liquidating or continuing partner can make the firm liable for losses of Florence incurred after its contract with the firm had become extinct, just as no conduct of his would entitle the firm to one-half the profits that Florence might have made after the contract had ended. Between the firm and Florence there was no longer a contract. Therefore, it is very clear that the receiver of R. D. Wood & Co. is not liable to the receiver of Florence for one-half the losses of Florence incurred after the contract had expired. Why then should Walter be liable? Florence had no contract with him whereby he had agreed to share one-half its losses and one-half its profits. True, Walter went on after Stuart's death and operated Florence but without receiving advances for his expenses or payment for his disbursements as provided by the contract, if we read the record correctly. If Walter assumed the firm's contract with Florence after dissolution, he assumed the whole of it. This would entitle him to reimbursement for his expenses as well as it would hold him liable for one-half the losses.

For Walter's unauthorized acts of borrowing money from Florence for use in the prosecution of the business of the dissolved partnership, the law imposes liability upon him. In these transactions he got Florence's money. As the partnership is not liable for its return, he certainly must be liable. This is a very different liability from that of sharing losses with Florence imposed upon him by the decree of the court for continuing operations after the ending of the partnership contract, whereby nothing was taken from Florence and nothing enured to the firm or to Walter. What happened on the death of Stuart was a falling apart of the contractual relations of Florence with the firm. Clearly, Walter was not responsible for that. Florence was then (legally) free to make a new contract with anyone it chose. No new contract was made, but Walter went on doing business for Florence without a contract. Whether the law implies one, and whether, accordingly, Walter is entitled to compensation for his services, unprofitable as they were to Florence, are not matters of pres-

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ent concern. Similarly, the question whether in Walter's management of Florence, a clear distinction can be made between acts done in his capacity of surviving partner of the firm and acts done in his capacity as managing head of Florence, is not here for decision.

The old contract being extinct and no new contract containing a loss sharing provision having been made, Florence is without a contract containing such a provision that can be enforced against any one. Therefore, Florence must bear the whole of its own losses. While this may be a hardship to Florence, it is one of the consequences of its manner of doing business, for which (legally) it alone is responsible. Entertaining this view, we direct that the decree below be affirmed, except the part charging Walter Wood with one-half the losses of Florence incurred after the dissolution of the firm, and that the case be remanded with instructions that the decree be modified in this particular in accordance with this opinion.

DETROIT-KENTUCKY COAL CO. et al. v. BICKETT COAL & COKE CO.

(Circuit Court of Appeals, Sixth Circuit. July 1, 1918.)

No. 3129.

1. CORPORATIONS ⟸99(2)—ISSUE OF STOCK—CONSIDERATION.
Under Const. Ky. § 193, and Ky. St. §§ 568, 569, corporate stock cannot be issued in return for labor or services, unless the market value of the services is equal to the par value of the stock.

2. CORPORATIONS ⟸99(2)—ISSUANCE OF STOCK—CONSIDERATION.
Where a contract with a corporation was invalid, under Const. Ky. § 193, and Ky. St. §§ 568, 569, by reason of an agreement to issue stock without receiving its par value, the validity of the contract is not affected by a rejected offer to pay an additional amount pending litigation.

3. CONTRACTS ⟸137(2)—SEPARABLE PROVISIONS.
In a contract of a coal mining company with a sales company to issue stock to president of latter and give sales company exclusive rights to sell coal, sales company to make certain advances, the part of the contract giving the exclusive agency was not separable, so as to be enforced, where agreement to issue stock was invalid; no offer being made to cancel the stock provision and yet make the advances, which were necessary for operation of the mine.

Appeal from the District Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

Suit by the Bickett Coal & Coke Company against the Detroit-Kentucky Coal Company and others, for specific performance of contracts and to enjoin violation of such contracts. From an order granting a preliminary injunction, defendants appeal. Reversed.

Nelson B. Cramer, of Cincinnati, Ohio, and J. J. Moore, of Pikeville, Ky., for appellants.

Henry J. & Charles Aaron and W. H. Holly, all of Chicago, Ill., and Humphrey, Middleton & Humphrey, of Louisville, Ky., for appellee.

Before KNAPPEN, MACK, and DENISON, Circuit Judges.

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KNAPPEN, Circuit Judge. Appeal from an order granting preliminary injunction.

The Detroit-Kentucky Coal Company (hereinafter called the Detroit Company) is a coal mining corporation organized under the laws of Kentucky, with a capital stock of $50,000. In February, 1917, it held long-time mining leases on about 1,000 acres of bituminous coal lands in Pike county, Ky., upon a royalty of 6¼ cents per ton. The Detroit Company had begun development, apparently to the extent of constructing tipple and power house, installing machinery, beginning construction of switch siding to the Baltimore & Ohio Railroad, and opening up two seams of coal. The mines seem to be in a good mining district, favorably located with respect to railroad and switching facilities, freight rates, and car service, and the character and quality of coal producible from the mines appear to be good. In the then state of the market the royalties were reasonable. The company was, however, without means for completing development and for marketing its coal. It had given its president, George, one-half its stock as consideration for the mining leases, the cash outlay for which (made by George) seems to have been but a few hundred dollars. While the company had sold some of its remaining stock, and contracted for the sale of more, it had realized but a few thousand dollars therefrom, and was already in debt at least $8,000 on account of the development thus far had.

In this juncture it applied to Bryan G. Tighe, vice president of the Bickett Coal & Coke Company (an Illinois corporation engaged at Chicago in buying and selling coal), for a loan of $15,000, to be secured by mortgage upon all of its assets, apparently including capital stock held in the company's treasury, as well as certain private holdings of stock—the Bickett Company to be given the exclusive right for a certain period to sell the Detroit Company's output. This application fell through, partly at least from the fact that it later appeared that the Detroit Company's indebtedness was larger than at first represented, and that further development, including the building of houses for miners, required considerable additional sums of money. The result was that on April 10, 1917, the Detroit Company, through its president and vice president (its secretary attesting), made two contracts with the Bickett Company, the one called a finance contract, and the other a sales contract.

By the terms of the finance contract the Bickett Company agreed to immediately advance to the Detroit Company $8,000 to pay certain indebtedness due the railroad and other creditors, to advance within 60 days a further sum of $7,000 for operating expenses, and thereafter to make such advances as should be necessary for the proper development from time to time of the mines of the Detroit Company—all sums advanced to be repaid from the profits of the Detroit Company as rapidly as permissible. The Detroit Company, in turn, agreed to increase its capital stock to $100,000, to give Tighe 51 per cent. thereof, as fully paid and nonassessable, for his services in procuring the finance and sales contracts referred to, to cause the number of its directors to be increased from three to five (electing Tighe and Bickett—appellee's president—as directors), and to hold the necessary meetings of stockholders and directors to accomplish the changes mentioned. It was also

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agreed that George, the then president of the Detroit Company, should be elected its general manager, his management, however, to be under the supervision and direction of the president of the Bickett Company, which had the right to employ, at the expense of the Detroit Company, a mining superintendent in complete charge of all matters pertaining to the development of the Detroit Company's property, including the mining, screening, and shipping of coal.

By the terms of the sales contract the Bickett Company was given the exclusive right to sell the entire output of the Detroit Company's mines until April 1, 1920, paying therefor until April 1, 1918, $1.50 per ton, the prices for the two later years to be fixed by agreement previous to the beginning of the respective years, and in case of failure to agree upon prices the Bickett Company to receive a commission of ten per cent. on all sales made either by it or the Detroit Company (the Bickett Company agreeing only to use its best efforts to sell), the Detroit Company in such case having the right to fix prices.

These two contracts were made without previous authority from the Detroit Company's directors or stockholders, aside from its president (George), its secretary (Sohn), and its vice president (Nerny), who seem to have represented a majority of the outstanding stock. The contracts were ratified at a subsequent directors' meeting; a stockholders' meeting was called for the purpose, but failed to approve the contracts. The company's attorney, in fact, advised the stockholders that the contracts were illegal and void.

The Bickett Company, which had meanwhile advanced the entire $15,000 in the two installments specifically called for by the finance contract, filed its bill for specific enforcement of both contracts, and a temporary restraining order was issued, which later was continued until the hearing on motion for preliminary injunction; defendant being later permitted to sell its output and collect all moneys therefrom, expending it only for operation and development.

Defendant answered the injunction bill, praying its dismissal and the cancellation of both contracts, for the reasons, among others, that the contract for the issue of stock to Tighe was ultra vires and void under the Kentucky Constitution, its execution subjecting the corporation to loss of its franchise by virtue of the Kentucky Statutes; that the sales contract was unconscionable, in that the agreed price for coal was far below its then market value; and that the entire contract was unenforceable because of the fact that the consideration therefor had wholly failed, in that the Bickett Company was not obligated to furnish further moneys, except upon compliance with the stock agreements, and without such moneys being furnished defendant could not operate its business.

Pending hearing upon motion for preliminary injunction, the defendant Ford, who was vice president of the Matthew Addy Company, a coal-selling agency at Cincinnati, purchased stock in the Detroit Company. An arrangement was made by which the Matthew Addy Company was to make certain necessary advances for development and operation, and to have the exclusive contract for selling the Detroit Company's output. Thereupon the Bickett Company filed an amended bill, asserting such arrangement, actual or contemplated, and offering

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that it or Tighe would pay the Detroit Company $15,000 for the 51 per cent. of the capital stock which was to go to Tighe, and to increase the price to be paid for the coal to $1.75 per ton. This amended bill was filed with the approval of George and Nerny. The Detroit Company refused to agree to this proposed modification of the contract, and repeated its offer, formerly made (which had been accompanied by actual tender), to return to the Bickett Company all advances made by it.

Upon hearing, had largely upon affidavits filed by both parties, the court, without opinion, ordered on July 24, 1917, preliminary injunction, restraining the Detroit Company from violating either of the contracts of April 10, 1917, "as modified by the offer of the complainant" by its amended bill, as well as from entering into contracts with Ford or the Matthew Addy Company, or others, for the sale of the mine output. The appeal (which operates as a supersedeas) is from this order.

1. Since the contracts in question were made, a radical change has taken place with respect to the stockholdings in and the control and policy of the Detroit Company. George, Nerny, and Sohn, who represented that company in making the contracts, at first joined in their repudiation and in the defense thereto presented. There is testimony that George, after agreeing to sell Ford part of his stock and giving the latter proxies for voting the bulk of the remainder, contracted to sell to Bickett the bulk of his holdings at a price apparently about par. The amended bill, containing the offer to pay $15,000 for the stock and to increase the coal price, was accompanied by a letter from George recommending acceptance of the offer. Between the writing of the letter and its filing, George had been deposed from office by action of the directors, for alleged hostility to the company's interests, and Kandt was elected to succeed him. Nerny is alleged to have contracted to sell and to have delivered all of his stock to Ford in July, 1917, and the latter, who is alleged to own and to have paid for a substantial block of stock, was elected vice president. He is also treasurer. Sohn seems from the date of the stockholders' meeting to have persisted in his repudiation of the contracts. Kandt and Ford are in harmony with him. As to the effectiveness of some of the stock transfers and stock holdings, as well as to the equities and merits between the parties concerned, there is substantial controversy, and in one or more cases litigation pending; but we need not concern ourselves with these considerations, for their subject-matter was at most addressed only to the exercise of discretion on the part of the District Judge, in granting preliminary injunction.

2. There is persuasive testimony tending to show that the coal price fixed in the sales contract was at the time unconscionably low, including testimony from apparently competent and disinterested witnesses to the effect that at the date the contracts were executed (which was but a very few days after the United States entered the war) the market price of coal in the district in question ranged from $2.50 to $4 per ton, that a fair average price on a yearly contract basis was within about the same range, and that there was no room for profit in mining coal at $1.50 per ton. On the other hand, there was testimony, on the part

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at least of the Bickett Company's representatives, that coal at the mines in question could have been mined and loaded on cars at 95 cents per ton.

If, however, the contract were otherwise valid and specifically enforceable, we should probably not be disposed, on the score of unconscionable coal price, to interfere with the discretion of the District Judge in granting preliminary injunction, especially in view of the Detroit Company's pressing need of financial assistance, the possible lack of certainty at the time that the existing high prices would be maintained throughout the year, the fact that the year for which the price was fixed has now elapsed (prices for the further period being subject to readjustment), and the ability of the court, on final hearing, to effect substantial justice.

[1] 3. The question, however, of the validity of the contract giving Tighe 51 per cent. of the Detroit Company's capital stock for negotiating the two contracts presents other considerations; for if the contract was, as matter of law, invalid and unenforceable, there was no room for the exercise of discretion in granting the injunction. Section 193 of the Constitution of Kentucky provides that:

"No corporation shall issue stocks or bonds except for an equivalent in money paid or labor done, or property actually received and applied to the purposes for which such corporation was created, and neither labor nor property shall be received in payment of stocks or bonds at a greater value than the market price at the time such labor was done or property delivered, and all fictitious increase of stock or indebtedness shall be void."

This constitutional provision is re-enacted by section 568 of the Kentucky Statutes. In Altenberg v. Grant, 85 Fed. 345, 29 C. C. A. 185, this court, in an opinion by Judge Taft, construed this constitutional provision as forbidding the issue of stocks and bonds in exchange for work or property except "when the market price of the labor or property shall be equal to the par value of the bonds or stock exchanged," expressly rejecting the contention that the purpose of the section is fulfilled "if it appears that the work done or property delivered is equal to" the market price of the stock to be issued. This decision has never been overruled or criticized in this court, nor has it been criticized by the Court of Appeals of Kentucky, which, so far as we are advised or have been able to find, has never passed upon the specific provision of the section involved here.[1] We approve of and adhere to this decision.[2]

[1] Reference to the section was made by the Court of Appeals of Kentucky in Clarke v. Lexington Stove Works, 72 S. W. 286, 288.

[2] Altenberg v. Grant is distinguished from Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227, by the fact that the Constitution of Kentucky in question was adopted after the decision in the latter case; the former Constitution and statutes containing no provision of that nature. It is distinguished from Clark v. Bever, 139 U. S. 96, 11 Sup. Ct. 468, 35 L. Ed. 88, in the fact that the Iowa statute there involved differed materially from the Kentucky Constitution and Statutes. The provision of the New York Stock Corporation Law involved in Morgan v. Bon Bon Co., 222 N. Y. 22, 118 N. E. 205 (cited by appellee), is distinguished from the provisions of the Kentucky Constitution by what is said in Altenberg v. Grant, 85 Fed. at page 346, 29 C. C. A. at page 186. The latter case is cited with apparent approval in Granite Brick Co. v. Titus (C. C. A. 4) 226 Fed. 557, 567, 141 C. C. A. 313, 323.

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[2] Section 569 of the Kentucky Statutes makes express provision for the forfeiture of the charter of a corporation for "abuse or misuse of its corporate powers, privileges or franchises." We are thus clearly bound to hold (even assuming that the contract was otherwise fair enough) that it was not only the right, but the duty, of the Detroit Company to refuse to carry out the stock provision in question. The Detroit Company could not with safety carry it out, even with the approval of a majority of its stockholders; for the record will not sustain an inference that the value of Tighe's services, in negotiating the two contracts between the Detroit Company and the company whose officer he was, equaled $51,000, or anything like that sum; and were we to assume that his services were worth the then market value of the stock to be given to him, it would not help appellee. Nor does appellee's offer, pending litigation, to give $15,000 additional for the stock, help the situation, not only for the reason that, if the contract was in violation of the Constitution of the state when made, it could not be validated by a rejected offer, made pending litigation, to pay even an adequate price, for courts cannot compel parties to make contracts, but for the further reason that the record is equally barren of basis for a conclusion that Tighe's services, plus $15,000, equaled $51,000; in other words, that his services in obtaining the two contracts in question were worth $36,000. The instant case presents peculiar hardship in the fact that Tighe is given, by the provision we are considering, a clear majority of the stock of the Detroit Company, thus enabling an absolute control of the policy and operation of that company, even after the expiration of the sales contract.

[3] Appellee contends, however, that the stock provision is separable from the other provisions of the contract, and that the remaining provisions can be specifically enforced. We cannot assent to this proposition. The finance contract and the sales contract are interdependent and are interwoven; a substantial consideration for the making by the Detroit Company of each of the contracts was appellee's agreement to furnish money for development and operation. Without such assistance from some quarter the Detroit Company could not have developed and operated its mines, and could not have carried out the sales contract. Had appellee offered to cancel the stock provision and to carry out the contract in every other respect, including the making of advances, a different case might be presented. But no such offer or suggestion has been made, and it cannot be assumed that without the stock provision appellee would have been content to make the advances, relying only upon the security of the Detroit Company's ability to make repayment out of profits.

For the reasons stated in the third paragraph of this opinion, the order for preliminary injunction is reversed, with costs, and without considering the question of adequate remedy at law or other defenses urged.

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DEVIL'S DEN CONSOL. OIL CO. v. UNITED STATES.
LOST HILLS MINING CO. et al. v. SAME.

(Circuit Court of Appeals, Ninth Circuit. July 1, 1918.)

Nos. 3094–3096.

1. MINES AND MINERALS ⟸38(2)—MINING CLAIMS—SUIT BY UNITED STATES TO CANCEL CLAIM.

The public lands being under the control of the Land Department, including a bureau headed by the Commissioner of the General Land Office, to whom, as a special tribunal with quasi judicial powers, Congress has confided the execution of laws for the sale and disposal of public lands, where a patent for mineral and oil lands has been applied for, and charges of fraud are under investigation, pending action upon the application, the courts are without jurisdiction to determine the rights of claimants in possession as against the United States.

2. MINES AND MINERALS ⟸38(7)—MINING CLAIMS—SUIT BY UNITED STATES FOR CANCELLATION—RECEIVER.

Bill by the United States, alleging that defendants wrongfully entered into and held possession of mineral and oil lands belonging to the United States, setting up fraud in the entry, but failing to show that any proceeding was pending in the land office to determine the right of defendants to the lands, was insufficient to warrant appointment of receiver by the court, pending the determination on the application for patent.

Appeal from the District Court of the United States for the Northern Division of the Southern District of California; Robert S. Bean, Judge.

Three suits in equity by the United States against the Devil's Den Consolidated Oil Company, against the Lost Hills Mining Company, and against the Universal Oil Company. From orders granting motions for the appointment of receivers (236 Fed. 973), the defendants appeal. Cases remanded, with directions, and orders affirmed, on condition that amendments be filed; otherwise, reversed, with directions to dismiss the bills.

These cases were heard together in the court below and have been argued and submitted together here. They are, in the main, alike, the real issues being substantially the same; but there are some differences, which will be pointed out. They are cases of great importance, not only by reason of the questions involved, but also because the lands in controversy are oil-producing in large quantities, and hence of great value. That the lands are mineral in character is shown, and it is conceded that the legal title thereto is in the United States, and that the defendants to the respective suits were at the time of their commencement in possession of the lands respectively involved in them, and were at the time extracting oil therefrom. In such circumstances the government instituted the suits, and, among other things, prayed for the appointment of a receiver in each of them, which applications the court below granted, and from which orders the present appeals were taken. The evidence upon which the orders were based has by stipulation of the parties been printed only in the record of case No. 3095. We therefore make reference to that record, as have the respective counsel in their arguments and briefs, noting only the differences that have been referred to.

In its bill in case here numbered 3095 the government alleged that on and before September 27, 1909, the lands involved, to wit, the northwest quarter and the southeast quarter of section 30, and all of section 32, of township 26 south, range 21 east, Mt. Diablo meridian, were parts of the public domain, of which the United States has ever since been the owner and en-

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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titled to the possession, including all oil, petroleum, gas, and other minerals therein contained; that on the said 27th day of September, 1909, the President, under the authority legally vested in him, withdrew and reserved the said described tracts, together with other lands, from mineral exploration and from all forms of location, occupation, entry, or disposal under any law of the United States; that nevertheless, and in violation of law and of such action of the President, the defendants Lost Hills Mining Company and Universal Oil Company entered upon and took possession of the said specifically described tracts, "long subsequent to the 27th day of September, 1909, but not prior thereto, for the purpose of prospecting and exploring for petroleum and gas therein, and did so prospect and explore long subsequent to the date on which said lands were withdrawn, as hereinbefore mentioned, by said withdrawal order of September 27, 1909."

The bill also alleges that none of the defendants had discovered petroleum, gas, or other minerals in the lands before their withdrawal, and that neither of them, nor any one under whom they claim, was at the date of such withdrawal a bona fide occupant or claimant of any of the land, or in the diligent prosecution of work leading to the discovery of oil or gas therein, and that neither of them, after the dates of their respective alleged entry thereon, "and after beginning the prosecution of the work of drilling for oil and gas, in violation of the order of withdrawal of September 27, 1909, continued in the diligent prosecution of such work till oil or gas was discovered"; that long after the withdrawal of the lands as alleged, "to wit, on the 29th day of July, 1910, and not before that date, as plaintiff is informed and believes," the defendant Lost Hills Mining Company discovered petroleum therein, and since that date it and the defendant Universal Oil Company have drilled numerous wells thereon, and have, in violation of the rights of the complainant, and to its great and irreparable damage, and to the great and irreparable injury to the said described lands and other lands of the government, extracted therefrom large quantities of petroleum and gas, the exact amount and value of which the complainant is unable to state, all of which the defendants have sold and converted to their own use; that the said named defendants are continuing to unlawfully extract such oil and gas, to the irreparable injury of the lands, and that each of them "claims some right, title, or interest to said land, or some part thereof, or in the petroleum or gas extracted therefrom, or in or to the proceeds arising from the sale of such petroleum, or through and by purchase thereof, and each of said claims is predicated upon, or derived directly or mediately from, some pretended notice or notices of mining locations, or otherwise, and by conveyances, contracts, or liens directly or mediately from the persons by whom such pretended locations are claimed to have been made. But none of such location notices and claims is valid against this plaintiff, and no rights have accrued to the defendants or any of them thereunder, either directly or mediately, nor have any minerals been discovered on said land, except as hereinbefore stated; but said claims are asserted to cast a cloud upon the title of the plaintiff herein, and wrongfully interfere with its operation and disposition of said land, to the great and irreparable damage of said plaintiff, and to the great and irreparable injury of said land, and the plaintiff herein is without redress or adequate remedy save by this suit, and this suit is necessary to avoid a multiplicity of actions."

The next allegation of the bill is as follows: "Except as in this bill stated, the plaintiff has no other knowledge or information concerning the nature of any other claims asserted by the defendants herein, or any of them, and therefore leaves said defendants to set forth their respective claims and interests. In that behalf plaintiff alleges, because of the premises of this bill, that none of the defendants has or ever had any right, title, or interest in or to, or any lien upon, said land or any part thereof, or any right, title, or interest in or to the petroleum, mineral oil, or gas deposited therein, or any right to extract petroleum, gas, or other minerals from said land, or to convert or dispose of the petroleum or gas so extracted, or any part thereof; on the contrary, the acts of these defendants who have entered upon said lands and drilled oil and gas wells thereon, and used and appropriated the petroleum deposited therein, and assumed to sell and convey any interest in

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or to any part of said lands, or any part of the petroleum extracted therefrom, were all in violation of the laws of the United States and of the aforesaid order of withdrawal, and all of said acts are in violation of the rights of the plaintiff herein, and such acts interfere with the execution by the plaintiff of its public policies with respect to said lands and the petroleum and gas therein as hereinbefore set forth."

After alleging the value of the lands involved in the suit to exceed $1,000,000, the prayer is in substance that the defendants and each of them be required to disclose and state their respective claims; that they and each of them be adjudged to have no estate, right, title, or interest in any of the lands involved, or in the contents thereof, and that all of the said property be decreed to be the property of the complainant, free and clear of any claim on the part of either of the defendants; and that all of them be enjoined from asserting any right, title, interest, claim, or lien on any of the said property, and that each of them, and all of their officers, agents, servants, and attorneys, during the progress of the suit, and thereafter, finally be enjoined from going upon any portion of the said land in controversy, and from in any manner using or extracting therefrom any of its contents, and from in any manner committing any trespass or waste thereon, and for an accounting and for the appointment of a receiver to take possession of all of said specifically described land, and of all wells and other property thereon, "with full power and authority to continue the operations on said land in the production and sale of petroleum and other minerals, where such course is necessary to protect the property of the complainant against injury and waste, and for the preservation, protection, and use of the oil and gas in said land, and the wells, derricks, pumps, tanks, storage vats, pipes, pipe lines, houses, shops, tools, machinery, and appliances being used by the defendants, their officers, agents, or assigns, in the production, transportation, manufacture, or sale of petroleum or other minerals from said land or any part thereof, and that such receiver may have the usual and general powers vested in receivers or courts of chancery."

Subsequently the bill was so amended as to describe the lands involved as the northwest quarter and the southeast quarter of section 30, and the northeast quarter and west half of section 32, all in township 26 south, of range 21 east, Mt. Diablo meridian.

The answer of the defendants, after specifically denying various allegations of the bill, set up as a further and separate defense that on the 13th day of February, 1907, eight specifically named individuals, all of whom it alleged were then citizens of the United States, entered upon and took possession of the northwest quarter of the said section 30, and duly located the same under the laws of the United States relating to placer mining claims, a notice of which location was thereafter duly filed in the office of the recorder of the county in which the land is situated, since which time the said piece of land has been in the actual, peaceable, open, notorious, continuous, exclusive and undisputed possession of the defendant Lost Hills Mining Company and its predecessors in interest, the aforesaid locators, and that during each year since its location more than $100 has been expended in its development, and that during all of the said time the said defendant and its predecessors in interest were in the diligent prosecution of work leading to the discovery of oil thereon, and which actually resulted in the discovery of oil by means of a well drilled at the cost of over $5,000, which produced at least 200 barrels per day; that the said defendant and its predecessors in interest also discovered upon the said land extensive and valuable deposits of gypsum, of good commercial quality, that has been opened up and developed at an expense of over $600, and that prior to and on the date of the order of withdrawal made by the President, and prior to and at the time of the passage of the act of Congress of June 25, 1910, known as the Pickett Act (36 Stat. 847, c. 421 [Comp. St. 1916, §§ 4523–4525]), and ever since and continuously, the said defendant has been and now is a bona fide occupant and in the exclusive possession of the said piece of land under a bona fide claim thereto by virtue of the said location and work and that long prior to the commencement of the suit the said defendant made due application in the proper land office of the United States for

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a patent to the said piece of land, pursuant to the provisions of the Revised Statutes, and that after due proceedings had in the land office, as specifically set out in the answer, the said defendant was by the officers of the local land office allowed to purchase the said piece of land, and paid therefor the full price fixed by law therefor, receiving the receipt in duplicate of the receiver, numbered 679,643, and dated February 24, 1912, whereupon the register and receiver allowed the entry and forwarded one of the duplicate receipts with the entire record, to the Commissioner of the General Land Office for his examination and approval; that subsequently, and pending the application for the patent, charges on the part of the government were filed in the General Land Office, based upon the grounds of a lack of diligent work on the part of the applicants looking to the discovery of oil, and upon the alleged lack of discovery within the proper time, and in cases Nos. 3095 and 3096 on a lack of good faith respecting the claim to the discovery of gypsum, and in case No. 3094 on the further ground of a lack of good faith on the part of the locators of the ground involved in that case.

Similar proceedings are alleged respecting the other pieces of land involved in cases 3095 and 3096, except that in case numbered 3096 the bill alleged that the application for patent to the land therein involved was not filed in the local land office until about 25 days after the commencement of the suit, and that, the statutory time for advertising not having passed, no receiver's receipt had then been issued, and in case No. 3094 the bill makes no reference to gypsum. The answers in the several cases further pleaded a lack of jurisdiction in the court to try and determine the matters alleged in the bills of complaint, or the title to the lands therein described, or the right of the defendants to their contents.

On the hearing of the applications for the appointment of a receiver in the several cases, a large amount of evidence was introduced, both on the part of the government and the defendants to the suits, including copies of all of the proceedings in the Land Department relating to the applications for patents, and showing that those proceedings are still pending and undetermined in the Land Department, although partly there heard upon evidence of the respective parties, which evidence remains unconcluded—respecting which pending proceedings there was entered into between the respective parties a stipulation which is in part as follows:

"The following facts, data, and documents hereto attached and made a part of this stipulation are hereby stipulated, by and between the respective counsel in the above-entitled action, to be correct copies of the originals, and that the copies of any documents hereto attached are to be taken the same as if the originals were hereto attached. It is furthermore stipulated that, upon any proceedings in the above-entitled action in court, the facts, matters, data, and documents hereto attached, and which are stipulated to be correct and true copies of the originals, may be introduced by either party the same as if the originals were offered, and with the same force and effect thereof, but subject to objections of counsel as to their relevancy and materiality. Attached hereto, and marked 'Exhibit A,' and made a part of this stipulation, is a copy of all the papers filed by the Lost Hills Mining Company, one of the defendants herein, in mineral entry No. 03431, upon the application of said company for a patent covering the northwest quarter (N. W. ¼) of section thirty (30), in township twenty-six (26) south, range twenty-one (21) east, M. D. B. & M., Kern county, California containing one hundred and sixty (160) acres. Attached hereto and marked 'Exhibit B,' and made a part of this stipulation, is a copy of all of the papers filed by the Lost Hills Mining Company, one of the defendants herein, in mineral entry No. 03432, upon the application of said company for a patent covering the southeast quarter (S. E. ¼) of section thirty (30) in township twenty-six (26) south, range twenty-one (21) east, M. D. B. & M., Kern county, California, containing one hundred and sixty (160) acres. Attached hereto, and marked 'Exhibit C', and made a part of the stipulation, is a copy of all of the papers filed by the Lost Hills Mining Company, one of the defendants herein, in mineral entry No. 03457, upon the application of said company for a patent covering the northeast quarter (N. E. ¼) of section thirty-two (32), in township twenty-six (26) south, range

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twenty-one (21) east, M. D. B. & M., Kern county, California, containing one hundred and sixty (160) acres. Attached hereto and marked 'Exhibit D,' and made a part of this stipulation, is a copy of all of the papers filed by the Lost Hills Mining Company, one of the defendants herein in mineral entry No. 03459 upon the application of said company for a patent covering the southwest quarter (S. W. ¼) of section thirty-two (32), in township twenty-six (26) south, range twenty-one (21) east, M. D. B. & M., Kern county, California, containing one hundred and sixty (160) acres. Attached hereto, and marked 'Exhibit E' and made a part of this stipulation, is a copy of all the papers filed by the Lost Hills Mining Company, one of the defendants herein, in mineral entry No. 03448, upon the application of said company for a patent covering the northwest quarter (N. W. ¼) of section thirty-two (32), in township twenty-six (26) south, range twenty-one (21) east, M. D. B. & M., Kern county, California, containing one hundred and sixty (160) acres.

"It is furthermore stipulated that the following is a true and correct copy of a letter of the Commissioner of the General Land Office, dated Washington, November 29, 1915, clear-listing the southeast quarter (S. E. ¼) of section thirty-two (32), township twenty-six (26) south, range twenty-one (21) east, M. D. B. & M., containing one hundred and sixty (160) acres, Kern county, California. * * *" The letter of the Commissioner referred to in the stipulation was addressed to the Chief of Division N, and is in part as follows: "Sir: December 2, 1911, the Lost Hills Mining Company made mineral application No. 03458 for the Fog Horn placer mining claim, embracing the S. E. ¼ of section 32, township 26 south, R. 21 E., M. D. M. The said land was included in petroleum reserve No. 13, by executive order of October 7, 1910. No other existing withdrawals affect this land. There has been received in the record reports by special agents and a mineral inspector of this office, in which it is shown that the tract is petroleum bearing in character, and has been developed to a state of high production of this mineral. The claim was located February 14, 1907, by O. D. Barton, W. B. Wallace, Sarah McCord, C. A. Butts, Hugh McPhaill, A. Levis, R. C. Hardin, and A. H. Murry, Jr. At the same time these persons, with 28 others, also located some 22 other tracts in the vicinity. Some two years or more after location the said locators organized the Lost Hills Mining Company, a corporation, the present applicant. The several locations were transferred to the said corporation, each interested person receiving his proportionate share of the stock issued. It thus appears that there exists no reason for questioning the good faith and regularity of the said Fog Horn location. * * *"

It was that quarter section, thus clear-listed by the Commissioner, that was dropped from the bill of complaint by the amendment thereto that has been mentioned.

Joseph D. Redding, Morrison, Dunne & Brobeck, and Oscar Sutro, all of San Francisco, Cal., for appellant.

Robert O'Connor, U. S. Atty., of Los Angeles, Cal., and Henry F. May and Frank Hall, Sp. Asst. Attys. Gen., both of San Francisco, Cal.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). [1] The court below held that it had jurisdiction, during the pendency of the applications for patents in the Land Department, to determine whether those proceedings were fraudulent and unlawful, and, if so, to annul by its judgment any and every interest in the property and in its contents claimed by the applicants, saying in its opinion:

"It is insisted, however, that as the applications for patents are now pending and undetermined in the Land Department the court will not assume jurisdiction, even if such applications are fraudulent and unlawful, until they are finally disposed of by the department. The Land Department is vested, conformably to the acts of Congress, with the exclusive jurisdiction to de-

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termine the rights of claimants to public lands, and until it has exhausted its jurisdiction by the issuance of a patent a court will not assume to determine which of two rival claimants is entitled to the property. Johnson v. Towsley, 13 Wall. 72, 20 L. Ed. 485; Marquez v. Frisbie, 101 U. S. 473, 25 L. Ed. 800. But the government is not an adverse party to a proceeding to acquire title to its property, nor is the Land Department a tribunal to which it must submit its rights, or litigate with one who has taken possession of its property or has attempted to acquire title thereto. The notice required by statute of an application for patent to a mining claim is designed and intended to cut off the rights of private claimants, and not the government of the United States. It is given in order that all persons having adverse claims may be heard in opposition to the issuance of the patent. But (section 2325, R. S. [Comp. St. 1916, § 4622]), 'If no adverse claim shall have been filed it shall be presumed that no adverse claim exists, and thereafter no objection from third persons to the issuance of patent shall be heard, except it be determined that the applicant has failed to comply with the terms of this chapter.' If, however, an adverse claim is filed during the period of publication, the adverse claimant is required by section 2326 (Comp. St. 1916, § 4623) to commence within 30 days thereafter proceedings in a court of competent jurisdiction to determine the same, thus clearly showing that the purpose of the statute is to make the proceeding binding on private parties and not the government.

"There is no reason to be found in the relation of the government to such a proceeding which will deprive it of the same right to relief, if the proceedings are fraudulent or unlawful, as an individual would have in regard to his own contract procured under similar circumstances. Indeed, there are reasons why it should not be denied the right to invoke the aid of a court by the mere receipt and acceptance of an application for a patent and the purchase price by an officer of the local land office; for, as said by Mr. Justice Miller in United States v. Minor, 114 U. S. 233, 5 Sup. Ct. 836, 29 L. Ed. 110: 'In nine cases out of ten, perhaps in a much larger percentage, the proceedings are wholly ex parte. In the absence of any contesting claimant for a right to purchase or secure the land, the party applying has it all his own way. He makes his own statement, sworn to before those officers, and he produces affidavits. If these affidavits meet the requirements of the law, the claimant succeeds, and what is required is so well known that it is reduced to a formula. It is not possible for the officers of the government, except in a few rare instances, to know anything of the truth or falsehood of these statements. In the cases where there is no contesting claimant, there is no adversary proceeding whatever. The United States is passive; it opposes no resistance to the establishment of the claim, and makes no issue on the statement of the claimant. When, therefore, he succeeds by misrepresentation, by fraudulent practices, aided by perjury, there would seem to be more reason why the United States, as the owner of land of which it has been defrauded by these means, should have remedy against that fraud—all the remedy which the courts can give—than in the case of a private owner of a few acres of land on whom a like fraud has been practiced.' I am of the opinion, therefore, that the court has jurisdiction to try the questions involved in these cases."

We are unable to sustain that position of the learned judge, and are of the opinion that the case cited in support of it—United States v. Minor, 114 U. S. 233, 5 Sup. Ct. 836, 29 L. Ed. 110—in no respect does so. That was a suit brought by the government to annul a patent it had issued for land, on the ground of fraud practiced in the procurement of its issue—a wholly different question, and one upon which the authorities are practically all one way. Among the very numerous cases upon the subject, see Johnson v. Towsley, 13 Wall. 72, 83, 20 L. Ed. 485; Steel v. St. Louis Smelting Co., 106 U. S. 447, 1 Sup. Ct. 389, 27 L. Ed. 226; Marquez v. Frisbie, 101 U. S. 473, 25

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L. Ed. 800; United States v. Schurz, 102 U. S. 378, 26 L. Ed. 167; Cosmos Exploration Co. v. Grey Eagle Co., 190 U. S. 301, 315, 23 Sup. Ct. 692, 24 Sup. Ct. 860, 47 L. Ed. 1064; United States v. Detroit Timber & Lumber Co., 200 U. S. 321, 26 Sup. Ct. 282, 50 L. Ed. 499; Love v. Flahive, 205 U. S. 195, 27 Sup. Ct. 486, 51 L. Ed. 768; Garfield v. United States, 211 U. S. 264, 29 Sup. Ct. 67, 53 L. Ed. 176. Here, however, the charges of fraud complained of were made in the course of the proceedings in the Land Office, are there pending and under investigation, and are as yet undetermined. Nothing in our public land laws is more firmly settled than that the sale and disposal of the public lands has been placed by statute under the control of the Land Department, at the head of which is the Secretary of the Interior, and which includes a bureau headed by the Commissioner of the General Land Office, to whom, as a special tribunal with quasi judicial powers, Congress has confided the execution of the laws which it has enacted for the sale and disposal of the various kinds of public lands. As was said in Cosmos Exploration Co. v. Grey Eagle Oil Co. (C. C.) 104 Fed. 20, no court can lawfully anticipate what the decision of that department may be in respect to any contest arising before it, nor direct in advance what its decision should be, even in matters of law, much less in respect to matters of fact. After, however, the proceedings in the Land Department have come to an end by the issuing of the government title, that the courts are open for the control of such title, either by the government, in the event that its title has been procured either by fraud or in any other illegal way, or at the suit of any private party equitably entitled thereto, is established by almost innumerable decisions, some of which are cited above.

[2] The court below further said in its opinion, to which reference has been made, that if it was wrong in its view as to its power to determine the rights of the applicants for the patents pending the proceedings therefor in the Land Department, it was nevertheless of opinion that the government was clearly entitled, upon the allegations of the bills and the showing made, to the protection by the court of the property involved from waste and destruction pending the final determination of its rights in the Land Department. Based upon a sufficient bill, we quite agree that a court of equity has such power, and that it is its duty to exercise that power. This court so held in El Dora Oil Co. v. United States, 229 Fed. 946, 144 C. C. A. 228; but in the instant cases the bills are not based upon any such power of the court, and there is not only no allegation, but not even a reference in either of the bills, regarding any proceeding in the land office respecting the lands in question. On the contrary, the bills, as will have been seen from the statement of the case, make the very astonishing allegation that:

"Except as in this bill stated, the plaintiff has no other knowledge or information concerning the nature of any other claims asserted by the defendants herein, or any of them, and therefore leaves said defendants to set forth their respective claims and interests."

In considering a similar question in the case of Cosmos Exploration Co. v. Grey Eagle Oil Co., supra, 190 U. S. 315, 23 Sup. Ct. 692, 24 Sup. Ct. 860, 47 L. Ed. 1064, the Supreme Court said:

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"The bill is not based upon any alleged power of the court to prevent the taking out of mineral from the land, pending the decision of the Land Department upon the rights of the complainant, and the court has not been asked by any averments in the bill, or in the prayer for relief, to consider that question. For the reasons stated, we think the bill does not state sufficient facts upon which to base the relief asked for, and that the defendants' demurrer to the same was properly sustained."

In subsequently modifying, on petition, its judgment of affirmance in that case, the court directed that the decree dismissing the bill be modified, "without prejudice to such future proceedings as complainant may be advised," and that, as so modified, it should stand affirmed. While, for the reasons already stated, we are of the opinion that the court below was and is without power to determine the rights of the appellants in or to the lands in question, or their contents, pending the determination thereof by the Land Department, or in any way to forestall the latter's decision thereof, and that the allegations of the bills—which are, in effect, mere suits to quiet the complainant's title to the lands, and to enjoin the defendants thereto from committing trespass and waste thereon, and for the appointment of a receiver of the property pending the litigation—are insufficient, as they stand, to sustain the appointment of a receiver in view of the facts set up in the answers and shown in the proofs, yet in view of those averments, and of those facts, we have no doubt of the jurisdiction of the court to protect the property in question from waste and its contents from appropriation by the appellants, pending the determination of their alleged rights thereto by the appropriate tribunal—the latter obviously having no power to afford such protection—and that, upon so amending the bills in the court below as to conform to the proofs made, the possession of the property by the court below through its receivers, pending the proceedings in the Land Department, should be continued.

The cases are therefore remanded, with directions to the court below to permit the bill in each case to be so amended within a reasonable time, to be fixed by the court, as to conform to the proofs, the order appealed from in each case to stand affirmed upon the filing of such amendment; and in the event of the failure of the complainant to so amend the bills, or either of them, such order as to which such failure shall occur to stand reversed, with directions to dismiss such bill—neither party to recover costs of these appeals.

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GOODE v. OCEANIC STEAM NAV. CO., Limited.

(Circuit Court of Appeals, Second Circuit. April 10, 1918.)

No. 183.

1. APPEAL AND ERROR ⊜1008(1)—REVIEW—FINDINGS.
A finding of the trial court as to the size and age of a seaman, who testified at the hearing on a libel in personam for personal injuries, will be deferred to on appeal.

2. SHIPPING ⊜166(1)—PASSENGERS—NEGLIGENCE.
Where a woman passenger fell in stepping from the platform of a ship's companionway into a lifeboat, though both the ship and boat were practically motionless, *held*, that failure to place a seaman in the boat, or to provide the platform with devices to be grasped, was not negligence; nor was it negligence for a seaman, who steadied the passenger when she began the step, to let go before she placed her foot on the thwart of the lifeboat.

3. SHIPPING ⊜166(1)—PASSENGERS—CARE.
If a woman passenger, whose appearance did not indicate that she was unable to control her balance as a normal person, desired extra assistance in stepping from a companionway of a ship into a lifeboat, the ship and boat being practically motionless, she should request additional assistance.

Rogers, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Southern District of New York.

Libel by Mabel E. Goode against the Oceanic Steam Navigation Company, Limited. From a decree for respondent, libelant appeals. Affirmed.

Appeal from a decree of the District Court for the Southern District of New York (Hough, C. J., presiding), dismissing a libel in personam. The libel was filed November 6, 1916, to recover for personal injuries suffered on board the respondent's ship Laurentic on January 13, 1913, while in the harbor of Havana. The libelant was a passenger on board the Laurentic on a pleasure trip in the West Indies. The vessel had stopped in the harbor of Havana, and the passengers were offered an opportunity to make what was known as the New Castle trip, going ashore in lifeboats towed by a launch. A companionway was put over the starboard side of the Laurentic running aft, at the base of which was a platform some 2½ or 3 feet square, on each side of which there was a rope, except at an open side leading to the lifeboat. The lifeboat was held by one man on either end close up to the side of the platform. Some question is made whether the gunwale, 3 or 4 inches wide, was on a level with the platform or a few inches higher. The passengers stepped from the platform onto the seat or thwart of the lifeboat, which was 12 or 15 inches wide and about 6 inches below the level of the gunwale. At the bottom of the boat there were thwartship ribs.

Before the plaintiff, who was in the company of her husband, came down the companionway, about 25 people had already seated themselves in the boat, which was stiff; there being little or no motion in the harbor on that day. Havana is a nearly land-locked harbor, with a rise and fall of the tide of less than one foot. On either side of the platform stood two seamen of the ship, whose age and size is in some dispute. As the libelant, who came down the companionway, turned to her left and was about to step from the platform into the lifeboat, the seaman on her right took her under the arm to assist her in her step. She lifted up her foot and was about to step down when the seaman, supposing that she was already in safety, withdrew his hand and she lost her balance. Her foot slipped upon the thwart and

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she fell into the bottom of the boat, a distance of some inches, spraining her ankle upon one of the ribs, and causing the injuries in question. The platform itself was supported from the ship by a chain and bridle to support either side. There were iron uprights or stanchions 3½ to 4 feet high on either end, within reach of the libelant as she took the step. At the time she was a woman in good health, 40 years old, and weighing about 170 pounds.

The charges of fault are in failing to provide upon the platform a rope or other contrivance by which the libelant could assist herself in stepping into the lifeboat, in not providing a man in the lifeboat, and in stationing a person of insufficient strength to help her down, who carelessly let go his hold of her when she was in the act of stepping.

Abbott & Coyne, of New York City (B. B. Coyne, of New York City, of counsel), for appellant.

Burlingham, Montgomery & Beecher, of New York City (Morton L. Fearey, of New York City, of counsel), for appellee.

Before WARD and ROGERS, Circuit Judges, and LEARNED HAND, District Judge.

LEARNED HAND, District Judge (after stating the facts as above). We see no possible ground for negligence in this case, unless it be the act of Reilly, the seaman who helped the libelant into the boat. There was certainly no reason to have a seaman in the boat itself. The passengers were none of them decrepit or infirm; the step was an easy one, at most only 6 inches deep; the lifeboat had no motion, or substantially none; the libelant was a woman in the prime of life and vigor, apparently in no need of assistance. We cannot see that such a situation required more than the two men who were to help the passengers into the lifeboat. The situation is quite different from that of a boat in motion alongside a steamer.

[1] We accept the opinion of the District Judge that the person who helped the libelant in was Reilly, a seaman 30 years old, weighing about 170 pounds. He saw Reilly and the libelant, and his judgment is better than ours as to which is correct as to the identity of this seaman, and whether he was a young boy 16 years old or not. It is true that the District Judge tried the case in part upon depositions, but we cannot agree with the libelant's position that for that reason the finding as to those witnesses whom he did see was not better than ours can be, who have only the written depositions as to all.

[2, 3] It is substantially conceded that the cause of the libelant's misstep was Reilly's failure to keep hold of her until her foot had actually reached the thwart, or until she had become firmly planted. But this does not seem to us sufficient evidence of negligence. The case turns precisely upon the question whether Reilly should have apprehended that the libelant would rely upon his support for so long as she in fact did. It seems to us in common experience that, in steadying a woman who is making a step under these circumstances, one does not ordinarily keep the support until her foot actually reaches the lower step, particularly where the step, as here, was only 6 inches, no more than, if as much as, the ordinary riser of a staircase. The purpose is to insure the balance of the person assisted until the weight of the body has begun to leave the leg which remains on the

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higher step and has begun to fall, so as to be caught by the lower foot. Only in the case of decrepit persons, whose balance in landing is doubtful, do we think it necessary that the support should be kept until the foot has been steadied upon the lower step. We agree with the District Court that Reilly took the usual course with persons who are apparently strong and able to take care of themselves. There is no suggestion in the record that the libelant in appearance was unwieldy or incapable of managing her weight. It is true this was considerably above the average, but that did not indicate that she could not control her balance as normal people ordinarily do. We think that, if her control was not that of the ordinary person, it was incumbent upon her to ask for the extra assistance, which was not otherwise indicated.

Finding no negligence, the decree will be affirmed, with costs.

ROGERS, Circuit Judge. I dissent. I agree that the only possible ground for negligence is in the act of Reilly, a seaman, employed by the defendant and stationed by it to help the libelant into the boat. The majority opinion concedes that the cause of the injury was Reilly's failure to keep hold of the libelant until her foot had become firmly planted on the thwart or seat of the boat. In that I also concur. But I am not able to agree that Reilly was not guilty of negligence in withdrawing his assistance before the woman was securely established in the boat. If he had not undertaken to render any assistance, the libelant might have gotten along very well. But when he undertook to render assistance, he was under obligations not to withdraw it until she was safely within the boat.

In Hanlon v. Central R. R. Co. of New Jersey, 187 N. Y. 73, 79 N. E. 846, 10 L. R. A. (N. S.) 411, 116 Am. St. Rep. 591, 10 Ann. Cas. 366, the facts were somewhat analogous to the case at bar. The plaintiff was a passenger on the defendant's railroad, had arrived at her destination, and while stepping from the car to the station platform was injured by falling to the ground. As she was in the act of descending the car steps, the train conductor reached out his hand to help her, taking her arm by the elbow. Before she had placed her foot on the platform he withdrew the support of his hand, and she fell between the platform and the car. She obtained a verdict, which the Court of Appeals unanimously affirmed. The opinion, which was written by Judge Gray, states that:

"It [the railroad company] was not bound to furnish her any personal assistance in leaving the car; for she was, so far as the case shows, in the possession of her faculties and of good health, and was capable of moving about alone. There was nothing defective about the car platform or steps. The conductor of the train stood there, however, and voluntarily undertook to guide and to support her in descending from the car. * * * I think we must reach the conclusion that, while the defendant was under no obligation to supply the aid of a servant in assisting the plaintiff to descend from the car, yet, as the conductor undertook to do so, she had the right to rely upon that official's careful performance of his undertaking, and to hold the defendant responsible for any failure on his part to use reasonable care."

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The case at bar is a much stronger case than the one before the New York Court of Appeals, for certainly it was a much less hazardous enterprise for a woman to alight from the steps of a railroad car to the station platform than for her to descend from a steamship into a lifeboat, the gunwale of which was a couple of inches above the platform. The lifeboat is described as big and wide and having seats on which four men could sit. The passengers were to be taken ashore in lifeboats; the boats being in the harbor of Havana and more or less disturbed by the ordinary roll of the sea. I am unable to distinguish this case in principle from the New York case, and so I am of the opinion that the decree appealed from should be reversed, and the cause remanded, with instructions to enter a decree in favor of the libelant for such damages as this court should determine she is entitled to upon the record.

STANDARD FASHION CO. v. MAGRANE HOUSTON CO.

(Circuit Court of Appeals, First Circuit. June 28, 1918.)

No. 1343.

1. INJUNCTION ⟸58—NEGATIVE COVENANTS—ENFORCEABILITY.
Merchant's covenant not to sell or permit to be sold on its premises during contract term any other patterns, and not to sell specified patterns except at label prices, being auxiliary to performance of agreements which could not be specifically enforced, could not be enforced by injunction until such relief was shown to be clearly necessary to prevent substantial injustice, in absence of adequate remedy at law.

2. INJUNCTION ⟸58—NEGATIVE COVENANTS—ENFORCEABILITY.
Merchant's contract containing negative covenant, not to sell on his premises during the term of the contract any other make of patterns than plaintiff's *held* not so clear as to permit of enforcement by injunction; the term being indefinite.

Appeal from the District Court of the United States for the District of Massachusetts; Chas. F. Johnson, Judge.

Suit for injunction by the Standard Fashion Company against the Magrane Houston Company. Decree for defendant, and plaintiff appeals. Affirmed, reserving to plaintiff the right to make application to the District Court under equity rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv), to transfer its suit to the law side.

Robert G. Dodge, of Boston, Mass. (Herbert Noble and James B. Sheehan, both of New York, on the brief), for appellant.

James W. Sullivan, of Lynn, Mass., for appellee.

Before DODGE and BINGHAM, Circuit Judges, and BROWN, District Judge.

PER CURIAM. The plaintiff fails to satisfy us that the negative covenant in its contract with the defendant is one which the court should enforce by injunction, even if it is not in violation of Clayton Act Oct. 15, 1914, c. 323, 38 Stat. 730. We do not think it sufficiently proved that the plaintiff will sustain any substantial injury from the

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breach of that covenant beyond that for which it can recover damages in a suit at law.

[1] While the covenant forbids the defendant "to sell or permit to be sold" on its premises patterns other than the plaintiff's, it does not prevent defendant from selling elsewhere, and the plaintiff is left free to establish other agencies for their sale, wherever it may be able to do so, and it had in fact, while the contract was in force, established another agency with a concern larger than the defendant, doing business in the defendant's immediate vicinity. That the loss of the defendant's agency during the unexpired term of the contract damages the plaintiff, under these circumstances, to an amount not calculable in money, we are not prepared to believe upon the testimony of the plaintiff's president, which is all that is offered to support the claim.

The circumstances under which like negative covenants were enforced by injunction in Butterick, etc., Co. v. Fisher, 203 Mass. 122, 89 N. E. 189, 133 Am. St. Rep. 283, or in those cases in other state courts upon which the plaintiff relies, were, in this and other material respects, different from those presented in this case. The decisions referred to are not in any event binding upon us. The negative covenant here in question, being in its nature auxiliary to the performance of agreements which we cannot order specifically performed, is therefore not to be enforced by injunction, unless such relief is shown clearly necessary to prevent substantial injustice, in the absence of any adequate remedy at law.

In Javierre v. Central Altagracia, 217 U. S. 502, 508, 30 Sup. Ct. 598, 600 (54 L. Ed. 859) the issue of an injunction to enforce a negative covenant of this character was disapproved. It was said that:

"There is a certain anomaly in granting the halfway relief of an injunction" against the breach of such a covenant "when the court is not prepared to enforce the performance to accomplish which indirectly is the only object of the negative decree."

In Dalzell v. Dueber Mfg. Co., 149 U. S. 315, 13 Sup. Ct. 886, 37 L. Ed. 749, the court said, applying the language of Colson v. Thompson, 2 Wheat. 336, 341 (4 L. Ed. 253):

"The contract which is sought to be specifically executed ought not only to be proved, but the terms of it should be so precise as that neither party could reasonably misunderstand them. If the contract be vague or uncertain, or the evidence to establish it be insufficient, a court of equity will not exercise its extraordinary jurisdiction to enforce it, but will leave the party to his legal remedy."

[2] We do not think it can be said that the contract here in question is so clear in its terms that neither party could reasonably misunderstand them. The negative covenant is as follows:

"Second party also agrees * * * not to sell or permit to be sold on the premises of second party, during the term of this contract, any other make of patterns and not to sell Standard patterns, except at label prices."

It is necessary to determine the meaning of the phrase "the term of this contract." The defined term is "a term of two years from date hereof," November 25, 1914. The following words: "From term to term thereafter until this agreement is terminated as hereinafter pro-

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vided"—do not explicitly define the duration of any term. The negative covenant may well be limited to the defined term of 2 years. Upon the plaintiff's construction we should be obliged to enlarge the language of the covenant and to read it, "during the continuance of this contract," thereby including any subsequent or additional terms which might result from any failure to give notice of a desire to terminate. We do not find a clear intention of the defendant to be bound by the negative covenant for an indefinite period, or for further terms each of 2 years and 3 months. That the defendant was willing to restrict the use of its premises during a defined term of 2 years, or of 2 years and 3 months, does not indicate a willingness to be restricted indefinitely, or throughout any future period of contract relations. We see no reason why the contract relations might not well continue between the parties after the restriction upon defendant's use of its premises had ceased at the end of 2 years. It is in evidence that there are many contracts of this character which are in successful operation without the aid of a negative covenant like this.

Furthermore, we think the terms of the contract relating to notice of desire to terminate are not so precise that neither party could misunderstand them. They provide for notice within 30 days "after the expiration of any contract period." The meaning of the words "any contract period" is not clear. The plaintiff contends that it is a term of 2 years from date, but owing to the peculiarity of the provision that notice of a desire to terminate must be given within 30 days after the expiration of any contract period, it results that the minimum period for which the parties were bound upon execution of the contract is a period of 2 years and at least 3 months and 1 day, not a period of 2 years, which is the ostensible "term" of the contract.

Ordinarily a provision for notice of termination is required to be given within the defined contract period, and is not employed for the purpose of extending the original period of obligation. The present contract is unusual in this respect. As a result, the words "any contract period" may refer either to the defined term of 2 years, or to the additional period of not less than 3 months and 1 day, or to the combined periods of 2 years and 3 months and 1 day.

Within 30 days after the expiration of this combined period of 2 years and 3 months, the defendant, by its letter of March 21, 1917, though somewhat informally, gave notice of its desire to terminate. The letter, it is true, stated a preference to discontinue in less than 3 months. Nevertheless it requested discontinuance at the earliest possible date, which fairly means at least at the end of the period of 3 months to which the letter refers. The plaintiff's letter in reply expressly refused to recognize, but, on the contrary, denied, the defendant's right to terminate at 3 months' notice, and asserted that the defendant was under engagement for the next 2 years. It thus appears that, whatever be the true construction of this unusual and somewhat complicated contract, its terms are not so precise that neither party could reasonably misunderstand them.

Upon the question of the application of the Clayton Act we express no opinion.

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We affirm the judgment of the District Court, not for the reasons assigned in its opinion, but on the ground that the negative covenant, if valid, and not prohibited by the Clayton Act, does not justify the interposition of the extraordinary powers of a court of equity to grant the special relief sought.

The decree of the District Court is affirmed, reserving the right of the appellant to make application to that court under equity rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv) to transfer its suit to the law side of that court, and the appellee recovers costs in this court.

THE HOKENDAQUA.

(Circuit Court of Appeals, Second Circuit. April 10, 1918.)

No. 203.

1. COLLISION ⊂⊃91—MEETING VESSELS COMING AROUND BENDS—CHANNEL.
Vessels bound, respectively, in and out of Harlem River, when rounding Horn's Hook, cannot be assumed to be on crossing courses, but should follow the meeting rules, which normally require each vessel to pass port to port.

2. COLLISION ⊂⊃91—MEETING VESSELS—LIABILITY.
Where a steam tug coming downstream in the Harlem River, on meeting another vessel rounding Horn's Hook, proposed a starboard to starboard crossing, instead of the ordinary passage port to port, *held*, that the tug undertook the risk of the venture, and the vessel's assent did not relieve her; hence, where a collision resulted, the tug must be deemed at fault.

3. COLLISION ⊂⊃90—SPEED IN RIVER.
For a yacht to proceed at a rate of 15 miles an hour in the Harlem River, in the midst of confined and dangerous waters, around a point which obscured the view of other vessels, is improper, and in case of a collision the yacht must be deemed at fault.

4. COLLISION ⊂⊃98—BACKING SIGNAL.
Where a yacht, on meeting a tug with a tow, assented to the tug's proposal for a starboard to starboard crossing, which necessitated the yacht's backing or passing under the stern of the tow, *held* that, as the yacht attempted to back, it was in fault for failure to give the backing signal, under Navigation Rules, art. 28 (Comp. St. 1916, § 7867).

Appeal from the District Court of the United States for the Eastern District of New York.

Libel by Walter P. Bliss against the steam tug Hokendaqua, her engines, etc., claimed by the James McWilliams Towing Line. From a decree for respondent and claimant, libelant appeals. Reversed and remanded, with directions to enter decree for half damages.

Appeal from a decree entered November 21, 1916, upon a libel in admiralty. The proceeding was brought by the owner of the steam yacht May against the steam tug Hokendaqua for a collision off Horn's Hook in the East River on the 11th day of August, 1914, at about 11 o'clock on a clear morning. The tide, which was nearly at its height, at that place makes over 4 knots an hour. The May, 240 feet in length, with full speed of between 11 and 12 miles an hour, was steaming up the west channel of the East River between Blackwell's Island and the Manhattan shore, bound through Hell Gate for

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Glen Cove. She was therefore passing over the land between 15 and 16 miles an hour. The channel was clear, except for the Red Star tug Milton, with a barge on a hawser, which the May was overtaking and passing on her own port hand. Somewhere about Eighty-First or Eighty-Second street she blew a bend whistle against the possibility of a vessel coming down the Harlem River around Horn's Hook. Horn's Hook itself is a high bluff, concealing vessels coming from the west down the Harlem River, which makes a deep bight into the land to the westward, so that all shipping coming down on the west side of the river is concealed until it emerges from behind the Hook itself.

The Hokendaqua, a steam tug with two light scows on a hawser, making a tow about 400 or 500 feet long, was bound downstream against the tide from New Haven to Jersey City. Coming down from Hell Gate, she had passed between Mill Rock and Ward's Island, and was coming through the Harlem River, instead of down the Astoria shore. She was consequently concealed from the view of either the May or the Milton until she emerged from behind Horn's Hook. When opposite Ninety-Second street she blew a bend whistle, but got no response, and continued on her course, starboarding to head out of the bight and down the east channel between Blackwell's Island and the Long Island shore. Her speed over the land and against the strong flood was probably not over 3 miles an hour. The Hokendaqua, upon emerging past Horn's Hook, saw the Milton coming up on her own starboard hand, at that time at about Eighty-Fourth street, and blew two whistles to signify an intention to cross her bows on her course down the east channel. The Milton answered with two, whereupon the Hokendaqua some moments after, seeing the May also coming up the river, in turn blew two to her and received an answer of two. There is some doubt as to the position of the May at this moment. Her own master says that she was just below Eighty-Sixth street. The master of the Milton, in a statement made out of court, places her at about Eighty-Third street, and on his examination in court at about Eighty-First or Eighty-Second street. The May reversed at once, believing that she could not pass under the Hokendaqua's stern. Being unable to steer while reversed, she kept her course substantially, and did not check her way until she had collided with the forward barge of the tow. The ensuing injuries on her port bow are those for which she sued. The accident occurred about off Horn's Hook and nearly in the center of the river. At that time the Hokendaqua, which kept her course and speed, had got well over on the Astoria shore and about on a line with the Blackwell's Island light, continued north. The tow was tailing behind her.

Burlingham, Montgomery & Beecher, of New York City (Charles C. Burlingham and Chauncey I. Clark, both of New York City, of counsel), for appellant.

Herbert Green, of New York City, for appellee.

Before ROGERS and HOUGH Circuit Judges, and LEARNED HAND, District Judge.

LEARNED HAND, District Judge (after stating the facts as above). [1, 2] In The Arrow, 214 Fed. 743, 131 C. C. A. 49, this court decided that the situation here in question was not a crossing, but a meeting, case, unless an exchange to the contrary is agreed upon. It follows, therefore, that each vessel must normally pass port to port, and that the May would have been right in keeping on, expecting the Hokendaqua to go down the west channel, or at least to wait where she was until the May had crossed her bow. The Transfer No. 12, 221 Fed. 409, 137 C. C. A. 207. The Hokendaqua did neither, but proposed a starboard to starboard crossing, and in so proposing she undertook the

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risk of the venture. The Nereus (D. C.) 23 Fed. 448; The Admiral (D. C.) 39 Fed. 574; Atlas Transp. Co. v. Lee Line Steamers, 235 Fed. 492, 495, 149 C. C. A. 38. The May's assent did not absolve the Hokendaqua from this risk, and we accept the decision of the May's master, made on the spur of the moment and with the contingency facing him that he had only one course, which was to back, that he could not pass across the bows of the Milton and under the stern of the tow. The May suggests that it might have been possible for the Hokendaqua to have crossed the bows of the Milton and under the stern of the May; but we think that such a difficult maneuver, particularly in these narrow waters, would have been a clear fault. The Transfer No. 9, 107 Fed. 533, 46 C. C. A. 450. The time for the Hokendaqua's decision was when she emerged and found the May and Milton both approaching on her starboard hand. We do not think it likely that the small Milton obscured the yacht, which, although a good many feet behind her, was on a course some 100 feet to the starboard of the Milton, and could not have been more than momentarily obscured. That the course proposed was impracticable and dangerous appears sufficiently by the event itself. Hence we disagree with the District Judge and hold the Hokendaqua in fault.

[3] We cannot, however, excuse the May. She was passing over the land at a rate of at least 15 miles an hour in confined and dangerous waters. This alone we should not hold to be a fault, where she commanded a view of all shipping which might interfere with her navigation; but this was not such a place, because Horn's Hook blocked her view of substantially all of the Harlem River. She had no sufficient reason to suppose that she would through bend whistles become aware of shipping coming down the Harlem River and momentarily in the bight behind the Hook. That she might be confronted with the sudden emergence of a tow 500 feet in length, as in fact she was, seems to us within every reasonable possibility. Such speed in such a place was unwarranted and dangerous.

[4] Moreover, we hold the May at fault for failing to give the backing signal under article 28 (Act Aug. 19, 1890, c. 802, 26 Stat. 328 [Comp. St. 1916, § 7867]), which she was clearly obliged to do. Her failure to do so advised the Hokendaqua that she would attempt to assist the maneuver by the only other course possible; that is, by passing under the stern of the scows. Had she indicated that she was backing, it does not follow that the Hokendaqua might not have checked her own speed and held her tow against the tide, considering the speed of the May herself, or that she might not even have cast off her tow and picked it up later—a course which would have given the May the opportunity to pass between her and the tow, if she could not wholly check her speed. Whether this failure contributed to the collision we cannot, of course, say, as the result is wholly speculative; but it is a violation of the statutory rule, and as such the burden rests upon the May to show that it could not have contributed to the collision.

The decree is reversed, with costs in this court to the May, and the cause remanded, with directions to enter a decree for half damages and costs in the District Court.

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STORY & CLARK PIANO CO. v. HOLMES.

In re MAHONEY.

(Circuit Court of Appeals, Seventh Circuit. April 9, 1918.)

No. 2479.

1. BANKRUPTCY ⊂=210—JURISDICTION OF COURT—POSSESSION OF PROPERTY.
Where actual possession of piano conditionally sold passed to trustee in bankruptcy of conditional buyer, piano thereby came into custody of law, and, under the general equity principle, the bankruptcy court had ancillary jurisdiction to determine all questions respecting title, possession, or control.

2. BANKRUPTCY ⊂=209(½)—ASSERTION OF "ADVERSE CLAIM"—"PROCEEDING IN BANKRUPTCY."
Piano company's good-faith assertion of title and right of possession to piano conditionally sold by it to a bankrupt constituted an "adverse claim," as distinguished from a "proceeding in bankruptcy," and entitled it to a plenary hearing in the bankruptcy court, but only the kind of plenary hearing that would end the situation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Adverse Claim; Second Series, Proceeding in Bankruptcy.]

3. BANKRUPTCY ⊂=212—ADVERSE CLAIM TO PROPERTY—INVITATION TO PLENARY DETERMINATION.
Where piano company, which had sold piano conditionally to bankrupt, had claim adverse to that of trustee, latter's petition in bankruptcy court against piano company, in nature of bill to quiet title, and rule thereon that piano company appear and set up its claim, were an invitation to the company to have a plenary determination of its alleged rights, and, the company having objected to the jurisdiction, and withdrawn on adverse ruling, title was properly decreed in the trustee.

4. SALES ⊂=477(1)—CONDITIONAL SALE—ELECTION TO PASS TITLE—RECLAMATION.
Having passed title to a piano conditionally sold by it, under the contract of sale, the piano company could not reclaim the instrument at will.

5. BANKRUPTCY ⊂=212—CONDITIONAL SALE—SURRENDER OF OWNERSHIP—SUFFICIENCY OF EVIDENCE.
On petition in nature of bill to quiet title by trustee in bankruptcy against piano company, which sold piano conditionally to bankrupt, evidence *held* to warrant finding that company had exercised its stipulated right to surrender ownership to the bankrupt.

6. SALES ⊂=462—CONDITIONAL SALE—STATUTE—SUBSCRIBED BY THE PARTIES.
Under St. Wis. 1917, § 2317, voiding conditional sale contract as to third persons, unless "subscribed by the parties," a duly recorded conditional sale contract, covering a piano, and signed by buyer and selling agent of piano company, who had no interest in or lien on piano, or right to sell in his own name, was void.

Appeal from the District Court of the United States for the Western District of Wisconsin.

Petition in equity in the nature of bill to quiet title by Arthur T. Holmes, trustee in bankruptcy of Earl J. Mahoney, bankrupt, against the Story & Clark Piano Company. From decree for complainant, defendant appeals. Affirmed.

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J. A. Baer, of Milwaukee, Wis., for appellant.
Fred Hartwell, of La Crosse, Wis., for appellee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

BAKER, Circuit Judge. Appellant, at Milwaukee, Wis., delivered a piano to Mahoney, who at the same time signed a conditional sale contract. One Mitchell, who in fact was a sales agent of appellant, joined in signing the instrument, but only personally, not describing himself as agent of appellant; and appellant did not otherwise execute the written contract. When three monthly installments had become due and remained unpaid, Mahoney informed appellant that he was unable to make the payments and advised appellant to come and take possession of the piano under the provision in the contract to that effect. Appellant's reply was a refusal to receive the piano and the institution of an action in debt and garnishment. Thereupon Mahoney went into bankruptcy and turned over the piano to Holmes, trustee. Appellant dismissed its action, and notified appellee that it claimed right of possession under the conditional sale contract; appellee asserted that the contract was void as against creditors, and, appellant taking no steps to enforce its alleged right, filed in the court below a petition in the nature of a bill to quiet title, asking that appellant be ruled to appear and set up its claim. In response to the rule appellant appeared specially, objected to the jurisdiction of the court, and also contended that it was entitled to have the matter of the asserted title determined in a plenary independent suit. On the overruling of these objections, appellant withdrew, and the hearing resulted in a decree of title in appellee.

[1] 1. Appellant confuses an asserted right of possession with actual possession. Mahoney's actual physical possession lawfully passed to appellee, and thereby the piano came into the custody of the law. When this situation arises in a bankruptcy court, as in any other, the general equity principle applies that the court that has actual possession of property has an ancillary jurisdiction to hear and determine all questions respecting title, possession, or control of the property. Murphy v. Hofman, 211 U. S. 562, 29 Sup. Ct. 154, 53 L. Ed. 327; Mining Co. v. Walsh (D. C.) 198 Fed. 351; Fidelity Trust Co. v. Gaskell, 195 Fed. 865, 115 C. C. A. 527.

[2, 3] 2. True, appellant's good-faith assertion of title and right of possession constituted an adverse claim, as distinguished from a "proceeding in bankruptcy," and entitled appellant to a plenary hearing, but only the kind of plenary hearing that would fit the situation. In re Eppstein, 156 Fed. 42, 84 C. C. A. 208, 17 L. R. A. (N. S.) 465; In re Rathman, 183 Fed. 913, 106 C. C. A 253. As in a railroad receivership suit, appellant could have intervened with a bill, on which it would have had the right to demand a full and orderly trial of its adverse claim. But the same ancillary jurisdiction that is available to one party to a controversy is of course open to the adversary. So appellee's petition and the rule thereon were an invitation to appellant to have a plenary determination of its alleged rights. If appellee's petition were not as full as appellant might deem necessary in

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an independent bill, it could have raised the question by motion, and could have supplemented any supposed shortage by its answer or cross-bill. But appellant rejected the invitation.

[4, 5] 3. Three remedies were given to appellant by the contract: (1) To take possession of the piano, sell it after giving ten days' written or posted notice, and collect any deficiency from the buyer. (2) To take possession, surrender the contract to the buyer, and retain all payments as liquidated damages. (3) If appellant should "so elect, to surrender title and ownership, and to proceed to collect from the buyer the sums remaining unpaid, without notice to the buyer of such election." Appellant was not defeated in the trial court on the ground of estoppel by its action at law or of an irrevocable election of remedies. Bierce v. Hutchins, 205 U. S. 340, 27 Sup. Ct. 524, 51 L. Ed. 828; Arctic Ice Machine Co. v. Armstrong Co., 192 Fed. 114, 112 C. C. A. 458; Nauman Co. v. Bradshaw, 193 Fed. 350, 113 C. C. A. 274. Appellant's action in debt and garnishment, together with correspondence showing appellant's intent to compel Mahoney to keep the piano and pay for it out of his wages as a railroad employé, were taken as evidence of the fact that appellant had exercised its stipulated right to surrender ownership. Having passed the title, appellant could not reclaim it at will. We think that under the evidence the finding of fact was warranted—a finding that might not be possible under the usual conditional sale contract, in which the title of the seller is kept in him until all payments are made.

[6] 4. Under section 2317, R. S. Wis., a conditional sale contract is void as to third persons, unless "subscribed by the parties" and duly recorded. In Kellogg v. Costello, 93 Wis. 232, 67 N. W. 24, a contract signed by the buyer and by the agent of the seller in the agent's own name was sustained, because the agent in that case was a factor, having the right to sell and sue in his own name on account of his interest in and lien on the property. We believe the fair implication is that the contract in suit is void as to third parties, under Wisconsin law, because Mitchell, though a selling agent of appellant, had no interest in or lien on the piano and no right to sell in his own name.

The decree is affirmed.

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WOODLAWN TRUST & SAVINGS BANK et al. v. DRAINAGE DIST. NO. 2 OF DAKOTA COUNTY, NEB., et al.

(Circuit Court of Appeals, Eighth Circuit. June 24, 1918.)

No. 4927.

1. EMINENT DOMAIN ⟸271—REMEDIES OF OWNERS—DAMAGES.
Where landowners, seeking injunction to restrain drain construction, failed to ask temporary restraining order, and, pending trial and appeal, the drain was completed, the landowners should be left to their action for damages.

2. EMINENT DOMAIN ⟸302—REMEDIES OF OWNERS—DAMAGES.
Where drain was constructed with probable damage to land, the amount of which was conjectural, while the landowners could recover, in one action, the same amount of damages as were recoverable in proceedings in the nature of eminent domain, it is advisable to await experience to establish the amount of damage.

3. EMINENT DOMAIN ⟸271—REMEDIES OF OWNERS—DAMAGES.
A drainage district, whose drains will probably damage land, cannot be confined to alternatives of injunction against maintenance of the ditch or duty to divert water and avoid damage, but may make full compensation for the damage.

Appeal from the District Court of the United States for the District of Nebraska; Joseph W. Woodrough, Judge.

Suit in equity for injunction by the Woodlawn Trust & Savings Bank and others against Drainage District No. 2 of Dakota County, Neb., and others. Decree dismissing the suit, and plaintiffs appeal. Modified and affirmed.

Edward Boyle, of Chicago, Ill. (Edwin J. Stason and A. L. Beardsley, both of Sioux City, Iowa, Edward J. Stevens, of Chicago, Ill., and John R. Winterbotham, of Sioux City, Iowa, on the brief), for appellants.

R. E. Evans, of Dakota City, Neb. (J. A. C. Kennedy and Philip E. Horan, both of Omaha, Neb., on the brief), for appellees.

Before CARLAND, Circuit Judge, and AMIDON and MUNGER, District Judges.

AMIDON, District Judge. Plaintiffs brought this action against the drainage district, asking for a perpetual injunction to restrain the construction of a ditch which should divert the waters of Elk creek into Jackson Lake, and thence through the outlet of the lake into the Missouri river. The court dismissed the suit, and plaintiffs appeal.

The project has been long under consideration. It has the approval of engineers of the highest standing. Jackson Lake is hardly more than a long coulee. The Missouri river many years ago changed its course and opened a new channel to the north. Jackson Lake occupies a part of the former channel. At times of high water the river backs up into this lake, and at times of flood the old channel is occupied by the river as one of its channels. The change in the course of the river left four or five sections of land lying between the lake and the new

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channel. This land was formerly in South Dakota, and is now in Nebraska, and is the property which the suit is brought to protect. From the lake there is an outlet or chute leading into the Missouri river. It is plaintiffs' contention that, if the waters from Elk creek are diverted into the lake, it will cause their lands to be submerged at times of high water. The evidence shows clearly that these lands are now valuable, and portions of them are highly improved and productive. It is the position of the defendants and their engineers that the drain will not cause any damage to the lands of plaintiffs; that, on the contrary, the waters diverted by the drain into Jackson Lake will pass through its outlet into the Missouri river.

The construction of the drain was first entered upon in 1909, but its actual construction was suspended by a suit instituted by an owner of land lying north of the lake, a neighbor of the plaintiffs here, by the name of O'Neill. He obtained an injunction, and carried his case through all the courts of Nebraska, and thence to the Supreme Court. All these courts refused to restrain the construction of the drain. O'Neill v. Leamer, 93 Neb. 786, 142 N. W. 112; Id., 239 U. S. 244, 36 Sup. Ct. 54, 60 L. Ed. 249.

[1] When a flood occurs in the Missouri river at the same time that there is a heavy rainfall in the watershed drained by Elk creek, it is plain that the volume of water cast into Jackson Lake by the drainage ditch would add to the depth to which plaintiffs' lands would be submerged, and on other occasions the drain might cause plaintiffs' lands to be inundated, when this would not result from the river alone. Again, the evidence shows clearly that floods frequently occur in the Missouri river from rainfalls further up its long course, which cause the inundation of plaintiffs' property. It will be difficult to assign to the drain the amount of damages which it causes to plaintiffs' property, because the lands are low, and are frequently inundated by the river. The damages are consequential, and not for property taken. In such a situation it is safer to proceed by experience than by theory. The defendants admit their liability for any damage that may be caused by the drain to plaintiffs' property. They deny that such damage will actually occur, but concede that, if their opinion is not borne out by experience, the district will be liable to make full compensation. The bill was filed on April 8, 1916, final hearing begun on July 6th, and decree entered on July 15th, of that year. Plaintiffs did not ask for a temporary restraining order. The drain has been constructed, having been completed in October, 1916. Such being the situation, the plaintiffs should be left to their action for damages. That is the holding of the highest court of the state. Hall v. Crawford Co., 94 Neb. 460, 143 N. W. 741; Nemaha Valley Drainage District v. Marconit, 90 Neb. 514, 134 N. W. 177; Bronson v. Albion Telephone Co., 67 Neb. 111, 93 N. W. 201, 60 L. R. A. 426, 2 Ann. Cas. 639. The holding of the federal courts is the same. New York City v. Pine, 185 U. S. 93, 22 Sup. Ct. 592, 46 L. Ed. 820; St. P., M. & M. Ry. Co. v. W. U. Co., 118 Fed. 497, 518, 55 C. C. A. 263; Andrus v. Berkshire Power Co., 147 Fed. 76, 77 C. C. A. 248; McCarthy v. Bunker Hill, etc., Co., 164 Fed. 927, 941, 942, 92 C. C. A. 259; Kansas v. Colorado, 206 U. S. 46, 117, 27 Sup. Ct. 655, 51

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L. Ed. 956; Georgia v. Tenn. Copper Co., 206 U. S. 230, 240, 27 Sup. Ct. 618, 51 L. Ed. 1038, 11 Ann. Cas. 488; Bliss v. Anaconda Copper Co. (C. C.) 167 Fed. 342; Stuart v. U. P. R. Co., 178 Fed. 753, 103 C. C. A. 89; Cubbins v. Miss. River Com. (D. C.) 204 Fed. 299.

[2] We do not mean that plaintiffs should be confined to successive actions for damages year by year. On the contrary, if it shall be shown as the result of experience, and shown to be probable as an inference from that experience and the proven facts, that plaintiffs' property will be damaged by the drain, then they should be permitted to recover the same damages in a single action as they would have been entitled to recover if proceedings in the nature of eminent domain had been instituted to have their damages assessed before the drain was constructed. When, however, it is uncertain whether any damages will be suffered by the construction of such a project, and, if damages should occur, their extent is speculative and conjectural, it is better to await the safe guidance of experience rather than proceed upon conjecture and speculation. The rule which the courts have adopted as to the effect of a reduction of rates upon public utilities is a safe rule here. Willcox v. Consolidated Gas Co., 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034, 48 L. R. A. (N. S.) 1134; Knoxville v. Knoxville Water Co., 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371; Northern Pacific Ry. Co. v. North Dakota, 236 U. S. 585, 35 Sup. Ct. 429, 59 L. Ed. 735, L. R. A. 1917F, 1148, Ann. Cas. 1916A, 1; Newark Natural Gas Co. v. Newark, 242 U. S. 405, 37 Sup. Ct. 156, 61 L. Ed. 393, Ann. Cas. 1917B, 1025.

[3] Defendants cannot properly be shut up to the alternatives: (1) An injunction against the maintenance of the ditch; or (2) the duty to divert the water whenever the ditch will cause damage to plaintiffs' property. In lieu of either, they are entitled to make full compensation for the damage. The trial court dismissed the bill upon the merits. That dismissal should have been without prejudice to plaintiffs' right to bring action for their damages, or to apply in this suit for such relief. With that modification, the decree is affirmed.

HARRIS & STEVENS CORP. et al. v. TARR & McCOMB, Inc.

(Circuit Court of Appeals, Ninth Circuit. May 20, 1918.)

No. 3101.

COURTS ⇐310—FEDERAL COURTS—JURISDICTION—DIVERSITY OF CITIZENSHIP—INDISPENSABLE PARTIES.

Where complainant, with consent of its creditors, continued in force previous assignments of oil leases to defendant, a non-resident, under an agreement that a bank, as trustee, should disburse receipts, the creditors and the bank are indispensable parties to a suit to recover possession of the property, etc., and, being residents of the same state as complainant, there can be no diversity of citizenship which would give the federal court jurisdiction.

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Bill by the Harris & Stevens Corporation, and another against Tarr & McComb, Incorporated. From a decree dismissing the complaint, complainants appeal. Affirmed.

This is an appeal from a decree sustaining a motion to dismiss the complaint. The appellants here were plaintiffs in the court below, and the appellee was defendant. The bill alleges that the suit is between citizens of different states, the plaintiffs being respectively a California corporation and the manager thereof and a stockholder therein, a citizen of California, while the defendant is an Arizona corporation; that on the 20th of March, 1917, and for a long time prior thereto, the plaintiffs were in the possession of and operating two certain pieces of oil-producing property in Kern county, Cal., under leases from the owners; that on the 24th of July, 1915, the plaintiffs had entered into a written contract with the defendant for the sale to defendant of the entire production of crude oil from these leases, during the life of said leases, for the sum of 30 cents per barrel f. o. b. cars at point of production, it being provided, however, that the defendant need not take said oil in the event that it should not be able to sell said production for said price at or upon said property; that on the 4th of October, 1916, for the purpose of securing the payment of certain advances and payments of money made and to be made to plaintiffs by defendant, the plaintiffs assigned said leases to defendant; that thereafter, and early in the year 1917, plaintiffs became indebted to sundry parties in about the sum of $40,000; that the said parties were demanding immediate payment thereof and threatening suits for the enforcement of payment; that on the 12th of March, 1917, the plaintiffs and defendant, and all of the creditors of plaintiffs, with the exception of three (whose claims represented a total of $3,000), entered into an agreement providing that the defendant should thereafter take all the oil produced by plaintiffs at the market price, less 22½ cents per barrel to be retained by it for marketing charges, paying over all moneys above the 22½ cents per barrel to the Citizens' National Bank of Los Angeles; that in said agreement it was further provided that plaintiffs should assign to said bank all accounts receivable, and that said bank would disburse such moneys received, for payment of operating expenses, and in pro rata payments to the respective creditors; that the said creditors agreed to extend the time of payment of their respective claims for a certain period, upon the payment of $6,000 or over at certain stated times, until their said claims were paid in full, with 7 per cent. interest thereon.

It was further provided in the agreement that, unless all the creditors of the plaintiffs should execute the agreement on or before the 20th day of March, 1917, the agreement should be null and void and all the parties thereto should be released of all liability thereunder; that thereafter, and shortly after the 21st of March, 1917, the three creditors, with claims aggregating $3,000, who had refused to enter into said agreement, threatened to commence suits against plaintiffs for the recovery of their claims, and levy attachment upon plaintiffs' property, and thereupon plaintiffs, for the purpose of protecting the interests of the creditors who had signed said agreement, and the interests of the plaintiffs in said property, surrendered to the defendant the possession of said leased property, and that defendant represented to and agreed with plaintiffs that it would take and receive possession of the said real and personal property, and hold and operate the same for the benefit of plaintiffs and the said creditors who had signed the agreement above mentioned, dated March 12, 1917; that the said defendant has from time to time rendered to the said Citizens' National Bank statements showing receipts and expenditures from the operation of said properties, and has paid the said bank certain sums of money to be disbursed to said creditors in partial payment of their claims, and that the said bank has so paid said money to said creditors.

Plaintiffs pray for a decree establishing the title and ownership of the plaintiff Harris & Stevens Corporation as lessee in said leasehold, and right to and immediate possession of said property thereunder, that the said real and personal property were received by and have since been held by the defendant

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in trust for plaintiffs, and that said trust is now terminated, for an accounting from defendant of all rents, income, or profits drived from said property, and for an injunction permanently restraining defendant from asserting any right or title in or to the said property.

The defendant moved the court to dismiss the complaint, on the grounds: (1) Of want of jurisdiction, because no diversity of citizenship existed, as certain indispensable parties defendant, to wit, certain creditors of plaintiffs and the trustee for said creditors, were citizens of the same state as plaintiffs; (2) misjoinder of parties plaintiff, in that plaintiff C. C. Harris is not interested in the subject-matter of the suit, and not entitled to any of the relief sought; (3) insufficiency of fact to constitute a cause of action in equity against the defendant; and (4) nonjoinder of indispensable parties, to wit, the creditors of plaintiffs, the trustees for said creditors plaintiffs and defendant, and the lessors of the leases set out in the complaint.

The court below granted the motion to dismiss, on all grounds stated, and decree was made accordingly. From that decree the plaintiffs have appealed.

Cates & Robinson, of Los Angeles, Cal. (Alton M. Cates, of Los Angeles, Cal., of counsel), for appellants.

Charles C. Montgomery, of Los Angeles, Cal. (Lynn Helm, of Los Angeles, Cal., of counsel), for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The jurisdiction of the court below was invoked on the ground of diverse citizenship. The motion to dismiss the action was based upon the ground that, if certain indispensable parties were made defendants, there would be a lack of diversity of citizenship. The motion to dismiss also raised the question of a misjoinder of parties plaintiff and insufficiency of fact to constitute a cause of action in equity. We think the determination of the first question properly disposes of this appeal.

The agreement of March 12, 1917, whereby the plaintiffs, with consent of certain of their creditors, continued in force previous assignments to the defendant of the leases of oil property mentioned in the agreement, the provision in the agreement for the appointment of the Citizens' National Bank of Los Angeles as the trustee of the parties, to disburse the receipts derived from the operation of the oil wells by the defendant until the creditors had been fully paid, the transfer of the possession of that property by the plaintiffs to the defendant after all the creditors had signed the agreement, were all parts of one transaction, having for its object the security and benefit of plaintiffs' creditors.

This action brought by the plaintiffs to recover possession of the property from the defendant before the object of the agreement has been accomplished, and while the Citizens' National Bank of Los Angeles was actually engaged in distributing to the creditors the profits from the operation of the oil wells by the defendant, is clearly and distinctly an action affecting the interest of the creditors, and requires that they should be made parties to the action. Furthermore, the Citizens' National Bank of Los Angeles is charged with a duty under the agreement and an interest in its execution, and is entitled to be heard with respect to such interest.

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It follows that the creditors and the Citizens' National Bank of Los Angeles are indispensable parties to this action, that their interest lies with the defendant, and they must be brought into the action as defendants; but as they are all citizens of California (so admitted), and the plaintiffs are also citizens of that state, and the jurisdiction of the court is invoked on the ground of diverse citizenship, the bringing in of such defendants will be fatal to the jurisdiction of the District Court. The action was therefore properly dismissed by the court below.

The decree therefore is affirmed.

MOORE v. FAIN.

(Circuit Court of Appeals, Sixth Circuit. June 29, 1918.)

No. 3140.

APPEAL AND ERROR ⟸866(3)—REVIEW—ACTION ON MOTIONS TO DIRECT VERDICT.

Where both parties moved court to instruct verdict, thereby affirming there was no disputed question of fact, and necessarily requesting court to find the facts, they are concluded by finding made by trial court, and appellate court is limited, in reviewing its action, to consideration of correctness of finding on law, and must affirm, if there is any supporting evidence.

In Error to the District Court of the United States for the Eastern District of Tennessee; Edward T. Sanford, Judge.

Action by Dan Lucian Fain against G. C. Moore. To review judgment for plaintiff, defendant brings error. Affirmed.

John C. Ramsey, of Cleveland, Tenn., and Sizer, Chambliss & Chambliss, of Chattanooga, Tenn., for plaintiff in error.

Littleton, Littleton & Littleton, of Chattanooga, Tenn., for defendant in error.

Before WARRINGTON and DENISON, Circuit Judges, and WALTER EVANS, District Judge.

WALTER EVANS, District Judge. Dan L. Fain, who will in this opinion be called the plaintiff, instituted this action in the court below for the recovery of $10,000 damages against G. C. Moore, who will be called the defendant. The declaration averred that the plaintiff was a citizen of Georgia, but afterwards the court, upon the plaintiff's consenting, granted him leave to so amend his pleading as to aver that when the action was instituted and at the time of the injuries complained of he was a citizen of Florida. He alleged that while on a train en route from Knoxville to Chattanooga, Tenn., he was unlawfully and without probable cause arrested by defendant on the 15th day of September, 1914; that he was removed from the train at Cleveland, Tenn., and taken before a justice of the peace there; and that after certain proceedings before that officer he was

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placed in the county jail and there confined until the next morning, when he was released from custody. The continuation of this confinement during the entire night, however, was somewhat his own fault, as the court below thought, inasmuch as he did not avail himself of the opportunities afforded during the night of proving that he was not one Frank C. Smith, for whose arrest a reward had been publicly offered, and who the defendant in good faith supposed the plaintiff to be when the arrest was made.

By the plea in abatement, as amended, the defendant, a citizen of Tennessee, claimed that the court below had not jurisdiction of the action because, as the plea alleged, the plaintiff, when the suit was begun, was also a citizen of that state, and not a citizen either of Georgia or Florida. The defendant also filed a plea of not guilty, upon its being agreed of record that this should not be treated as a waiver of the plea to the jurisdiction of the court, and it was further agreed that the cause might be proceeded with both upon the plea to the jurisdiction and upon the merits.

A jury was thereupon sworn, and the testimony of both parties fully heard. At its close the plaintiff and defendant each moved the court to instruct the jury to return a verdict in his favor. The court, after full consideration, charged the jury as follows:

"I therefore direct you to return a verdict that you find the issues for the plaintiff, and assess the damages at $750, and return the verdict accordingly."

The verdict followed this direction. We think this situation brought the case within the rule stated by the Supreme Court in Beuttell v. Magone, 157 U. S. 154, 157, 15 Sup. Ct. 566, 567 (39 L. Ed. 654), where it was said:

"The request, made to the court by each party to instruct the jury to render a verdict in his favor, was not equivalent to a submission of the case to the court, without the intervention of a jury, within the intendment of Rev. Stat. §§ 649, 700. As, however both parties asked the court to instruct a verdict, both affirmed that there was no disputed question of fact which could operate to deflect or control the question of law. This was necessarily a request that the court find the facts and the parties are, therefore, concluded by the finding made by the court, upon which the resulting instruction of law was given. The facts having been thus submitted to the court, we are limited in reviewing its action, to the consideration of the correctness of the finding on the law, and must affirm if there be any evidence in support thereof. Lehnen v. Dickson, 148 U. S. 71 [13 Sup. Ct. 481, 37 L. Ed. 373]; Runkle v. Burnham, 153 U. S. 216 [14 Sup. Ct. 837, 38 L. Ed. 694]."

The rule thus established was followed by this court in City of Defiance v. McGonigale, 150 Fed. 689, 691, 80 C. C. A. 425, Bank v. Maines, 183 Fed. 37, 41, 105 C. C. A. 329, and other cases. The qualification of the general rule suggested by Judge Severens in delivering the opinion of this court in Minahan v. Grand Trunk Ry. Co., 138 Fed. 37, 70 C. C. A. 463, and which seems to have met the approval of the Supreme Court in Empire Cattle Co. v. Atchison Ry. Co., 210 U. S. 1, 8, 28 Sup. Ct. 607, 52 L. Ed. 931, 15 Ann. Cas. 70, obviously does not apply here, because no other instruction was asked by either party.

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There was conflict in the testimony upon both pleas of the defendant, but certainly there was testimony which would support a finding of the essential facts upon which the question of citizenship involved in the plea to the jurisdiction must rest, and also testimony which would support the finding upon the issues raised by the plea of not guilty. This being true, both parties, as held by the cases supra, were bound by findings which cover the issues of fact. The trial court under the motions to instruct had the power to decide that the plaintiff was a citizen of Florida, and further that on the facts disclosed and found by the court the plaintiff was entitled to recover damages for the injuries complained of, though it might admit of doubt whether it was not the function of the jury and not of the court thereafter to assess the damages. However, we express no opinion upon this proposition, because in open court the defendant waived all exception to that part of the court's charge, and we cannot on the record say that the damages assessed were excessive, as claimed by the defendant.

Various other errors were assigned, but under the view we take of the case no useful purpose would be served by discussing them.

The judgment of the court below is affirmed, with costs.

EATON v. CLABAUGH.

(Circuit Court of Appeals, Sixth Circuit. June 29, 1918.)

No. 3113.

1. Brokers ⟸67(2)—Commissions—Acting for Both Parties—Knowledge.
Where, in negotiations for sale of a corporation's property, which its officers were authorized to make, they and the customer knew that the intermediary was acting for both parties, his right to recover commissions of the buyer is not affected by the contract taking the form of a sale of all the capital stock, and one of the stockholders not knowing of the dual agency.

2. Appeal and Error ⟸274(5)—Reservation of Grounds of Review—Sufficiency of Exception.
Exception to the charge submitting the theory that if plaintiff was a mere middleman, without any agency duties, he might recover commissions of the buyer, even if the sellers did not know of his compensation agreement with the buyer, being apparently intended only to challenge the rule of law announced, does not authorize review of the charge as unauthorized by the evidence.

3. Brokers ⟸67(2)—Commissions from Both Parties.
One may be such a mere middleman or broker as to be entitled to commissions from both sides under agreements therefor not known by both parties, though his duties do not pertain merely to bringing forward one particular and specific buyer or seller.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; D. C. Westenhaver, Judge.

Action by Albert Clabaugh against Cyrus S. Eaton. Judgment for plaintiff, and defendant brings error. Affirmed.

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Tolles, Hogsett, Ginn & Morley and Thomas H. Jones, all of Cleveland, Ohio, for plaintiff in error.

Matthew Gering, of Plattsmouth, Neb., and J. H. Smart, of Cleveland, Ohio, for defendant in error.

Before KNAPPEN and DENISON, Circuit Judges, and COCHRAN, District Judge.

DENISON, Circuit Judge. Clabaugh was manager of two lighting companies. The officers asked him to find a purchaser. He interested Eaton, who entered into written options for the two companies, and agreed in writing to pay Clabaugh $5,150 if the sales were closed. For the nonpayment of this amount, Clabaugh brought this action in the court below, and recovered the judgment now here for review.

1. What Eaton's counsel now urge as the chief meritorious defense is that the contract sued upon was superseded by a later agreement. Upon this matter, the parties flatly contradicted each other, and the jury must have adopted plaintiff's version; but nothing was saved for review. The portion of the charge assigned as error, and which instructed that changes in the contract would not disentitle plaintiff to his commission, plainly had reference only to the option contracts between the vendors and Eaton, and not at all to the contract sued upon. The court was not asked to give any special instructions with regard to this defense.

[1] 2. Assuming, without deciding, that plaintiff was acting in the subject-matter as agent of the vendors, we come to the question whether the dual agency bars recovery. Eaton knew of it and expressly consented. Plaintiff says that the vendors knew of and approved his commission contract with Eaton; this was denied; the jury, if it passed upon this issue, must have found with plaintiff. One Sunderland was the holder of one-eighth of the stock of one of the companies. Error is assigned because he was not allowed to testify that he did not know that plaintiff was getting pay from the purchaser. The deal for this company was under an option given in the name of the corporation, signed by its president and treasurer and covering all its property. No claim is made that this was not with Sunderland's approval, or that these officers were not intrusted by him with authority to make the bargain and the sale. At the end, Eaton decided that he would buy all of the capital stock, and leave the corporate title to the property untouched; and this was done. This change in plan made not a dollar's difference to any stockholder, and every one regarded it as merely another way of doing the same thing. If the final transfer had been of the corporate property, and if the corporation and its officers, representing Sunderland, had knowledge of the Clabaugh-Eaton contract (as, for the present purpose must be assumed), Sunderland's personal knowledge would have been immaterial; and, under these circumstances, the adoption of the finally selected form of transfer was not such a substantial change as to make his personal knowledge controlling. Hence there was no error in rejecting this testimony.

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[2, 3] 3. The court submitted to the jury the theory that if plaintiff was a mere middleman, without any agency duties, he might recover, even if the vendors did not know of his compensation contract with the vendee; and, possibly, the verdict rests upon this theory. The charge on this subject is assigned as error for two theories now argued. The first is that there was no evidence to support it; the undisputed fact being claimed to be that Clabaugh was charged with the duty to negotiate. This theory was not presented in the court below by requests to charge; the sole exception was to the whole charge on the subject, and was apparently intended only to challenge the rule of law announced. This is not sufficient. Denison v. McNorton (C. C. A. 6) 228 Fed. 401, 408, 142 C. C. A. 631. So far as we can judge from the record, the claim that there was no evidence to support the submission of the mere middleman theory is an afterthought.

The other theory argued is that, as matter of law, no one can be such a mere middleman or broker as to be entitled to commissions from both sides, unless his duty pertains only to bringing forward one particular and specific buyer or seller. Mechem on Agency, § 2413. Only this extreme position will support the general and broad exception taken, and this extreme position we cannot approve. Rupp v. Sampson, 16 Gray (Mass.) 398, 77 Am. Dec. 416.

Other matters argued are not based on exceptions and assignment.

The judgment is affirmed.

McKIBBEN v. PHILADELPHIA & R. RY. CO.

(Circuit Court of Appeals, Third Circuit. June 17, 1918.)

No. 2366.

1. NEW TRIAL ⊂=44(3)—GROUNDS—MISCONDUCT OF JURY.
The reading in a jury room by one of the jurors, at the request of the others, of a newspaper article giving an account of former trials of the case, and reflecting on the defendant, *held* to entitle defendant to a new trial after an adverse verdict.

2. NEW TRIAL ⊂=29—GROUNDS—MISCONDUCT OF COUNSEL.
Statements by counsel for a plaintiff in his argument to the jury of what had been done by juries in former trials of the case was so grossly improper as to entitle defendant to a new trial.

In Error to the District Court of the United States for the District of New Jersey; J. Warren Davis, Judge.

At Law. Action by Robert J. McKibben against the Philadelphia & Reading Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Frank S. Katzenbach, Jr., of Trenton, N. J., for plaintiff in error.

Joseph A. Shay, of New York City, and Wilbur A. Heisley, of Newark, N. J. for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

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BUFFINGTON, Circuit Judge. This was a suit brought by Robert J. McKibben, a citizen of New Jersey, against the Philadelphia & Reading Railway Company, a corporation of Pennsylvania. It was for personal injuries sustained by McKibben while working as brakeman on defendant's train, and which injuries, it was alleged, were caused by the railroad's negligence. The negligence charged was, inter alia, defendant's failure to furnish a proper coupler in compliance with the federal Safety Appliance Act. On the trial, the plaintiff recovered a verdict, and, on entry of judgment thereon, defendant sued out this writ. The assignments of error involve two questions: First, the court's refusal to set the verdict aside by reason of the jury having before them while they were deliberating on their verdict a certain newspaper article; and, second, the refusal of the court to give binding instructions in favor of the defendant.

[1] It seems that while the jury was deliberating one of its members produced a newspaper article giving an account of former trials of the case, the amounts of the verdicts rendered therein, and certain statements calculated to influence, if not, indeed, inflame, feeling against the defendant. That a single juror of a panel might be so recreant to his duty of impartiality as to produce such an article in a jury room is possibly to be expected; but when twelve jurors, of the character of men that should and usually do constitute federal juries, agree that such matters should be read to them, such a general situation, vitally affecting the integrity of the administration of justice, is disclosed as to make it the duty of this court to speak in no uncertain terms. We are not disposed to analyze or seek to determine just what problematic effect this unwarranted matter had on the jurors' minds, or at what stage of the proceedings the jury determined to have the article read. The noxious fact is that it had no place in the jury room, and that it was there, and was, at the request of the entire jury, read and heard. That the allegations of the article were harmful to and inflammatory against the defendant company, and that they were intended at some stage of the proceedings to affect the trial of the case, is evident by the fact, found by the judge below, that the article was "inspired by the plaintiff, or by some one acting for him." And that the article did come to the notice of a juror, that he was led by its contents to cut it out, to keep it through the trial, and to produce it in the jury room, and read it to all of his fellows, are facts tending to show that the purpose of this inspired article had been fulfilled. Under these facts our duty is clear to set aside a judgment rendered on a verdict given under such circumstances.

[2] Reversal being made on the foregoing ground, a discussion of other alleged error is unnecessary; but we deem it proper to here refer to another matter of mistrial, although it is not assigned for error—that is, the statement made by counsel of the plaintiff in his argument to the jury as to what had been done by other juries in former trials of this case. Such statements in the presence of a jury are in a federal court deemed so improper as to warrant opposing counsel to request, and courts of their own motion to direct, the withdrawal of a juror and the continuance of a cause, with such orders as to term costs as

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are proper. While the facts are not the same, the underlying principle applicable both to the newspaper article read to the jury and to this reference by counsel to the action of injuries in the former trials is so analogous that we repeat here what was said by this court in Vaughan v. Magee, 218 Fed. 632, 134 C. C. A. 390:

"We will not enter into a speculative analysis of what effect the statement and its repetition to the jury had. It suffices to say the jury improperly had before it substantial statements of matters which were not only not in evidence, but which on no principle of law could have been admitted in evidence. The possibility of the verdicts of juries being based on that which is not evidence goes to the very foundation of that fair and impartial trial for which courts exist. Whether the objectionable statements did or did not influence the jury in this particular case is not the test, for this court cannot permit any such practice to obtain even a foothold in this circuit."

The judgment below is reversed, and the case remanded for further action.

PAQUIN v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. May 17, 1918.)

No. 5008.

1. CRIMINAL LAW ⊂=722½—TRIAL—ARGUMENT.
In a prosecution under Harrison Drug Act Dec. 17, 1914 (Comp. St. 1916, §§ 6287g–6287q), the indictment not charging defendant's attempt to bribe an officer, and there being no evidence thereof, or as to defendant's character, except on defendant's cross-examination, it was improper for the prosecuting attorney in argument to comment on the fact that defendant, long after the offense was committed, had offered money to an officer if the latter would defer the arrest.

2. CRIMINAL LAW ⊂=369(1)—EVIDENCE—OTHER OFFENSES.
In a prosecution under Harrison Drug Act Dec. 17, 1914 (Comp. St. 1916, §§ 6287g–6287q), the question whether defendant, months after the alleged commission of the offense, had attempted to bribe an officer to defer his arrest had no tendency to prove or disprove the offense charged.

3. WITNESSES ⊂=277(4)—CROSS-EXAMINATION—SCOPE.
In a prosecution under Harrison Drug Act Dec. 17, 1914 (Comp. St. 1916, §§ 6287g–6287q), wherein defendant had not testified in his examination in chief as to his alleged offer to bribe an officer to delay his arrest, questions relative thereto were not proper cross-examination.

In Error to the District Court of the United States for the Eastern District of Missouri.

Ozias Paquin was convicted of a violation of the Harrison Drug Act, and he brings error. Reversed and remanded.

Charles P. Williams, of St. Louis, Mo. (L. L. Leonard, of St. Louis, Mo., on the brief), for plaintiff in error.

Vance J. Higgs, Asst. U. S. Atty., of St. Louis, Mo. (Arthur L. Oliver, U. S. Atty., of St. Louis, Mo., on the brief), for the United States.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

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SANBORN, Circuit Judge. The defendant below, Dr. Paquin, was indicted, tried, and convicted of violations of the Harrison Drug Act of December 17, 1914 (38 Stat. 785, 789, c. 1 [Comp. St. 1916, §§ 6287g–6287q]). The doctor was a practicing physician who had duly registered and paid for his license in St. Louis under the act to do business in the Victoria Building in that city. He was charged in the first count of the indictment with dispensing morphine sulphate on November 17, 1915, to one Arthur Reese at rooms 311, 311a, in the Benoist Building where he also had an office in St. Louis without having registered and bought a second license to do business in those rooms. In the second count he was charged with dispensing morphine sulphate to William Long on November 17, 1915, when he was not in personal attendance upon Long, without keeping a record of the amount of the drug he so dispensed, or the name or address of the person to whom he dispensed it.

Thirty-five alleged errors are assigned. One of them is that after the plaintiff had rested its case, and the examination of the defendant in his own behalf was closed, the court permitted the United States to prove by him on his cross-examination, over the objection of his counsel, that when in June, 1917, Dr. Digges, an officer of the United States, stated to him that he was about to report him, and did not know whether or not he should arrest him for an offense alleged to have been committed many months after November 19, 1915, when those on trial were charged to have been committed, the defendant told him that his daughter was in bed, about to be confined, that he expected a call any minute, asked him to defer the report and arrest and offered him $50 if he would defer them two days, and over the exception of the defendant the court permitted that portion of the argument of the attorney for the government to go to the jury, which was expressed in these words:

"I am saying now, gentlemen of the jury, that if Dr. Paquin is the man Mr. Williams says he is, an honorable, upright man in his profession, the moment that he was accosted by Dr. Digges he would not have reached down in his pocket and produced $50 and offered that to him not to do his duty; honest, upright, straight professional men do not do that kind of thing and you know it."

[1-3] This testimony was not relevant or material to any issue in this case. The defendant had not offered or introduced any evidence relative to his character. He had not been charged with any attempt to bribe an officer, or any other person; no evidence relative to that matter had been offered or introduced in the plaintiff's case, the defendant had no notice of or opportunity to defend against such a charge, nor did the question whether or not he had done so months after the offenses specified in the indictment were charged to have been committed have any tendency whatever to prove or disprove the violations of the act of Congress with which he was charged in this case. The defendant had not testified in his examination in chief in any way about this alleged offer to bribe, and the questions relative thereto propounded by the attorney for the United States were not proper cross-examination. The receipt of this evidence and the argument upon it were clearly injurious to the defendant, and a fatal error,

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which compels a reversal of the judgment, and renders the discussion and decision of other alleged errors immaterial.

Let the judgment below be reversed, and let the cause be remanded to the trial court for further proceedings.

LEHIGH VALLEY COAL SALES CO. v. MAGUIRE.

In re GILMORE-THAYER CO.

(Circuit Court of Appeals, Seventh Circuit. March 5, 1918. Rehearing Denied April 19, 1918.)

No. 2503.

1. BANKRUPTCY ⟸326—CLAIMS—SET-OFFS.
Bankruptcy Act, § 68 (Comp. St. 1916, § 9652), authorizing set-offs only in cases of "mutual debts or mutual credits," does not enlarge or change, but only recognizes, what under general law may constitute set-offs.

2. BANKRUPTCY ⟸326—CLAIM—SET-OFF.
A creditor, receiving money from his debtor to hold or use for a specific purpose, and not to apply on the debt, has no right of set-off, under Bankruptcy Act, § 68 (Comp. St. 1916, § 9652) as he becomes not the debtor of his debtor, but the trustee of a specific trust.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

In the matter of the bankruptcy of the estate of the Gilmore-Thayer Company. Beach W. Maguire, trustee, filed objections to the claim of the Lehigh Valley Coal Sales Company. From a decree sustaining the trustee's objection, the Coal Sales Company appeals. Affirmed.

Frederic Ullmann, of Chicago, Ill., for appellant.

Raymond Visser, of Chicago, Ill., for appellee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

BAKER, Circuit Judge. During the summer and fall of 1915 the bankrupt became largely indebted to appellant on open account for coal. Appellant, learning that the bankrupt was in financial straits, refused to ship any more coal unless paid for in advance. On November 29th the bankrupt sent an order to appellant for coal and a certified check for $275 in payment. At this time the bankrupt was insolvent, and appellant knew it. Creditors the next day filed their petition, under which appellee became successor to the bankrupt's estate. Appellant refused to ship coal, retained the $275, and filed a claim on its open account, crediting thereon the $275 so withheld. Appellee objected to the allowance of the claim as filed, on the ground that to permit appellant to apply the $275 upon its open account would constitute a preference. This position was sustained in the court below.

[1, 2] Set-offs are authorized only in cases of "mutual debts or mutual credits." Bankruptcy Act, July 1, 1898, c. 541, § 68, 30 Stat. 565 (Comp. St. 1916, § 9652). This does not enlarge or change—it only recognizes—what under general law may constitute set-offs. In

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New York County Bank v. Massey, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380, relied on by appellant, the bankrupt was indebted to the bank on his overdue notes; after he was insolvent he made a general deposit to his credit in the bank; and the bank, although its officers had reasonable cause to believe he was insolvent when he made the deposit, was permitted, after bankruptcy had intervened, to set off its notes against the deposit. As the general deposit created only the relation of debtor and creditor, this was clearly a case of mutual debts and credits. But where a creditor receives money from his debtor, with instructions not to apply it on the debt, but to hold or use it for a specific purpose, the right of set-off does not exist, because the creditor has become, not the debtor of his debtor, but the trustee of a specific trust. This principle is illustrated in Libby v. Hopkins, 104 U. S. 303, 26 L. Ed. 769. There the debtor owed his creditor a secured and also an unsecured indebtedness. Shortly before bankruptcy the debtor sent money to his creditor, with directions to apply it on the secured debt. In the bankruptcy proceedings the creditor filed his claim on the unsecured debt, crediting the remittances, which he had applied thereto in contravention of his debtor's instructions. Set-off was denied, because the creditor was not a debtor of his debtor, and he could not make himself one by his breach of trust. See, also, Western Tie & Timber Co. v. Brown, 196 U. S. 502, 25 Sup. Ct. 339, 49 L. Ed. 571; Continental & Com. T. & Sav. Bank v. Chicago T. & T. Co., 199 Fed. 710, 118 C. C. A. 142; Alvord v. Ryan, 212 Fed. 85, 128 C. C. A. 539.

The decree is affirmed.

REPUBLIC IRON & STEEL CO. v. PSHONKO.

(Circuit Court of Appeals, Third Circuit. May 24, 1918.)

No. 2373.

MASTER AND SERVANT ⇐286(19)—MASTER'S LIABILITY FOR INJURY TO SERVANT —NEGLIGENCE IN OPERATION OF COAL MINE.

Evidence of negligence of a mine owner, in failing to properly support the roof of its coal mine, which fell and injured plaintiff, a miner, *held* sufficient to warrant submission of the case to the jury.

In Error to the District Court of the United States for the Western District of Pennsylvania; W. H. Seward Thompson, Judge.

Action at law by Mike Pshonko against the Republic Iron & Steel Company. Judgment for plaintiff, and defendant brings error. Affirmed.

David E. Mitchell, of Pittsburgh, Pa. (Richard Jones, Jr., and O. T. Fell, both of Youngstown, Ohio, of counsel), for plaintiff in error.

Abraham Gratz, H. Fred. Mercer, and A. J. Eckles, all of Pittsburgh, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

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BUFFINGTON, Circuit Judge. In this case the plaintiff brought suit in a state court against the Republic Iron & Steel Company to recover damages for personal injury suffered by him while working in its mine and, as alleged by him, through its negligence. The defendant, being a corporate citizen of New Jersey, had the cause removed to the court below, where it was tried, and a verdict had for the plaintiff. On entry of judgment thereon, the defendant sued out this writ of error.

No questions were raised to the admission of evidence or to the charge of the court; the sole question being the court's alleged error in refusing to give binding instructions for defendant. No principles of law are involved, the simple question before us being whether there was testimony from which a jury could infer negligence on the part of the defendant. That question the court below re-examined on a motion for a new trial, and decided against the defendant's present contention in these words:

"While various causes of negligence were alleged in the plaintiff's statement, that chiefly relied on by the plaintiff was the fact that, in removing certain ribs of coal in the progress of the mining operations, there was left a large space of at least from 45 to 60 or more feet in dimension. In this space the roof was supported by stumps of coal left for that purpose, together with certain posts inserted to help support the roof. Evidence was offered to show that this was an unsafe condition in which to leave the roof, and that ordinary care required that falls of the roof should have been made at certain distances of from 12 to 15 feet, or thereabouts; that by reason of the failure to let down the roof, as ordinary prudence and care and the usual custom in mining required, and the roof for so large a space being inadequately supported, suddenly fell, entrapping the plaintiff in the fall, by which he was seriously and permanently injured. There was evidence tending to show that this condition was called to the notice of the defendant's superintendent when he was present at that part of the mine, and that he pronounced it safe, and thus induced the plaintiff to continue his work."

We have examined the proofs, and are of opinion the résumé of the testimony quoted above is correct. Such being the case, it follows the court made no error in refusing to withdraw the cause from the consideration of the jury and declining to give peremptory instructions for the defendant.

The judgment below is therefore affirmed.

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OEHRING et al. v. FOX TYPEWRITER CO.

(Circuit Court of Appeals, Second Circuit. April 1, 1918.)

No. 179.

1. PATENTS ⟸328—VALIDITY—INVENTION.
The Oehring patent, No. 560,171, for multiple drills, *held* valid and infringed.

2. PATENTS ⟸318(4)—INFRINGEMENT—PROFITS—APPORTIONMENT.
Where complainant's invention represented an entire revision of a machine and the creation of a new device in which all of the operative parts contributed to produce a new result, complainant may recover for defendant's infringement profits from the entire machine without any apportionment; it being impossible for defendant to prove what the old element, if any, contributed to the profits.

3. PATENTS ⟸318(6)—INFRINGEMENT—DAMAGES—CREDIT.
When the amount of capital used by an infringer for the manufacture of infringing devices is ascertained, interest is a proper credit to be allowed in computing the recovery by the owner of the patent.

4. PATENTS ⟸318(6)—INFRINGEMENT—DAMAGES—CREDIT.
Though defendant used an old plant and facilities which had theretofore been devoted to other business for the manufacture of the infringing device, a credit for interest on the capital invested cannot be denied because the plant was not constructed for the manufacture of the infringing device.

5. APPEAL AND ERROR ⟸731(4)—PATENTS ⟸322—REFERENCE—EXCEPTIONS TO REPORT—ASSIGNMENT OF ERROR.
Where a suit for the infringement of a patent was referred and the master worked out a difficult apportionment, any error as to details should be pointed out in the exceptions to his report and in the assignments of error to the decree.

6. PATENTS ⟸318(6)—INFRINGEMENT—ALLOWANCES.
In a suit for patent infringement, defendant, the manufacturer of the infringing devices, is entitled to allowances for taxes and insurance when properly apportioned to that device.

7. PATENTS ⟸318(5)—INFRINGEMENT—INTEREST ON PROFITS.
Where it does not appear that the infringement was wanton or deliberate, the owner of the patent is not entitled to interest on the profits from the date when they were actually made, but only from the date of the master's report ascertaining the same.

8. PATENTS ⟸318(5)—INFRINGEMENT—WILLFUL INFRINGEMENT.
Where at the time of defendant's infringement the validity of the patent was in serious controversy and a District Court had held it invalid, the infringement cannot be deemed wanton and deliberate so as to justify the allowance of interest on profits from the date when they were made.

9. PATENTS ⟸318(6)—INFRINGEMENT—EXPENSES OF SALESMEN.
In a suit for patent infringement where it appears that defendant's expense for salesmen was abnormal and was incurred in an effort to build up good will for the infringing article, the patent being about to expire, defendant is not entitled to a full allowance for the expense of salesmen, but only to an equitable percentage of such expense.

Appeal from the District Court of the United States for the Southern District of New York.

Suit by August J. Oehring and the Pratt & Whitney Company against the Fox Typewriter Company. From a decree for complainants for part of the relief sought, defendant appeals, and complainants cross-appeal. Modified and affirmed.

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Appeal from final decree dated November 28, 1916, awarding to plaintiff $11,053.35 profits made by defendant by its infringement of United States letters patent No. 560,171 of May 12, 1896. The interlocutory decree held claim 1 valid. Claim 3 was included in the accounting; but, as claim 1 was comprehensive of claim 3, the only question in that regard is as to costs.

The memorandum of the District Court, adverted to, is as follows:

The only question in these cases is whether any new facts have been shown the court requiring a conclusion different from that reached in respect of this same patent in the action against Gardam & Sons reported 202 Fed. 753, 121 C. C. A. 119.

The attention of this court is directed to two new matters, and two only: (1) The file wrapper relating to the patent in suit; and (2) the Adt machine of 1879, illustrated in defendant's Exhibit H.

In the file wrapper Oehring replied to certain comments of the examiner by saying: "While the drawings of this application may not clearly exhibit specific mechanism for adjusting the drill-carrying spindles in all directions, to wit, in an 'inclined direction,' nevertheless in view of the principle of operation shown and described and of the specific claim that the adjustment is in all directions, any slight change of construction whereby an inclined direction would be given to the drill-carrying spindles would be purely a matter of mechanics, coming within the skill of the ordinary mechanic, and would manifestly be an obvious modification of the invention."

I fail to see that this quotation means more than that Oehring asserted (as he always has) that the adjustment of spindles in all directions would include an inclined direction. This is obviously true; but it is a wholly different thing to argue that, because it is easy to include an inclined direction in all directions, it would not amount to invention to change a machine capable of adjusting spindles in an inclined direction to one adjusting in all directions.

The Adt machine is to me interesting because it shows what mechanics and inventors wanted and waited a long time to get.

Obviously in any nice work almost all of the holes to be drilled should be drilled by a perpendicular instrument. Unless the drill is moved, or the thing to be drilled is moved every time a hole is required, this perpendicularity will not be maintained unless some kind of flexible shafting be introduced. But the moment this is done the thrust has to be taken care of. Oehring took care of the thrust by taking it up on the bracket, and this is what enabled him to use a flexible shaft.

Adt has no flexible shaft, and it is in my opinion abundantly proven that the thrust was taken up at the ceiling or top of the machine. In order to make the Adt machine an anticipation the thrust must be transferred to the bracket, something which Adt never intended.

By the insertion of a universal joint in the shaft of Exhibit H, the limitations of the real Adt machine are in my judgment clearly shown. Unless a bracket be clamped to a standard, the shaft with the flexible joint is inoperative; if it be clamped to a standard, it is not the Adt machine.

Let it be admitted that, if the Adt machine be modified by transferring the thrust from the ceiling bracket and inserting a flexible shaft or universal joint above the new point of thrust reception, Oehring's invention would be substantially shown. It may be so, but if it be so the steps taken constitute invention of quite a high kind.

Complainants may take a decree as prayed for, with costs.

Fred L. Chappell and Chappell & Earl, all of Kalamazoo, Mich., and Philipp, Sawyer, Rice & Kennedy, of New York City, for appellant and cross-appellee.

Hans v. Briesen and Fred A. Klein, both of New York City, for appellees and cross-appellants.

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Before WARD, Circuit Judge, and LEARNED HAND and MAYER, District Judges.

MAYER, District Judge. [1] 1. The patent in suit covering an invention of substantial merit was broadly sustained in Oehring v. Gardam, 202 Fed. 753, 121 C. C. A. 119. In the case at bar only two matters were introduced which had not appeared in the Gardam Case, viz.: (a) The Adt machine of 1879, and (b) the file wrapper. As the patent in suit has expired and the patent features of the case can be of interest only to the parties, a discussion of the two new matters supra is unnecessary.

We agree with the District Court for the reasons clearly and concisely stated in the memorandum opinion below, that there is nothing in the Adt machine nor the file wrapper which affects the conclusion in the Gardam Case. Indeed, we are inclined to the view that the Gardam machine in the Gardam suit was a nearer approach to the invention than the Adt machine and we are satisfied that the patent was valid and infringed.

In the accounting, however, several interesting questions were raised which invite careful consideration, the more important of which were as follows: (1) Whether profits from the entire machine were recoverable or should have been apportioned; (2) whether interest on investment should have been credited to defendant as part of the cost of the infringing machines; (3) whether plaintiffs are entitled to interest on profits from the date when such profits were actually made by defendant; and (4) whether a credit should be allowed to defendant for 90 per cent. of defendant's salesmen's expenses. Other questions in the accounting will be referred to where necessary.

[2] 2. The structure of the patent was unitary. The novelty was the combination of universal with independent adjustability. Oehring v. Gardam, supra. No other single machine has thus far taken its place and there is no standard of comparison with any other machine. The only comparison, if any, is as between Oehring and a series of separate drills each adapted only for a restricted line of work. The invention does not belong to the class considered in Garretson v. Clark, 111 U. S. 120, 4 Sup. Ct. 291, 28 L. Ed. 371, or Dowagiac Mfg. Co. v. Minnesota Plow Co., 235 U. S. 641, 35 Sup. Ct. 221, 59 L. Ed. 398. The Oehring invention represented an entire revision of the entire machine and the creation of a new device in which all the operative parts contributed to produce the new result.

In the state of the evidence, it was incumbent on defendant, in any event, to prove what old element, if any, contributed to the profits, and this, of course, it was unable to do.

We therefore agree with the District Court that the case was not one for apportionment. Manufacturing Co. v. Cowing, 105 U. S. 253, 26 L. Ed. 987; Carborundum Co. v. Electric Smelting & Aluminum Co., 203 Fed. 976, 980, 122 C. C. A. 276; Orr & Lockett Hardware Co. v. Murray, 163 Fed. 54, 89 C. C. A. 492.

[3-5] 3. Interest on investment: When the amount of capital used by an infringer for the manufacture of the infringing devices is once

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ascertained, interest is a proper credit. Western Glass Co. v. Schmertz Wire Glass Co., 226 Fed. 730, 141 C. C. A. 486.

The case just cited reviews this subject comprehensively and historically and announces a rule which accords with business practice and common sense. Certainly, a merchant cannot correctly determine what his profit is until he knows the amount of his investment together with interest thereon, whether the investment is made out of his own funds or borrowed capital.

It is argued in the case at bar that interest on investment should not be allowed because defendant used for the infringing business an old plant and facilities which had theretofore been devoted to other business but there is no merit in this contention. If a plant once used to manufacture the machine A ceases that manufacture and engages in manufacturing the infringing machine B, we are at a loss to understand why the plant is any less an investment for the manufacture of B than if a new plant were purchased for such manufacture. If the plant, theretofore used solely to manufacture A, is used partly to manufacture A and partly B, then the sole problem is to ascertain what proportion is devoted to the manufacture of B, or, in other words, to work out the correct apportionment.

The plaintiffs assign as error that:

"The alleged interest on investment was not interest on investment at all, but was interest on inventory and property only, and that interest on inventory so calculated was not a proper charge."

The items which constitute the investment in the case at bar are (broadly classified) land, buildings, machinery, fixtures, light and power plant, accounts, and bills receivable. These all go to make up the capital which defendant had invested in the various departments of its business and, while a list of these items may be called an inventory, that inventory shows the investment. Plaintiff's brief refers to some items in detail, but an appellate court cannot undertake to examine the correctness of the constituent items entering into the final calculation as found by the trial court, where error is not assigned. In this case, the master submitted a draft report to counsel, then passed on the exceptions to the draft report, then filed his final report, which in due course came before the District Court on exceptions. Plaintiffs filed three exceptions to the final report on broad general propositions, i. e.: (1) To the allowance to defendant of interest on investment; (2) to the failure to allow plaintiff interest on profits made by the defendant for each fiscal year of the infringement; and (3) to the failure to find that the infringement was willful, deliberate, and intentional. So far as the record discloses, the detailed items of the investment account were not attacked by plaintiffs, and, in any event, plaintiffs assigned only three errors substantially similar to their three exceptions to the master's report. The master's report dealt painstakingly with a mass of figures, schedules, and detail and worked out a difficult apportionment. If error as to details was committed (and we do not hold there was), it should have been pointed out in the exceptions to the master's report and in the assignments of error.

[6] Defendant, however, duly excepted to the master's final report

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and duly assigned as error the failure to allow insurance and taxes in favor of defendant when properly apportioned. Since the decree below was filed, taxes and insurance have been held by this court to be proper credits (Gordon v. Turco-Halvah Co., Inc., 247 Fed. 487), and these items, properly apportioned, should have been allowed.

[7] 4. Interest on profits: The final decree allowed, in favor of plaintiffs, interest on defendant's profits from the date of the master's report. Illinois Central R. Co. v. Turrill, 110 U. S. 301, 303, 4 Sup. Ct. 5, 28 L. Ed. 154; Tilghman v. Proctor, 125 U. S. 136, 160, 8 Sup. Ct. 894, 31 L. Ed. 664; Crosby Valve Co. v. Safety Valve Co., 141 U. S. 441, 457, 12 Sup. Ct. 49, 35 L. Ed. 809.

Plaintiffs contend, in effect, that interest should be allowed from the date when profits were actually made by defendant.

The question of the allowance of interest in certain classes of cases has been in evolution. Faber v. City of New York, 222 N. Y. 255, 262, 118 N. E. 609; Robinson v. United States, 251 Fed. 461, — C. C. A. — (recently decided).

In a case such as that at bar, however, we are bound by the rule as settled by controlling authority and as was recognized by Judge Taft in National Folding-Box & Paper Co. v. Dayton Paper-Novelty Co. (C. C.) 97 Fed. 331.

In Mowry v. Whitney, 14 Wall. 653, 20 L. Ed. 860, interest was not allowed prior to the final decree, although the court stated, "We will not say that in no possible case can interest be allowed."

In Littlefield v. Perry, 21 Wall. 205, 229, 22 L. Ed. 577, Mowry v. Whitney, supra, was followed with the observation that:

"Circumstances may, however, arise which would justify the addition of interest in order to give complete indemnity for losses sustained by willful infringements."

In Illinois Central R. Co. v. Turrill, supra, followed by Tilghman v. Proctor, supra, interest was allowed from the date of the master's report and that is now the rule, otherwise unchanged and applied as recently as Western Glass Co. v. Schmertz Wire Glass Co., supra; for as said in Tilghman v. Proctor, supra, at page 160 of 125 U. S., at page 907 of 8 Sup. Ct., 31 L. Ed. 664:

"If the question thus presented were a new one, it would require grave consideration. But by a uniform current of decisions of this court, beginning 30 years ago, the profits allowed in equity, for the injury that a patentee has sustained by the infringement of his patent, have been considered as a measure of unliquidated damages, which, as a general rule, and in the absence of special circumstances, do not bear interest until after their amount has been judicially ascertained; and the provision introduced in the patent act of 1870, regulating the subject of profits and damages, made no mention of interest, and has not been understood to affect the rule as previously announced."

It is, perhaps, to be inferred from Mowry v. Whitney, Littlefield v. Perry, and Tilghman v. Proctor that interest from a date earlier than the master's report might be allowed when the infringement is proved to be wanton and deliberate.

[8] In the case at bar there were some features indicating a deliberate purpose to infringe, but, "at the time of the infringement, the fun-

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damental questions and validity of" Oehring's patent "were in earnest controversy and of uncertain issue" (Tilghman v. Proctor, supra), as is shown by the fact that the Circuit Court, on July 27, 1910, in Oehring v. Gardam, 180 Fed. 476, held the broad and important claim 1 invalid, and that it was valid was not finally decided by the Circuit Court of Appeals until February 10, 1913 (Oehring v. Gardam, 202 Fed. 753, 121 C. C. A. 119), shortly before the expiration of the patent on May 12, 1913. Therefore we cannot say that the infringement was wanton, and we conclude that the District Court was right in its disposition of the question of interest on profits.

[9] 5. The expenses of salesmen: Defendant had two salesmen, Kernan and Schow, who had been in defendant's employ for some years prior to the infringement. After the sale of the infringing devices was begun, no change was made in the compensation of the salesmen, and while selling the infringing devices they also continued to sell defendant's other products. The master allowed defendant 35.65 per cent. of the expenses for salesmen which represents such per cent. of the total expenses of salesmen as corresponds to the per cent. which the sales of infringing machines bear to the total sales of defendant's business. Defendant insists that 90 per cent. of salesmen expenses should be credited in favor of defendant.

There is no evidence that Schow devoted 90 per cent. of his time to the sale of infringing machines, Schow not having testified and the testimony in that regard not being on knowledge but amounting only to estimates based on general recollection of some of the correspondence and of orders received in the ordinary course of the business.

Kernan, however, testified without contradiction that about 90 per cent. of his expenses were attributable to the sale of the infringing machines. No record was kept as against these machines and no apportionment made by defendant on its books until the accounting was begun. Kernan, however, was very active and spent time, effort, and money in drumming up a trade and the 90 per cent. estimate of Kernan covers the time and expenses devoted to endeavoring to get business as well as to actual sales.

We think on the evidence that this estimate must be accepted. The facts in this case do not, however, justify the allowance of the full 90 per cent. In a sense, this expenditure was in the nature of a capital investment made to start a new competing business in anticipation of the comparatively early expiration of the patent, the sale of the infringing devices having begun at the end of December, 1909. It seems to us that this expenditure was abnormal and undertaken to create a market and good will for defendant's goods when the patent would expire in May, 1913, rather than to conduct the business normally with a view to making profits, if any, upon the particular machines sold. It is difficult and often impossible to arrive at an accurate apportionment in a case of this kind, and each case must stand on its own facts and the element of good faith must always be considered; and where, as here, it is quite plain that an expenditure was not normal to the business in hand, it would be inequitable and defeat the remedial purposes of the statute to permit a defendant to charge disproportionately all of its "drumming up" trade expenses as a credit to reduce

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profits. We are not prepared to say that the apportionment adopted by the master would be applicable in all cases; but, in the state of this record, we think it worked out an equitable result and did substantial justice between the parties.

The decree, as modified, in respect of insurance and taxes, is affirmed, without costs in this court or in the District Court, and the District Court is instructed to make the necessary calculations in conformity with this opinion.

LUTEN v. WHITTIER et al.

(Circuit Court of Appeals, Sixth Circuit. May 7, 1918.)

No. 3071.

1. PATENTS ⟸328—VALIDITY—REINFORCED CONCRETE BRIDGE.
Luten patent, No. 853,203, for a reinforced concrete bridge having spandrel walls, in view of the prior art and analogous arts, *held* void for lack of invention.

2. PATENTS ⟸27(1)—INVENTION.
Discovery of a previously unknown law of operation, involved in a known method, is not invention.

3. PATENTS ⟸328—INVENTION—REINFORCING BAR FOR CONCRETE.
Luten patent, No. 1,070,903, for a reinforcing bar for concrete, having projections of such height and spacing that the space between adjacent projections is more than 10 times the height of the projections, *held* void for lack of invention.

Appeal from the District Court of the United States for the Southern District of Ohio; John E. Sater, Judge.

Suit in equity by Daniel B. Luten against William F. Whittier and others. Decree for defendants, and complainant appeals. Affirmed.

Daugherty, Todd & Rarey, of Columbus, Ohio (G. B. Schley, A. M. Hood, and Russell T. MacFall, all of Indianapolis, Ind., of counsel), for appellant.

Edw. N. Pagelsen and Louis M. Spencer, both of Detroit, Mich., for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. Suit upon United States patents No. 853,203 (May 7, 1907), and No. 1,070,903 (August 19, 1913), both to Daniel B. Luten. The District Court found both patents invalid for lack of both invention and novelty, and dismissed the bill. This appeal is from that decree of dismissal.

[1] 1. The invention of patent No. 853,203 relates to a method of metal reinforcement of "arches, culverts, and similar bridge structures which are commonly constructed from concrete, stone, brick, mortar, and other similar materials"—being specially applicable to reinforced concrete arch bridges which are provided with spandrel walls to prevent the earth fill from overflowing the ends of the arches; that is to say, the sides of the bridge.

The stated general object of the invention is to "combine increased strength and efficiency with superior economy of materials and labor,

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as compared with structures of" their class in general use. The preferred method of accomplishing this object is illustrated by Figs 1 and 2 of the patent drawings here reproduced:

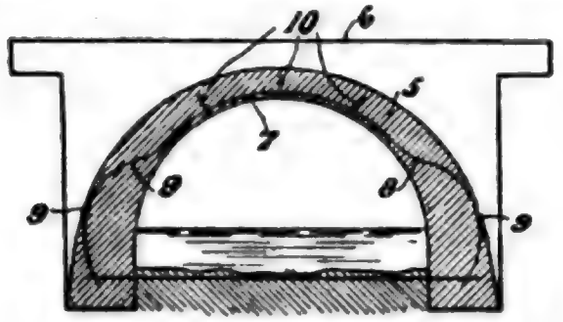


Fig. 1.

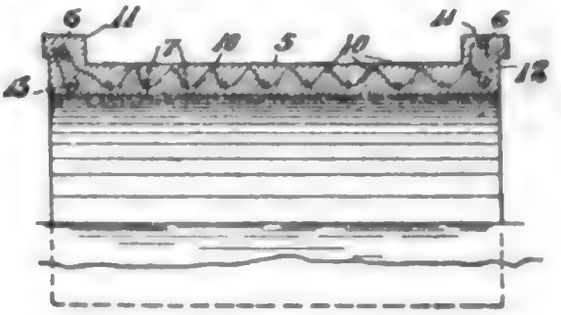


Fig. 2.

Fig. 1 being a cross-sectional view through the rib of the arch longitudinally with the span, and Fig. 2 a central sectional view through the arch body and its spandrel walls transversely of the span—*5* representing the rib of the arch, *6* the spandrel walls, *7* a series of tension rods imbedded in the arch rib, extending transversely of the axis of the arch, bonded at *8* by their own extensions into the material of the arch, and passing downward into the abutment; *10* straps likewise imbedded in the arch material, woven between the inner and outer sides, carried up into the material of the spandrel walls and anchored around tension rods *11* imbedded in those walls. There is thus embraced a reinforcement of the arch, both in the direction of the axis and transversely of the material of its rib, as well as a tying of the arch to the spandrel wall and a reinforcement of that wall.

The arrangement disclosed is claimed by the patentee to so bond the spandrel walls to the arch as to prevent the overturning of those walls or their breaking away under pressure of the filling or loading, and to so reinforce the arch as to resist the tendency of the tension rods to split the arch rib longitudinally through its underlying portion, and to prevent failure of the arch by the longitudinal splitting away of the portion carrying the spandrel walls. The claims in issue, being Nos. 3, 7, 10, 15, and 21, are printed in the margin.[1]

[1] 3. An arch having a spandrel wall and straps imbedded in the rib of the arch and extended into said wall to bond the wall to the body of the arch, substantially as described.

7. A bridge of concrete or similar material, with reinforcing members transverse to the roadway and extending upward into a wall or spandrel near its back face.

10. A bridge of concrete or similar material with reinforcing members imbedded transverse to the roadway and extending upward into a wall or spandrel.

15. A concrete arch and spandrel wall with a longitudinal member and a transverse member imbedded in the spandrel and overlapping, and a member imbedded in the arch in the general direction of its axis.

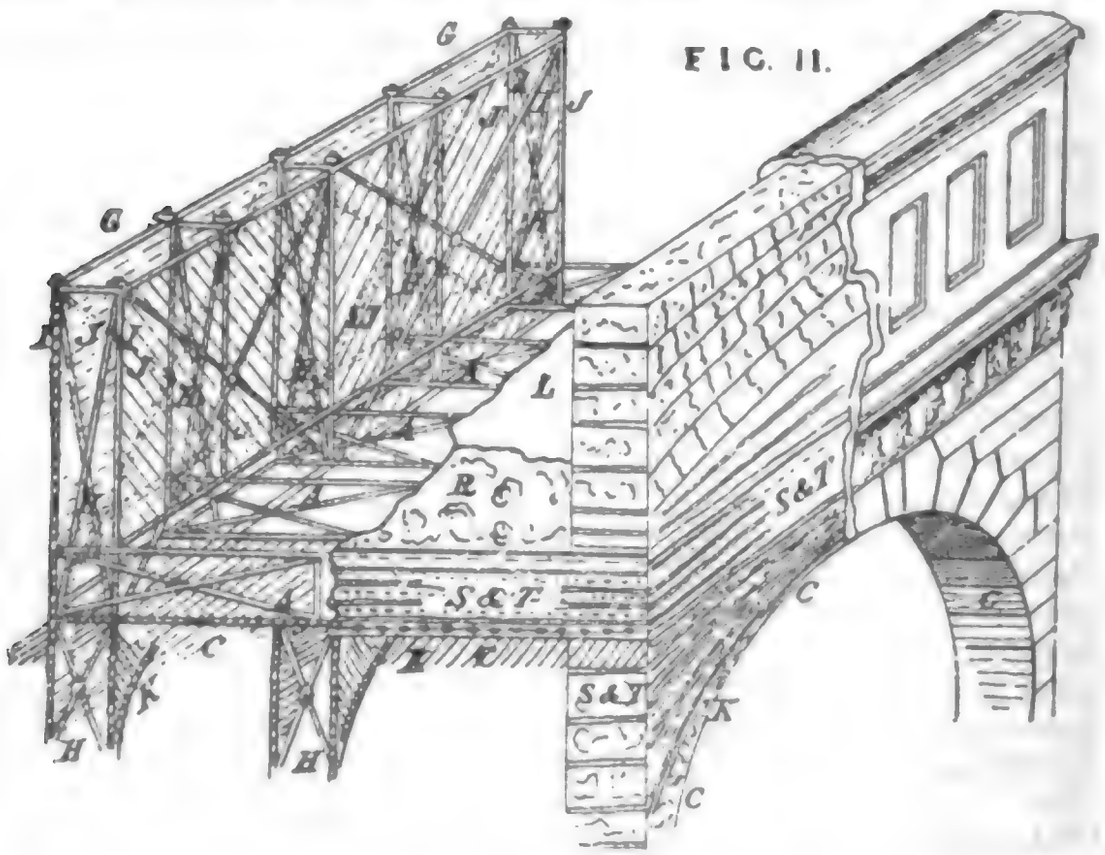
21. An arched structure of concrete or similar material with walls transverse to the axis of the arch and bonded to the arch by reinforcing members imbedded in the arch in a direction transverse to the walls.

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Masonry bridges of arch construction antedate the Christian era; spandrel walls thereon, for the purpose of resisting transverse pressure from filling or loading, have been used from time immemorial. At the date of Luten's claimed invention (which his testimony carries back to 1901) the art of reinforcing concrete, by metal, while not as advanced as now, was by no means in its infancy. Not only was its use for general building purposes then old, but it had been applied to the construction of arch bridges with spandrel walls, including the reinforcing of both arch and wall and the bonding of the two together.

We come at once to the question whether, in view of the prior art, the reinforcing and bonding means of the claims in suit involve invention. Brannon, by British patent No. 2,703, disclosed in 1871 (30 years before Luten) a bridge consisting of concreted material filling incasements of wirework, and forced into a dense and tenacious mass resting upon a series of masonry arches, as indicated by the subjoined patent drawing (reduced), which shows longitudinal reinforcing rods *G* in the

FIG. II.



side walls, vertical reinforcing rods *I* extending from the side walls into the arch, and transverse rods *A* extending from the side walls into the concrete and metal floor resting upon the arches. The combination of the metal and concrete was intended, not only to increase coherence and solidity of the mass, but to resist "traverse and tensile strains." The side walls, while not designed to resist earth pressure, were spandrel walls. A parapet may be a spandrel wall, for any wall built on the extrados of the arch and filling in the spandrel is a spandrel wall. The manner of applying the concrete is, of course, immaterial (Munising Co. v. American Co., 228 Fed. 700, 708, 143 C. C. A. 222); but as the metal structure was self-supporting, and the transverse rein-

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forcement entered, not the arches themselves, but the floor, which rests upon a series of arches, the Brannon device is not a complete anticipation of the Luten claims in suit, although several of those claims read literally upon it.

In 1873, Monier, by a fourth addition to his French patent of 1867, disclosed a bridge in which the abutments, the arch, and the spandrel wall were formed of iron bars, constituting a grillage "plastered with cement or hydraulic lime," as shown by (reduced) Fig. 1 of the patent drawings here reproduced, the left half of which shows the reinforcement, and the right half the bridge as completed.

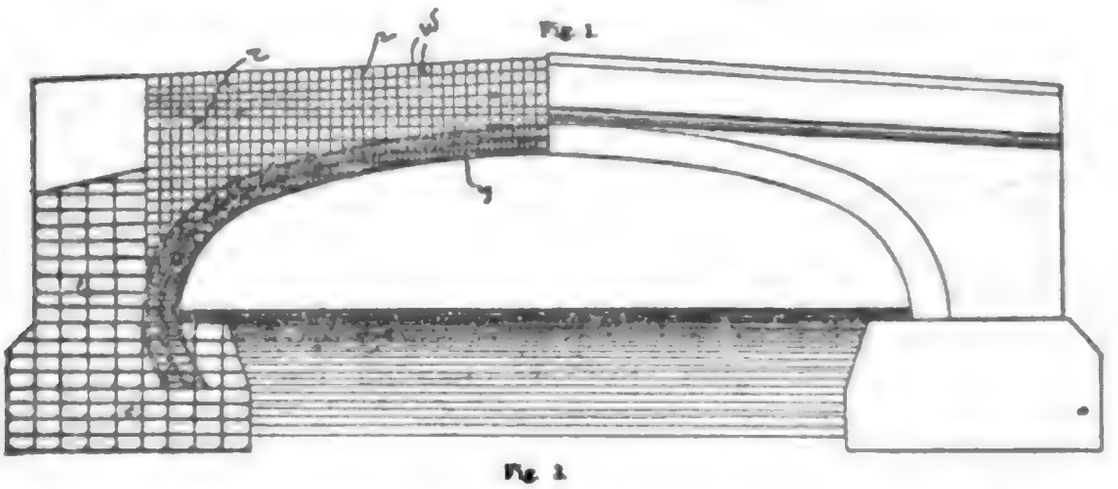


Fig. 1

In this figure the rods *W* run longitudinally through the spandrel wall, while rods *Z* extend vertically in the spandrel and into the arch. In other figures (not here reproduced) rods *Y* run through the arch in the general direction of the axis of the arch; the rods *W*, *Z*, and *Y* are tied together at their points of crossing. The claims in suit, other than *7* and *10*, read literally upon the Monier disclosure, although there, as in Brannon, the metal structure is self-supporting.

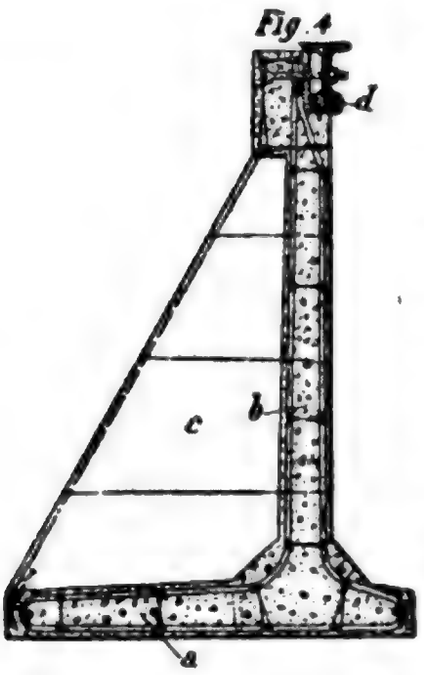
From about the year 1890 there was a rapid advance in the art of metal reinforced concrete for building purposes generally. Reference to some of the patents relating to this general subject (although not directly to bridge structures) is found in the opinion of this court in Trussed Concrete Steel Co. v. Goldberg, 222 Fed. 506, 138 C. C. A. 106. The Engineering News contained in 1893 a description of a Monier bridge arch of concrete reinforced with a network of steel. If the vertical rods shown in the illustration (and made by upturning the horizontal transverse rods) are intended to fasten the spandrel wall to the arch proper, the structure would seem to cover in terms the claims here in suit, except claim 7. The description, however, is silent on that subject, and the question must be determined by the drawing alone. The District Court was of opinion that the drawing showed such intended fastening. While we cannot say that it does not so show, the disclosure is not so clear as to convince us on that point, and we therefore disregard the disclosure, except for such bearing as it has on the art generally.

In 1897, however, Hinckley, by United States patent No. 623,904, showed a metal-concrete arch bridge containing longitudinal reinforce-

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ment in the arch rib, and forms of bonding connection between the spandrel wall and the arch rib, one in the form of a rod or anchor bar, another in the form of a frame, either fastened to one of the beams of the arch or simply built into its concrete—each form being imbedded in the concrete both of the arch and of the spandrel wall. This disclosure lacked the longitudinal reinforcement of the spandrel walls, found, however, elsewhere in the prior art. We think the method of connection between wall and arch not subject to the criticism of ineffectiveness.

There are, moreover, two disclosures in another art which we think pertinent to the subject of invention. These are the British patent to Hennebique (1900), No. 8,814, and the United States patent to Bone, No. 705,732, applied for in 1899, and issued in 1902—both on retaining walls. The Bone patent was considered by us in Akron v. Bone, 221 Fed. 944, 137 C. C. A. 514. Both these patents disclose (especially that of Hennebique) longitudinal reinforcing rods extending through both the upright retaining wall and the base, horizontal rods in the base continued upwardly in the retaining wall and anchoring the base and wall together, as shown by Fig. 4 of the Hennebique patent below.



Both Hennebique and Bone show reinforcement at the back side of the retaining wall (as called for in claim 7 of the patent in suit); Bone expressly stating, as his reason for using it, that the tension is there greatest and that the metal will there have the greatest effect. Hennebique also shows, as applied to a retaining wall and its base, essentially the reinforcement called for by claim 10. While disclosures in nonanalogous arts are not of great value on the question of anticipation (Star Brass Works v. General Elec. Co. [C. C. A. 6] 111 Fed. 398, 49 C. C. A. 409), that is not the question we are considering. Moreover, the retaining wall is directly analogous to the spandrel wall, considering the latter as designed to resist the pressure of earth filling and loading; so considered the problem is the same in each case. Luten recognized this problem in the statement in his patent that the reinforcing arrangement described prevents "failure of the arch * * * by the tendency of the spandrel wall itself to overturn due to the pressure of earth filling or other materials or loading back of it," and that it bonds the material of the arch rib "against the tendency of the spandrel wall to break away under the earth pressure," etc.

We think the Hennebique system of reinforcement and bonding applied to Hinckley's metal-concrete arch bridge (substituting the retaining wall of the one for the spandrel wall of the other and the base of the retaining wall for the arch) would directly anticipate Luten.

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Hinckley recognized the analogy between the bridge spandrel wall and an ordinary retaining wall by saying in his specification that it "is customary for spandrel walls *A* (like the retaining walls) to be so constructed that their weight suffices to counteract the outward thrust or pressure of the impounded earth, which in practice fills the space between them. By putting part of this thrust upon a metal bar or frame imbedded in the concrete a saving can be effected in the cost of the spandrel wall."

Plaintiff asserts, however, that until 1901 a spandrel wall was universally regarded as a load on the arch; that in that year he discovered that a spandrel wall served to stiffen the arch, and so to strengthen it, instead of being an extra load upon it; that his system of reinforcement is devised in view of that discovery, and is adapted to the condition so discovered; that such system accomplishes results not otherwise attained, those most prominently asserted being that the arch is suspended from or carried by the spandrel wall as a beam, that the longitudinal reinforcement of the wall prevents distortion or buckling of the arch, that the wall is held from slipping on the arch ring by the straps connecting the wall and the arch rib, that the reinforcing rods prevent cracking off of the end section of the arch rib, that the vertical rods in the spandrel wall prevent its cracking along a horizontal line above the springing lines of the arch, that the longitudinal and transverse rods in the spandrel wall prevent failure in short sections due to earth pressure, and that the rods extending from the wall into the arch ring and transverse to the roadway tend to prevent shearing a section of the arch ring from the remainder; that by reason of these discoveries it was possible to make spandrel walls thinner and lighter than formerly.

That a spandrel wall such as involved here strengthens the arch appreciably seems obvious to the most casual view, and can hardly be said to be the subject of discovery. Indeed, the patent in suit is silent respecting the function of the spandrel wall as helping to sustain the arch. It is a fundamental principle of the arch that a downward pressure at a given point causes it to rise and thus be distorted or buckled elsewhere. The inner line of the spandrel wall is itself arch-shaped, conforming to the extrados of the arch. At its ends it rests upon an abutment or foundation of some kind, as illustrated by a portion of a cut of one of plaintiff's bridges.



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The pressure of the wall, especially at a distance from the crown of the arch, by the mere fact of its weight, tends not only to resist thrust at the springing lines of the arch, but the tendency of the arch to distort or buckle outwardly when under thrust is resisted. In masonry, where the arch has been most commonly used, it has always been the general practice to bond the spandrel wall to the arch by mortar; and in concrete work such bond has regularly been effected through the concrete itself. If plaintiff's arch is suspended from his spandrel wall, so was Hinckley's, although perhaps plaintiff's method is more effective, in that his straps are carried higher up into the wall. This, however, is matter of degree only.

[2] If plaintiff discovered that a new and useful result was effected by the use of his means, he is entitled to a patent on those means, provided he has disclosed and specified them. Tilghman v. Proctor, 102 U. S. 707, 26 L. Ed. 279. But a discovery of a previously unknown law of operation involved in a known method is not invention (General Elec. Co. v. Cooper-Hewitt Co., 249 Fed. 69, — C. C. A. —, recently decided by this court); and we think that is the utmost plaintiff can claim. We are not impressed that the asserted lightness of plaintiff's spandrel walls is so far due to the features of the claims in suit as to indicate the presence of invention.

Years before plaintiff applied for the patent in suit the theory of steel reinforcement of concrete, in that the latter resists compression strains strongly and tension strains only lightly, while steel has strong tensile resistance and so reinforces the concrete by supplying the element which the latter lacks, was well known; and standard practice had for years called for the metal reinforcement of concrete where weakest, and where subject to the severest tensile strain. So far as we can see, plaintiff has merely applied this well-known principle in well-known ways, and has thereby accomplished no new result in a patentable sense. The question is not whether the preferred means disclosed differ in detail from prior construction, but whether plaintiff's claims, read in the light of the specification, call for means open to invention in view of the prior art. Taking into account the entire prior art, and recognizing that invention is but a question of fact, we think plaintiff's advance was only that properly attributable to the skill of the mechanical engineer familiar with bridge construction, and that the claims in suit lack invention. The instant case is obviously distinguished from Detroit Iron & Steel Co. v. Carey, 236 Fed. 924, 150 C. C. A. 186.

Plaintiff is evidently an intelligent and skillful bridge engineer, designer, and builder. His work has doubtless contributed greatly to the reinforced concrete bridge-building art, and he is entitled to great credit therefor. His success in that art is perhaps due in part to the invention in suit, but it seems to us not improbably due in larger part to his personal efficiency, and perhaps to other claims of the patent in suit not here involved, as well possibly to numerous other patents which he has taken out. In our opinion the District Court rightly held the claims in suit lacking in invention.

[3] Patent No. 1,070,903 is for a transversely corrugated bar for

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reinforcing concrete. Its basic idea is that the intervening spaces between the corrugations should be more than ten times their height, for the reason that the crushing strength of concrete is approximately ten times its shearing strength, and that, unless the length of the section of concrete lying between the projections is more than ten times the height of such section the rod, when subject to tension by longitudinal pulling, will entirely shear off this intervening concrete section, allowing the rod to pull out; while if the length of the concrete section is more than ten times its height there will be merely a crushing of so much of the area of the concrete as bears against the corrugations, the start toward failure being immediately arrested by the increased density of the concrete, caused by its compression. Economy of material, due to the wide spacing of the corrugations, is also an object.

The first claim alone is in issue. It reads:

"1. A reinforcing bar for concrete, provided with projections of such height and spacing that the space between adjacent projections is more than ten times the height of the projections."

We think this claim clearly lacking in invention. Reinforcing metallic bars imbedded in concrete, and provided with projections and deformations of various kinds to aid in preventing a slipping of the bar in the concrete, were old long before Luten applied for his patent. Plaintiff admits that he did not discover that the compressive strength of concrete was ten times as great as its shearing strength; indeed, he admits that it is not even definitely known at the present time what the precise ratio is. At the time of plaintiff's application, however, it was the general (though not the universal) understanding of engineers that such was approximately the ratio, although that opinion is apparently not now so generally held as then. It was apparently never regarded as absolutely fixed and invariable. Plaintiff concedes that at "as early a date as 1901 [which was ten years before plaintiff's application] the point was that the bar should be so proportioned that it could not fail in shear but must fail in compression." The testimony in this case, as to the effectiveness of plaintiff's bar in producing this result is in more or less conflict, but we need not consider that question.

It is not claimed that there would be invention in discovering that the space between the projections should have the same relation to the height as the ratio of compression strength to shearing strength. Plaintiff admits that that is "simply what one does in proportioning rivets in structural steel; that is to say, proportioning a rivet so that it will neither shear off nor compress, so that all the parts of the structure shall be equally strong." The contention is, however, that the patent covers "all bars having projections in which the spaces between the projections are more than ten times the height of the projections," regardless of how much or how little the ratio may be above 10 to 1.

The record does not show that reinforced rods in which the ratio between distances apart and height was greater than 10 to 1 were not used before plaintiff's application; on the other hand, there are several disclosures in the prior art, by way of patent drawings of bars, the height of whose projections is less than one-tenth of the space be-

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tween them. Thus, in the Hyatt British patent of 1877 (No. 289) the drawings indicate a ratio of from 11½ to 1 to 13 to 1, according to different witnesses—plaintiff giving the first-named ratio. In the Thacher United States patent of 1899 (No. 617,615) the relation shown is conceded by plaintiff to be about 20 to 1. In the Fietz-Leuthold Swiss patent of 1895 (No. 10,703) the ratio appears to be from 11 to 1, as admitted by plaintiff, to 12 to 1, according to another witness. True, these ratios are predicated upon measurements of drawings not affirmatively appearing to be made to scale; and in the absence of teachings on this subject in the specifications, such disclosures are usually and properly regarded as merely accidental. Munising Co. v. American Co., supra, and cases there cited. But in view of what has been said of prior engineering acceptance generally of a ratio of about 10 to 1 between compressing and shearing strength of concrete, the engineering knowledge of the function of the reinforcing rod and its relation to such concrete strength, of the number of patent disclosures cited, the fact that the object of the deformation was to prevent slipping, and plaintiff's recognition that the ratios named are indicated by the face of the drawings, there is less reason to think that such showing is merely accidental, notwithstanding the drawings of Hyatt's United States patent of 1878 (No. 206,112) indicate a ratio of about 8 to 1. But, however this may be, an assertion, upon this record, of invention in the alleged discovery that a ratio of something more than 10 to 1 (without determining how much more) was desirable, on the theory that plaintiff alone saw the advantage of halting failure by increasing initial compression, is, to our minds, too shadowy for recognition.

The judgment of the District Court must be affirmed.

MOTION PICTURE PATENTS CO. v. CALEHUFF SUPPLY CO., Inc.

(Circuit Court of Appeals, Third Circuit. June 13, 1918.)

No. 2360.

1. PATENTS ⇐328—VALIDITY—PROJECTING KINETOSCOPE.
The Latham patent, No. 707,934, for a projecting kinetoscope, claim 7, employing a device taken from the prior art without developing any new functions, is invalid for want of patentable invention.

2. PATENTS ⇐41—VALIDITY—COMBINATION OF ELEMENTS.
If invention is wholly lacking, a patent cannot be sustained, even for the specific combination of specifically contrived elements.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Suit in equity for infringement by the Motion Picture Patents Company against the Calehuff Supply Company, Incorporated. From a decree (248 Fed. 724) dismissing the bill on final hearing, plaintiff appeals. Affirmed.

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Melville Church, of Washington, D. C., George F. Scull, of New York City, and Cyrus N. Anderson, of Philadelphia, Pa., for appellant.

Ladner & Ladner, of Philadelphia, Pa. (Oscar W. Jeffrey and W. B. Morton, both of New York City, of counsel), for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. In this action the defendant is charged with infringement of plaintiff's patent No. 707,934, granted to Woodville Latham, August 26, 1902, for a Projecting Kinetoscope. The court found claim 7 of the patent—which was the only one in issue—invalid, and dismissed the bill. 248 Fed. 724. The plaintiff appealed.

The defences at the trial were: (1) Invalidity of the patent by reason of prior patents and prior inventions, (2) estoppel by virtue of certain Patent Office proceedings, and (3) non-infringement. Infringement was later admitted. As the issue of estoppel is subordinate to that of validity, we shall address our discussion to the validity of the patent.

[1] A very brief summary of the art of moving picture mechanism is necessary to an understanding of Latham's contribution.

The practical art began with Edison. He is, without doubt, its founder. He solved its fundamental problems by evolving a theory, which, with its picture proportions and time movements, has been accepted by the art and has been practiced almost without deviation from the day of its disclosure.

Edison found, in taking or projecting a series of separate pictures, that it is necessary (in order to give the illusion of continuous and uninterrupted movement) to make an actual interruption in the movement of the picture medium for a time that will permit the separate exposure of each picture but will prevent the eye detecting the interruption. This time, though almost infinitesimal, is measured with nice calculation by the varying sensitiveness of the picture medium and the retina of the human eye.

Edison's first contribution was the medium or particular vehicle on which moving pictures can be carried. This is a sensitized film invented by another but adapted by Edison to receive and project pictures in sequence, the edges of the film being perforated so that it can be moved across the lens aperture of the camera or projector with a predetermined motion. He conformed the perforations of the film to the sprocket rotary mechanism of his next invention. This was a device for taking or projecting pictures in series. This mechanism consisted of two reels or drums placed apart, one above the other. They were respectively film delivering and film receiving reels. Between them was placed a rotary means, being a wheel with sprockets, which, in its rotation, developed the Geneva intermittent movement, and, by its sprocket engagement with the film perforations, drew the film from the delivering reel to the camera lens where it stopped an instant for exposure and then passed it on to the receiving reel. The

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intermittent rotary member was geared with a multiple blade shutter, which synchronized with the film as it intermittently passed the lens, thereby bringing the film to a positive stop before the shutter opened, causing a stationary though instantaneous exposure of the picture through the shutter aperture when it opened, and resuming the movement upon the closing of the shutter, to be repeated so rapidly that a succession of pictures projected upon a screen gave the illusion of motion.

Edison's contributions, though very simple, were so complete that their fundamental characteristics have not been improved upon by the art. The art still uses the Edison perforated film and the Edison sprocket rotary mechanism. Such improvements as have been made relate chiefly to exposure problems, and to problems of carrying films of increased length to project pictures in a correspondingly greater series.

At the time of Edison's invention, a moving picture display was of short duration. The film was only about 50 feet long and its weight was inconsiderable. A film of this length and weight responded readily and accurately to Edison's intermittent movement mechanism. Since then, however, the public has demanded exhibitions on a larger scale and the art has responded by supplying films of a thousand feet or more containing many thousand pictures.

The increased length of films increased their weight and raised a problem that was not present when Edison was dealing with short films. The inertia of the greatly increased weight of long films when wound on the Edison delivering reel disturbed the accuracy of exposure registration of Edison's intermittent movement mechanism by jarring or jerking the film and throwing it out of alignment with the lens and shutter, thereby producing pictures with irregular and imperfect spacing. To the solution of this problem, without dispensing with the admittedly necessary elements of Edison's inventions, many inventors applied their talents. Among them was Latham.

Latham's projecting mechanism is a combination of elements which are not very intelligibly shown in the claim of the patent in suit.[1]

The several elements are vertically arranged. Omitting for the sake of clarity idlers and rolls which are not pertinent to this controversy, the first two elements are reels for carrying the film, placed apart one above the other. One is the delivering reel; the other the receiving or take-up reel. The next are two sprocket wheels or toothed drums placed apart, but in close relation respectively to each reel. These sprocket wheels have an uniform continuous rotary motion.

[1] Claim 7. "The combination with devices adapted to support the bulk of a flexible film and supply it *for exposure* and receive it after exposure, of positively-driven toothed rotary devices located between and entirely disconnected from said supporting devices and at opposite sides of the exposure-window, said toothed devices being adapted to carry and feed the flexible film by the engagement of their teeth with equally-spaced holes made in the edges of the film and to respectively produce and take up slack in the film, and an intermittently-acting rotary feeding device also provided with teeth which engage with the holes in the film, whereby the film is intermittently fed across the exposure-opening."

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Located between the two continuous rotary members near the center of the alignment is another sprocket wheel or toothed drum, which has an *intermittent* rotary motion. Both continuous rotary members and the intermittent rotary member are so geared that their rotation is direct and equal.

The film is drawn at the start from the delivering reel in a steady uninterrupted movement by the first continuous rotary member by positive engagements of its sprockets with the sprocket perforations of the film. Passing this member, the film is relaxed into a loop, the lower part of which is then carried to the intermittent rotary member, which, by engagement of its sprockets with the sprocket perforations of the film, carries the film to the lens aperture with the requisite interruption for exposure through the lens and the corresponding aperture of the shutter. The film is here relaxed into another loop and its lower part is then passed on to the second continuous rotary member, which, by its sprocket engagement with the sprocket perforations of the film, moves the film to the take-up reel where the movement ends. The result photographically is a series of pictures, which, though separately projected, are projected so rapidly that they give the appearance of motion. The result mechanically is twofold: (1) Relief to the intermittent rotary member of tension or drag incident to the weight of the film roll by making a loop in the film just before it is intermittently fed past the lens, and (2) movement of the film at this critical point without jarring and slipping and with the requisite accuracy of registration for exposure.

This mechanism is used everywhere and is a mechanical and commercial success.

[1, 2] Had Latham invented the entire mechanism shown by his patent disclosure, it would be a great invention. But Latham invented none of its parts. All were old. Had he been the first to assemble old parts in the organization of his patented device, he still would be credited with invention of high order. But he was not the first to make such an assemblage, except as he put in it one particular part. It is to the introduction of this part (the conceded invention of another) we think the question of invention is restricted.

What was the particular object of Latham's machine? Manifestly, it was to provide an improved means for using Edison's perforated film. He made the machine for the film.

Where did Latham get the parts of his machine and his idea of their assemblage? The first parts, as we have seen, are the delivering and take-up reels. Edison supplied these and they perform in Latham's structure the identical function they performed in Edison's. The next are the two continuous sprocket rotary members located in close relation to Edison's reels. Armat and Joly supplied these and they perform in Latham precisely the function they were given by Armat.

Armat was perhaps the first to develop practically the idea of taking the film from the reel, not by intermittent movement mechanism as in Edison but directly by a toothed or sprocket mechanism with a continuous movement independent of the intermittent movement which feeds the film for exposure. For his invention Armat was awarded Letters

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Patent No. 673,992, May 14, 1901, on an application filed February 19, 1896. He was in some measure preceded by Gray, who was awarded German Patent No. 92,809, June 2, 1895, and United States Patent No. 540,545, June 4, 1895, on an application filed March 9, 1895, and was followed by Joly, who was granted French Patent No. 24,875, August 26, 1895, and United States Patent No. 569,875, October 20, 1896, on an application filed June 5, 1896. Latham's filing date was June 1, 1896.

The continuous sprocket rotary members in Latham perform two functions, being exactly the same they performed in Armat and Joly. They are: (1) Taking the load of the rolled film directly and continuously from the reel, and (2) making the initial movement of a loop.

The next elements in Latham are the two loops of the film. The first is begun, as we have just seen, by a continuous rotary member and is completed by the delivery of the film to the intermittent rotary member. The latter member then draws the film from the loop instead of drawing it directly from the loaded reel, as in Edison, and after passing it before the lens, feeds it to a second loop. The second loop, in its travel toward the take-up reel, performs the same function, by inversion, as the first.

The looping of a delicate or fragile material to avoid strain and rupture in feeding it into rolls was very old in several arts, notably in the printing press art (No. 224,440 to Kidder, 1880; No. 508,814 to Cox, 1893), and it was old also in the moving picture art. It appears in Green and Evans British Patent No. 10,131 of 1889 and in Gray, Armat and Joly (supra), where it performed the same function it performs in Latham.

The remaining element in Latham is the sprocket intermittent rotary means employed to interrupt the movement of the film and give it a positive stop at the lens for an instant of exposure. Edison developed this completely, and had it in his device, but without co-acting mechanism to take up the inertia of the roll and feed the film continuously to a loop. Without discussing Gray, it is clear that Armat and Joly had the three elements in combination,—the continuous movement mechanism, the intermittent movement mechanism, and the film loop between the two. But in Armat and Joly, the intermittent movement of the film was exerted by frictional contact—in Edison by sprockets. Latham took out of Armat's combination Armat's frictional intermittent movement mechanism and substituted Edison's sprocket intermittent movement mechanism. The latter works better on a perforated film.

Latham's elements being old, and the principle of his organization being old, the question of invention is narrowed down to this: Is there invention in substituting Edison's superior sprocket intermittent movement means for Armat's inferior frictional intermittent movement means? When Edison's means is in Latham's organization it performs there precisely the same function on a film artificially relaxed as it performed in the Edison device on a film naturally lax.

As all parts of Latham's device were taken from the prior art, and as they perform in his device the same functions they performed in the devices from which they were taken, without developing any new func-

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tions, we are unable to find invention. If invention is wholly lacking, a patent can not be sustained even for the specific combination of specifically contrived elements, which, apparently, is all the plaintiff is asking for.

We have given very careful consideration to the evidence bearing upon Latham's contention, that in inventing a camera involving the principle of the patent, he was before Armat and Joly in the invention of projectors, but we find the evidence insufficient to disturb the legal significance of the patents' filing dates.

We are of opinion that the seventh claim of the patent is invalid for want of patentable invention. The decree below is affirmed.

CAMP BROS. & CO. v. PORTABLE WAGON DUMP & ELEVATOR CO.

(Circuit Court of Appeals, Seventh Circuit. June 24, 1917. Rehearing Denied June 24, 1918.)

No. 2241.

1. PATENTS ⇐328—VALIDITY—INFRINGEMENT.
 Inks patent, No. 684,064, claim 1 of which was for combination dump and elevator and means for operating the dump and elevator simultaneously, *held* not anticipated; also, *held* infringed.
2. PATENTS ⇐73—ANTICIPATION—DATE OF ISSUE.
 A patent speaks as an anticipation from the date of its issue, and not from the date of the application.
3. PATENTS ⇐61—APPLICATION—DISCLOSURE.
 Until a patent is issued the public have no right of access to the application, and so until issuance of the patent the application cannot be regarded as a prior foreclosure or publication of matters set forth therein.
4. PATENTS ⇐69—PUBLICATION—WHAT CONSTITUTES.
 Public disclosure or publication, to be effective as such, must be a revelation of an invention so publicly disclosed as to raise a presumption that the public would know of it; so, where an application for patent is filed and a division of specifications ordered, the patent being issued on the specifications as divided, matter contained in the original specification cannot be deemed disclosed, for only the file wrapper would indicate its existence.
5. PATENTS ⇐130—INVENTION—PRESUMPTION.
 The date of an invention of a patented article is presumptively the filing date of the application, where this shows clearly the thing patented; but the patentee may, of course, show earlier invention date.
6. PATENTS ⇐53—INVENTION—EXPERIMENT.
 Though a patent application suggested a device later invented and patented by another, yet where no patent therefor was granted, and no such device constructed or brought into use, the suggestion in the application does not show prior invention.
7. PATENTS ⇐102—VALIDITY—VERIFICATION.
 Where the amended application for a patent did not present a conception materially different from or enlarged over that shown by the original application, no new oath is necessary.

Appeal from the District Court of the United States for the Northern Division of the Southern District of Illinois.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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Suit by the Portable Wagon Dump & Elevator Company against Camp Bros. & Co. From a decree for complainant, defendant appeals. Affirmed.

Albert H. Graves and Charles K. Offield, both of Chicago, Ill., for appellant.

H. H. Bliss, for appellee.

Before BAKER and ALSCHULER, Circuit Judges, and LANDIS, District Judge.

ALSCHULER, Circuit Judge. [1] The decree appealed from found valid and infringed claim 1 of appellee's patent, No. 684,064, issued October 8, 1901, to I. N. Inks. The patent, as stated in the application therefor, "relates to wagon dumps or devices for elevating one end of the wagon to such an extent that the contents of the bed will fall out at the other end." In the '80's and '90's there seems to have been a growing demand for a portable device usable on the farm, whereby the farm wagon loaded with grain might be readily dumped, and the load lifted by power (usually horse power) into cribs, bins, or other receptacles. The convenience and utility of operative contrivances of this sort is manifest in the economy of labor and time effected through their employment.

So far as the development of the art is shown through patent grants, the record discloses Seeley's patent, No. 410,336, 1889, which presents a machine in which the loaded wagon was driven onto a dumping platform, the wheels resting upon pivoted dumping timbers, so supported that the operator, by manually releasing a holding mechanism, causes the dumping timbers to so tip or tilt that the rear of the wagon is dropped down sufficiently to cause the load to flow from it and into a hopper at its rear. The horses which hauled the wagon in the meantime are standing on a tread power, which they operate, and set in motion the mechanism which drives the elevator, consisting of a series of buckets attached to a revolving belt, whereby the grain in the hopper is raised to the required height, and dropped into the receptacle therefor. When the load has been thus elevated, the dumping timbers are manually raised, restoring the wagon to its level position for hauling it away and making room for the next wagon load, and so on.

Schroeder, No. 598,119, 1898, shows a contrivance in which the dumping device is hand-operated, as in Seeley, and in which respect both these inventions are distinguishable from that of Inks. Then there are patents to Kidd, No. 630,239, August 1, 1899, and No. 660,992, October 30, 1900. The first was applied for June 6, 1896, and the patent was granted after division of the application had been ordered and made. The divisional application was filed December 22, 1898, and thereon Kidd's second patent was issued.

Kidd's first patent shows a device whereby the wagon is hauled upon the dumping members, which are manually operated and tip the wagon, dumping its load into a receptacle sufficiently large to receive it. Thereupon, by the same power which actuates the elevating machinery, the receptacle holding the load is gradually lifted, and its contents dumped upon a cross-conveyor operated by the same power,

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and carried to the boot of the elevator, whence by the same power it is elevated. The elevator is operated simultaneously with the lifting and dumping of this receptacle. The substantial difference between this and the Inks construction is that in Inks the load is dumped directly from the wagon upon the conveyor or elevating means, whereas, in this Kidd device, the load is first dumped into the intermediate receptacle, from which it is in turn dumped for elevating as indicated.

In the second of Kidd's patents the raisable intermediate receptacle is omitted, and the load is dumped from the wagon into a stationary hopper, from which it falls upon the conveying or elevating means. The wagon is tilted and its load dumped by the same motive power whereby the elevating is effected. The device shown in the drawings of this last-named patent illustrates this stationary receptacle or hopper sufficiently large to receive at once the entire wagon load. From this, and from certain expressions in the specifications, it is contended that the dumping of the wagon and the elevating are thereby contemplated to be successive, and not simultaneous, operations, and herein it is claimed for appellee that this Inks structure patentably differs from this disclosure of Kidd. It is claimed for appellant that this disclosure by Kidd responds fully to Inks' claim 1, and that the claim is void. Inks' claim 1 is as follows:

"The combination, with a dump and an elevator, of means for operating the dump simultaneously and from a common motor with the operation of the elevator, substantially as described."

The specific concept patentable over the prior art, asserted to be secured to Inks by this claim, is the operation of mechanism for raising the front end of the wagon to dump its load, at the same time that the elevator is by the same power being operated to raise and dispose of the grain while it is being so dumped. Thereby the use of a hopper large enough to hold the entire wagon load was dispensed with, and time was saved in the operation, which would be lost in the successive operation of dumping and elevating, in that the elevating process would begin when the grain began to flow from the wagon to the hopper, saving in the complete operation the time required for dumping, estimated by the witnesses to be about a quarter of a minute, during which the elevator would be idle, if the two functions operated successively, and not simultaneously.

In the machine actually described and illustrated in Kidd's second patent, the fact that the receiving hopper is of sufficient capacity to hold the entire wagon load, coupled with the fact that in the construction so shown the gears and belts are not so arranged and correlated as to provide for simultaneity of operation of the dump and elevator, makes it plain that the invention of Inks' claim 1 is not there shown. But it is contended that by the making of a few simple changes in the arrangement of the gears and belts, such as any mechanic of ordinary skill could readily make, the simultaneous operation might have been effected. This might be true enough after the idea of the simultaneity of the two operations had been suggested to the mechanic. It cannot be said that this idea would be plainly apparent, notwithstanding the facility with which the machine might

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be adapted to incorporate it. An illustrative machine claimed to have been constructed under the teachings of this Kidd patent showed the simultaneity of operation of both functions by a common motive power, as is indicated in Inks' claim 1.

Appellee contends the machine is not the embodiment of Kidd, but is changed in the light of Inks and shows Inks' invention. Appellant claims that the changes in the illustrative machine from Kidd's construction are but simple changes in gears and belts, such as would suggest themselves to one of ordinary mechanical skill. This may be so, if the mechanic had conception of the simultaneity of operation. With this concept revealed to him it might well be said that such simple changes would effect the result. In the conception of the simultaneity of operation by the common power, plus the mechanical changes necessary to attain it, in our judgment resides invention, and not merely mechanical skill.

[2, 3] But appellant insists that the specification of Kidd's first application as originally filed, as well as of the divisional application under which his second patent was granted, fully shows the entire combination of Inks' claim 1, and that in any event the illustrative machine embodies in this respect that which the Kidd application so pointed out. The part of the specification thus referred to is as follows:

"If desired, such connections may be made between the platform *101*, the power shaft *20*, and the elevator as will lift and tilt the wagon gradually, and operate the conveyer and elevator rapidly, so that, when the wagon is tilted sufficiently to discharge the last portion of the load into the hopper, nearly if not quite all the contents of the hopper will have been removed and elevated. If such connections are made, the hopper may be of less capacity, sufficient only to receive a portion of the load gradually until all of the load has passed through said hopper. With such an arrangement the platform *101* could be fulcrumed materially closer to the ground, and by so doing the hauling of the wagon several inches in elevation might be avoided."

It is insisted for appellee that this language contemplates alternate action of the dumping and elevating operations; i. e., a partial dumping of the wagon, then an elevation of what is dumped, then further dumping and further elevation, alternately, but not simultaneously, as in Inks. We do not think that the quotation contemplates such alternating operation. "Lift and tilt the wagon gradually" and "operate the conveyer and elevator rapidly" indicate such relation of these functions that, as stated, when the last of the load is dumped, "nearly if not quite all of the contents of the hopper will have been removed and elevated." Of course, neither in Inks nor in Kidd could the two functions be wholly completed at the same instant, for that which is elevated must in the order of things be first dumped, and of necessity the dumping must begin before the elevating starts, and, to elevate the entire load, that process must in any event continue for a brief period after the dumping ceases.

The disclosure in the quoted part of the application might have supported a claim by Kidd in his second patent, similar to Inks' claim 1. But Kidd's patent shows no such claim, and it does not appear that prior to Inks any machine in this or any related art had been built which embodied the elements of that claim.

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Kidd's second patent could not of itself be considered an anticipation of Inks' claim, or in the prior art. Inks' application was filed August 28, 1900. Kidd's second patent was granted October 30, 1900. A patent speaks as an anticipation from the date of its issue, and not from the date of application for the patent. Bates v. Coe, 98 U. S. 33, 25 L. Ed. 68; Hamilton Beach Mfg. Co. v. Geier Co., 230 Fed. 430, 144 C. C. A. 572; Gen. Elec. Co. v. Allis-Chalmers Co. (C. C.) 190 Fed. 170; Diamond Drill, etc., Co. v. Kelly Bros. (C. C.) 120 Fed. 282. Nor is what is the quoted part of the specification of Kidd's second patent to be regarded in the light of a prior disclosure or publication of the Inks invention, for at the time Inks filed his application Kidd's second patent had not been granted, and neither Inks nor the public had then any right of access to Kidd's application. Patent Selling & Exporting Co. Actieselskabet v. Dunn, 213 Fed. 40, 42, 129 C. C. A. 634; Gray Telephone Pay Station Co. v. Baird Mfg. Co., 174 Fed. 417, 98 C. C. A. 353; Sundh Electric Co. v. Interborough, etc., Co., 198 Fed. 94, 117 C. C. A. 280; Vacuum Engineering Co. v. Dunn, 209 Fed. 219, 126 C. C. A. 313. In the last case the court said:

"His application was confidential; the public could not see it or be informed of its contents until patent issued upon it. Before that date came Locke & Dunn with their application."

[4] But the quoted portion of Kidd's application for his second patent appears also in his original application filed June 6, 1896, for his first patent, which was granted August 1, 1899, before Inks' filing date. In this patent as issued the quoted part of the specification does not appear, having been eliminated by amendment made under order for division by the Patent Office. But is this such prior public disclosure or publication as would invalidate the Inks claim? Public disclosure or publication to be effective as such must be a revelation of an invention so publicly published or disclosed as to raise a presumption that the public concerned with the art would know of it. Where application for a patent is filed, and no change therein is made in the Patent Office, the specification as filed becomes part of the subsequently issued patent. But where changes in the application are made after filing, particularly where a division is ordered, and pursuant thereto certain features of the original application are eliminated therefrom, there is nothing in the issued patent to show the specification as originally filed, nor, indeed, anything to indicate that any specification was ever filed, other than the one which appears as part of the patent as issued. The file wrapper alone will disclose what the original application was, and what, if any, changes in the application intervened before issuing of patent. It is within the domain of possibility that as to every patent which has been granted the original application disclosed some other invention unrelated to that for which the patent issued, and which only an examination of the file wrapper would reveal. If, therefore, disclosure of invention other than that for which the patent was issued, but which only the file wrapper would reveal, is to be considered as prior publication within the meaning of the law, no patentee could be certain that there had

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not been prior publication of his invention through its inclusion in some application as originally filed, unless every file wrapper in the Patent Office were searched to eliminate the possibility that the invention in question at some prior time had been in such manner disclosed. The resultant inconvenience of holding such contents of a file wrapper to be publication—indeed, the practical impossibility of making in each case the search necessary to learn whether or not there lies buried in some one file wrapper of the infinite number in the Patent Office, some paper disclosure of an invention, of itself, apart from its inherent want of the elements of a public disclosure—induces the conclusion that it may not be regarded as such a publication. In Walker on Patents (5th Ed.) § 60, it is said:

"Novelty is not negatived by any successful application for a patent, nor by any documents pertaining thereto, different from the letters patent issued in pursuance thereof. When such an application, or such a document, is offered to prove the existence of something which is not shown by the letters patent themselves, the justice and propriety of this rule is apparent."

And of the analogous situation of an abandoned application for a patent section 58 states:

"Novelty is not negatived by any prior abandoned application for a patent. Abandoned applications for patents are not, by the statutes, made bars to patents to later applicants. They furnish no evidence that the processes or things they describe were ever made or used anywhere. Being only pen and ink representations of what may have existed only as mental conceptions of the men who put them upon paper, they do not prove that the processes or things which they depict were even known in any country. Nor can they be classed among printed publications, for they are usually in writing, and are not published by the Patent Office." Interurban Ry. & Ter. Co. v. Westinghouse El. Mfg. Co., 186 Fed 166, 108 C. C. A. 298; Corn-Planter Patent, 23 Wall. 181, 211, 23 L. Ed. 161.

[5, 6] But it is insisted that the defense that Inks was not the original and first inventor is conclusively established by the fact that the application for the Kidd second patent was filed before the Inks application, there being no further evidence in the record on the subject of priority of invention as between them. The date of invention of a patented article is presumptively the filing date of the application, where this shows clearly the thing patented, with right, of course, to show by evidence an earlier invention date. But this presumption attaches only and in so far as the application results in grant of patent. If Kidd had been allowed a patent for substantially the combination which was awarded to Inks, the fact that Kidd's patent postdated that of Inks would nevertheless presumptively fix Kidd's filing date as the date of his invention. But Kidd's two claims made and allowed, as they appear in his patent, have no reference to a structure wherein there is simultaneity of operation of the dumping and elevating functions, actuated by a common source of power, as in Inks' claim 1. Although, as we have seen, Kidd's specification says in effect that this may be done, there is not in the specification or the grant, described, claimed, or patented to him, any device for doing it, and, of course, he could have had no patent for the function.

The language above referred to from Kidd's application, while having a bearing on the issue of prior invention, does not determine that

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issue. No patent for such a device having been granted Kidd, the fact that the evidence fails to show that, prior to Inks, neither Kidd nor anybody else perfected or brought into use any such device as that which Kidd in the application merely suggested, "cannot take the case out of the category of unsuccessful experiments." The Corn-Planter Patent, supra; Wright Co. v. Curtiss Co. (C. C.) 177 Fed. 257; Philadelphia Fire Extinguisher Co. v. Northwestern Fire, etc., Co., Fed. Cas. 10,337. We do not think that the quoted words from Kidd's specification, under all that the record herein shows and fails to show, are sufficient to establish that Kidd, and not Inks, was the original and first inventor.

We find nothing in the Kidd patents or their applications which, either by way of anticipation, or of prior disclosure or publication, or prior invention, affects the claim in question. Nor are we impressed by appellant's contention of the want of patentable invention in the claim. The slight forward step which Inks made shows improvement of unquestioned utility, which, though foreshadowed in the Kidd specifications, had not before been reduced to practice, and is not to be found in any of the references to the prior art; and this, with the presumptive validity of the grant, fortified, as the record shows it to be, by long and general acquiescence, and by wide and substantial tribute, disposes of the defenses to the claim other than those of invalidity for want of oath to amended application and noninfringement.

[7] We find no merit in the contention of invalidity on the ground that the file wrapper shows no oath to Inks' amended application. We do not regard the amended application as presenting a conception materially different from or enlarged over that shown by the application as filed, and for such reason alone a new oath was not necessary. Steward v. American Lava Co., 215 U. S. 161, 30 Sup. Ct. 46, 54 L. Ed. 139; De La Vergne v. Featherstone, 147 U. S. 209, 13 Sup. Ct. 283, 37 L. Ed. 138.

The question of infringement remains. Defendant's machine, complained of, is substantially different in many respects from that described by the patent in issue, and it shows various features which are protected by patent issues junior to Inks. While we may concede to all such due advance in the art, yet it is not seriously controverted, and it plainly appears, that the claim in question reads fully and squarely on defendant's machine, which, notwithstanding other and possibly superior advantages it may possess, shows the combination with a dump and elevator of means for operating them simultaneously from a common motor as set forth in claim 1. There was no error in finding the claim infringed.

The decree of the District Court is affirmed.

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RITTER et al. v. VENEER MACHINERY CO.

(Circuit Court of Appeals, Seventh Circuit. April 9, 1918.)

No. 2512.

1. PATENTS ⊜238—INFRINGEMENT—SUBSTITUTION OF EQUIVALENTS.
If defendant shows the deletion of one element, without substitution, it escapes infringement, notwithstanding plaintiff be something of a pioneer, and as such entitled to a considerable range of equivalents.

2. PATENTS ⊜328—INFRINGEMENT—ESSENTIAL ELEMENTS.
Boenning patent, No. 709,864, claims 4, 5, 10, 12, and 15 for a machine for edge-uniting veneers is so far basic as to be entitled to lay claim to the essential so-called feeding parts of both the Black patent No. 1,010,846, and defendant's machine, manufactured substantially in accordance with its teaching, and to entitle plaintiff to a decree restraining infringement and for an accounting.

3. PATENTS ⊜328—ANTICIPATION—MACHINE FOR EDGE-UNITING VENEERS.
Boenning patent, No. 709,864, for a machine for edge-uniting veneers, *held* not anticipated, as the prior devices were in another art.

4. PATENTS ⊜328—INFRINGEMENT—SUBSTITUTION OF EQUIVALENT PARTS.
Black patent, No. 1,010,846, for a machine for edge-uniting veneers, and defendant's machine, manufactured according to its teaching if possessed of invention, make only minor improvements on the Boenning patent, No. 709,864, claims 4, 5, 10, 12, and 15, and do not eliminate one element of that patent without providing a substitute.

Appeal from the District Court of the United States for the District of Indiana.

Suit by the Veneer Machinery Company against Fred A. Ritter, doing business as the Batesville Furniture Company, and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Samuel Dowden, of Indianapolis, Ind., for appellants.
Fred L. Chappell, of Kalamazoo, Mich., for appellee.

Before BAKER, KOHLSAAT, and ALSCHULER, Circuit Judges.

KOHLSAAT, Circuit Judge. Appellee brought this suit to restrain appellant from infringing claims 4, 5, 10, 12, and 15 of patent No. 709,864, granted September 30, 1902, to W. M. Boenning, and for an accounting. These claims had previously been sustained by the Circuit Court of Appeals for the Sixth Circuit in Veneer Machinery Company v. Grand Rapids Chair Company, 227 Fed. 419, 142 C. C. A. 115, and were also upheld by the District Court. The subject-matter of the patent is a machine for edge-uniting veneer strips. This was formerly accomplished by hand—a very tedious process. One of the chief incentives to the manufacture of veneer strips grows out of the increasing scarcity of choice wood, whereby there is difficulty in procuring material suitable for structural purposes, such as making doors, furniture, and the like, and for other

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purposes. By the use of veneers this difficulty is practically overcome. So far as the record shows, Boenning was the first to conceive a machine for the production if this article of commerce. It has now arrived at great proportions in the building and furniture trades, as well as many others. The machine and its operation is set out in much detail in the patent, as well as in said prior Court of Appeals suit, and need not be gone into with such particularity as might otherwise be required at this time.

Briefly, the alleged infringing device is manufactured substantially in accordance with the teaching of the patent to Black, No. 1,010,846, for a machine for edge-uniting veneers, granted December 5, 1911, and is practically the infringing machine restrained in the Sixth Circuit case above cited. The genius of the patent in suit is expressed in claim 4, which reads as follows, viz.:

"4. In a device for edge-uniting two blanks of veneer or similar material, means for carrying said blanks in one direction, mechanism tending to force one of said blanks at an angle to the line of travel of said means and a distributer for placing a strip of adhesive material above the joint between said blanks."

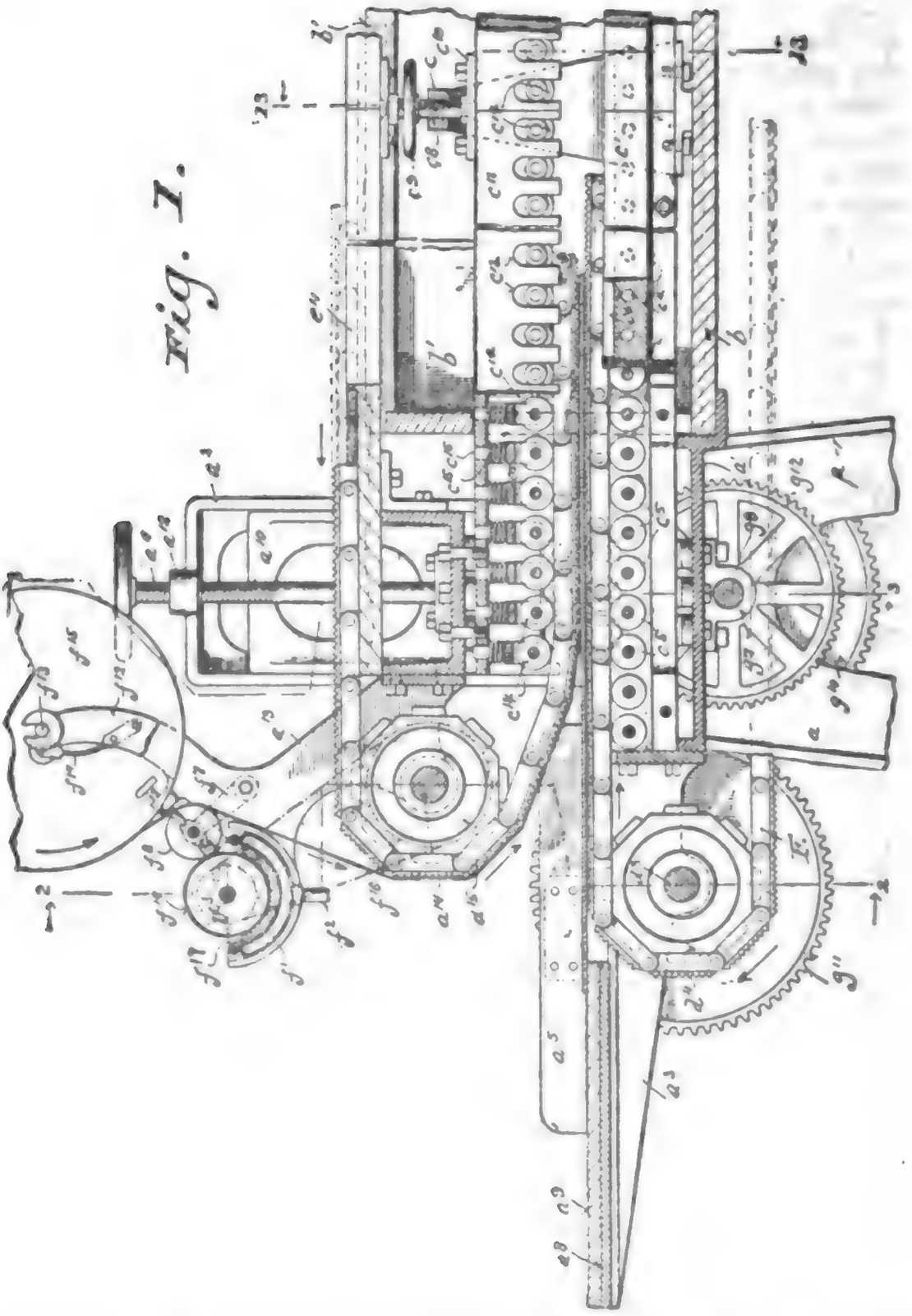
The specification reads in part as follows, viz.:

"In accordance with the present invention, two strips or blanks of veneer, each having a planed or otherwise trued edge, are brought in contact with a revolving cylinder or roller supplied with glue, so that each trued edge will receive its proper amount. The blanks are then placed on a table in front of and forming part of the apparatus, so that the trued edges will lie adjacent to one another and project over the upper surface of a conveyer in the same plane with the upper surface of the table and moving toward the rear thereof. The blanks are moved in the direction of the travel of the conveyer, until their ends contact with the upper part of the conveyer, which is suspended immediately above and in line with the lower part. The two parts of this conveyer are moved at the samp speed and the lower part is so shaped and supported as to form a solid bed, while the upper part is yieldingly held in contact therewith, thus forming a combined conveyer and press for the blanks. A strip of suitable material, such as muslin or paper, on a spool or reel, is arranged so as to pass over a glue-distributing roller or cylinder and lie against and move with the upper portion or part of the conveyer, with the adhesive side down, to lie over the joint between the two blanks, tending to couple or unite them. The blanks, when caught in the jaw formed by the two portions of the conveyer, are carried between four sets of rollers—two lower and two upper sets. The lower sets of rollers are driven at the same speed with which the conveyer moves, while the upper sets are merely idlers, so mounted as to be yieldingly held in contact with the blanks, to give them a severe pressure. The upper and lower sets of rollers on one side are arranged so that their axes are at right angles to the line of travel of the conveyer, thus holding and guiding the blanks passing between them straight. The other two sets are arranged so that their axes may be shifted, and they will preferably be arranged so that they will tend to force the blank passing between them forward and toward the other blank, so that the adjacent edges of said blanks will be brought in close contact, thus forcing out the superfluous amount of glue between them. * * *"

Figure 1 of the drawings will suffice to illustrate the machine so far as here essential:

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Fig. 1.



Claim 4 of Black likewise expresses the genius of the Black patent. It reads as follows, viz.:

"4. In a machine of the class described, the combination of a table, companion endless friction faced members for conveying the work along the table, at least one of which members travels in an oblique line, whereby the work is simultaneously fed forward and crowded together by the same operation of the same members, means for holding the work in engagement with the companion endless members, whereby the work is conveyed by frictional engagement therewith, and a nonyielding surface intermediate the members for

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preventing the bending of the edges of the work during the feeding and crowding operations, substantially as described."

"The operation," says the specification, lines 10 to 31, page 149, is as follows:

"The strips of veneer are fed in upon either side of a channeled guide member *63*, and when they are engaged by the belt they are fed forward underneath the compression rollers, and at the same time, owing to the angle at which the belts are traveling, they are fed toward one another whereby the edges are brought into close engagement. The strip will travel underneath the shoe *29*, which is of sufficient width to overlie the edge of each, and will be thus prevented from overlapping one another during the feeding operation. When the strips are brought into position where they pass underneath the roller *34*, the strip of tape from the reel *53* is adhered to the strips along the adjoining edges, thus uniting the two sections together. After the tape has been applied, the strips are fed on until they have passed entirely beneath the adhering roller and out of the machine."

Fig. 1.

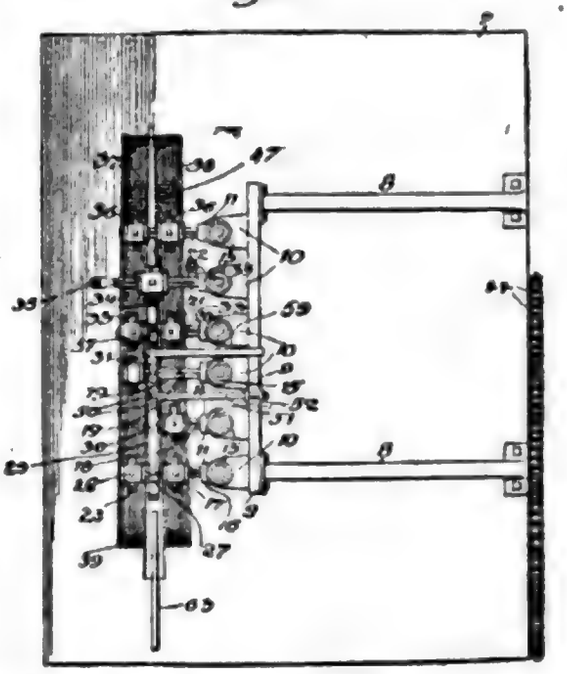


Figure 1 of the Black drawings shows the alleged two-element feeding device of Black.

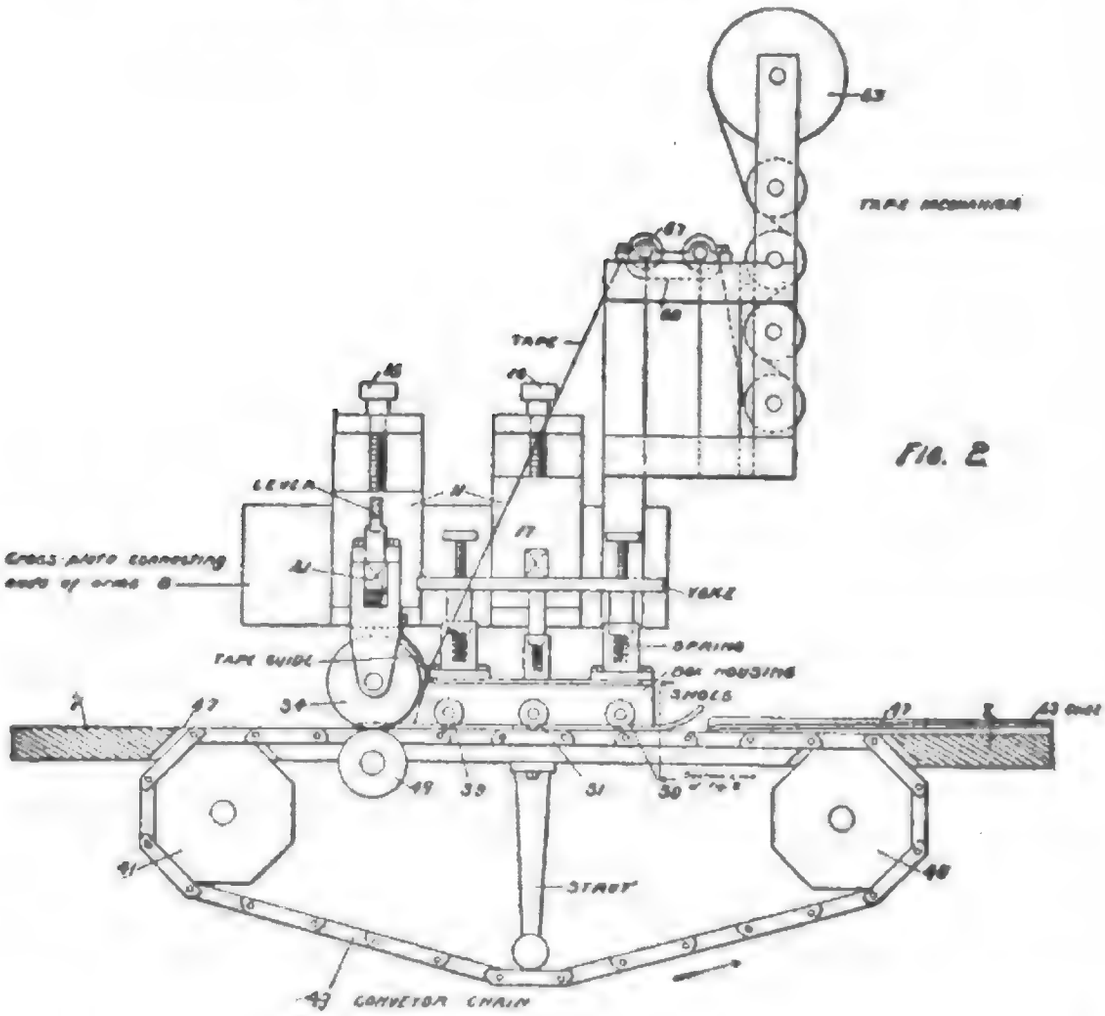
The three main elements of the patent in suit are the conveyer and crowder, constituting the so-called feeding features and the taper, whereby the blanks are glued together along their entire adjacent edge. With the latter, we need waste no time. It is one of the well-known means for distributing adhesives to backing strips or other objects. The patent in suit applies the glue after the strip is placed, while Black prepares a strip glued before attaching.

Appellant's main defense rests upon the claim that Black has constructed a machine which accomplishes with two elements what Boenning requires three to accomplish, and that without providing a substitute for the alleged eliminated feature. It will be seen, from the claims and the drawings, that Boenning makes provision for two distinct movements in preparing the blanks for so-called taping—one the act of conveying the veneer blank to position for taping, and then onward through the machine by means of traveling endless chains, which at first frictionally advance and then seize it between them, and firmly hold it; the other, the act of crowding the veneers firmly together on their trued abutting edges, so that the edges may be firmly and closely united and freed from surplus glue as they pass on into and through the drying chamber.

[1, 2] The Black patent provides two endless moving chains or belts which travel slightly toward each other, being appreciably further apart at their front end than at the rear, converging as they go back, until they almost contact, thus combining, as it will be seen, the conveyer and crowding movements in one. Thus, while being ad-

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DRAWING OF ALLEGED INFRINGING MACHINE.



vanced, the blanks are crowded together, and, when completely brought together along their whole adjacent trued edges, they proceed in a straight line; i. e., at right angles to the front edge of the table, as in Boenning's. The alleged infringing device differs somewhat from Black. For instance, it, in some instances, substitutes sliding boxes for rollers in such a manner as to secure substantially the same action, and makes other changes, without varying materially the essential principles or working of the Black machine. If appellant is right in claiming the deletion of one of Boenning's elements without substitution, it escapes infringement, notwithstanding Boenning be something of a pioneer, and as such entitled to a considerable range of equivalents. This is too well settled to require citation of authorities. But is the claim sustainable? If it shall prevail, it must be plainly established, in view of Boenning's service to the art. It is evident that Black both advances and crowds the blank, on the same principle as Boenning. His converging chains are carried by rollers which operate the chains. The blanks are started from the front of the machine, with their trued edges abutting against a guide between them or against each other. Through the action caused by the placing of certain of the rollers at an acute angle calculated to force the passing blank rearward and toward its companion blank, the two are

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crowded into contact, and are then glued. This guide may vary in form and position and is not new. Is the converging chain a one-piece device or is it the equivalent of Boenning's conveyer and crowder? Mortimer E. Cooley, appellee's expert, says:

"If any question arise as to the equivalency of these rollers to the conveyer chains (appellant's), it is only necessary to consider that the conveyer chains moving in a straight line are merely rollers of an infinite radius, in the same sense that a rack which engages with a pinion is a gear wheel of infinite radius. * * * Either can be substituted for the other without change of function."

"Mechanism tending to force one of said blanks at an angle to the line of travel to said means is found in the complainant's (appellee's) patent in the upper and lower sets of three rollers, each of which have their axes inclined to the direction of movement of the veneer blanks through the machine; that is, inclined at an angle to the fore-and-aft axis of the machine."

In the defendant's (appellant's) machine:

"The two conveyer chains, together with their respective sets of three compression rollers and shoes immediately above, are each inclined at an angle to the fore-and-aft axis of the machine. Thus there exists, in the defendant's (appellant's) machine, mechanism tending to force, not only one, but both, of said blanks, at an angle to the line of travel of said means."

As above noted, the angle is too slight to affect the general result. The conveyer chains, compression rollers, and shoes of appellant's machine contain and perform the precise functions of appellee's means for advancing and crowding the veneers. The appellant's endless movable beds, standing to one side of the wedge-shaped portion of the table, intermediate the two chains, together with the shoe above it, perform the same guiding functions that the appellee's conveyer chains do. They hold the abutting edge of the veneers in fixed relation to each other, to prevent overlapping; the wedge-shaped parts however, being stationary, except as to relative movement between these parts and the traveling bed. The rollers are to one side of a fixed bed, the relations of which are, however, of such a nature as to accomplish the same result as is produced by the mechanism of the patent in suit. Thus, we find no merit in the claim made by appellant to the elimination of one element of the appellee's machine without substitution.

We do not deem it necessary to discuss at length the actuating means of the invention, nor the distributing means. We are of opinion that appellee's invention is of very considerable merit, and so far basic as to be entitled to lay claim to the essential so-called feeding parts of both the Black patent and the alleged infringing machine, and therefore entitled, in the absence of other sufficient barring causes, to the relief prayed for.

[3, 4] The appellant claims as anticipations, as follows, viz.:

The English patent to Davidson & Thom, No. 72, granted in 1892, for improvements in and relating to the manufacture of veneer fabrics, for decorating walls, ceilings, etc., calls for an endless belt over which the backing fabric for the veneers passes, and also for one or more pairs of presser rollers for pressing the veneers and cemented fabric together as they pass between such rollers. It does not specify or claim means for uniting the edges of the veneers, nor for crowd-

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ing the veneers close together. The specification says that the veneer is laid upon the backing fabric in continuous sheets, by hand, so that this may be done by an automatic continuous feed mechanism, such as is ordinarily used for feeding sheets of paper in printing machines. This patent was not before the Circuit Court of Appeals in Veneer Machinery Co. v. Grand Rapids Chair Co., supra.

The Ward patent, No. 647,056, dated April 10, 1900, which is a machine for manufacturing "backing," calls for a plurality of endless belts. These belts are four in number, and move vertically with respect to the movement of the strips or slats of wood upon the bed of the machine, and serve only to exert a downward pressure upon the slats. Their forward movement is accomplished by toothed feeding wheels and secondary feed wheels; the latter forcing the slats between a pair of depression rollers where the glue-coated paper is applied. None of these wheels or rollers has a lateral movement, as in the patent in suit. The slats move successively upon the bed and are crowded together, edge to edge, by their being forced against and between the depression rollers by the secondary feed wheels. This patent was considered by said Circuit Court of Appeals for said Sixth Circuit.

Patent to A. L. Garver, No. 542,156, issued July 2, 1895, relates to a machine for applying a strip of cloth, leather, or other material to the backs of books, or around the edges of books, to reinforce the binding, etc. The device is provided with an endless feed apron or belt, the upper portion of which passes above the table or bed of the machine and between two pairs of presser rolls. One of these sets of rollers is situated at a little distance in front of the other, and each set comprises two rollers, one above the other. The axes of the first pair of rollers are obliquely of the movement of the feed apron; the left-hand ends being a little in advance, so as to give the rollers a somewhat lateral movement to the right. These rollers are used when it is desired to fold the strip over the edges of the book, being at other times thrown out of operative position. For this class of work a tape-folding and tape-guiding device is provided, which is attached at the right of the feed apron, and which also serves as the right-hand guide for the book as it is fed into the machine. In operation, the book, in its closed condition, is placed upon the feed apron and between the left and right hand guides, with the edges of the book over which the tape is to be folded lying toward and in the tape-folding and right-hand guide. The feed apron and oblique rollers carry the book forward, and the rollers at the same time, by reason of their lateral movement, in co-operation with the left-hand guide and its devices, tend to crowd the book to the right and keep it within the tape-folder and guide for the purpose of applying the tape. This patent was not before the Court in the Sixth Circuit.

Viewed in the light of these patents, appellants insist that appellee's patent is to be limited to the structure of the Boenning patent, and not entitled to a range of equivalents broad enough to include the alleged infringing device. This we do not concur in. The prior art fails to anticipate the patent in suit. While the former contains devices for the performance of ingenious approaches to the veneering

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act, they are all in another art. So far as we can find from the record, Boenning alone conceived the machine of the patent in suit. The prior art is called into service, to be sure, but speedily loses its identity. The combination is Boenning's. Black has made some improvements, as has the appellant's machine. If possessed of invention, they are minor improvements on the patent in suit, and only such. In view of the foregoing, there is no need to consider further the question of estoppel growing out of appellant's assertion that Boenning estopped himself from claiming the elements of what it calls a two-part or element device, by action taken before the examiner. Appellant has not eliminated one element of the patent in suit without providing a substitute. Such was also the judgment of the Court of Appeals of the Sixth Circuit, as above shown, in substance.

We discover no merit in the defense of estoppel. The judgment of the District Court is affirmed.

B. F. GOODRICH CO. v. CONSOLIDATED RUBBER TIRE CO. et al.

(Circuit Court of Appeals, Seventh Circuit. April 9, 1918.)

No. 2529.

1. PATENTS ⟸312(3)—INFRINGEMENT—REASONABLE ROYALTY.
In a suit for patent infringement, evidence *held* sufficient to warrant the court in applying the doctrine of reasonable royalty to the assessment of damages.

2. PATENTS ⟸327—PRECEDENT—CONSIDERATION.
Findings of a District Court of another circuit, affirmed by the Circuit Court of Appeals of that circuit, as to damages in a suit involving the patents, are entitled to much weight and consideration in a suit in this circuit, based on the same patents and covering practically the same period.

3. PATENTS ⟸318(1)—INFRINGEMENT—ASSESSMENT OF DAMAGES—MODE.
Difficulty in determining the reasonable royalty in a suit for patent infringement does not alone bar the court from adopting that rule, even though it widens the field of investigation.

4. PATENTS ⟸312(3)—INFRINGEMENT—REASONABLE ROYALTY.
In a suit for infringement of a patent for a rubber tire, evidence *held* to support a finding that 5 cents per pound was a reasonable royalty.

5. PATENTS ⟸318(5)—INFRINGEMENT—INTEREST.
In an infringement suit, where profits are awarded, interest is not allowed until the amount has been judicially determined; but interest is allowed from the date when the infringer would have paid royalty, if licensed, where the damages are measured by established royalty, and that rule is applicable to cases where damages are based on reasonable royalty.

6. PATENTS ⟸318(5)—INFRINGEMENT—INTEREST.
Where damages for patent infringement were based on reasonable royalty for period of ten years, interest is allowable only from the end of the period, for it would be impossible to determine upon what sum the infringer should have paid interest during any one year.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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7. PATENTS ⊂=319(3)—INFRINGEMENT—INCREASED DAMAGES.

In a suit for infringement of patent, which had been declared invalid by one tribunal before the infringement commenced, the trial court's denial of treble or increased damages claimed by the holder of the patent *held* not improper.

8. PATENTS ⊂=318(1)—INFRINGEMENT—FOREIGN INFRINGEMENT.

Where defendant manufactured one of the infringing elements and shipped it abroad, and proof did not show that complainant had obtained the patent from the foreign country, complainant is not entitled to royalties upon defendant's foreign sales; it appearing that defendant sold none of the patented product abroad.

Appeal and Cross-Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit by the Consolidated Rubber Tire Company and the Rubber Tire Wheel Company against the B. F. Goodrich Company. From the decree (237 Fed. 893), which was for part only of the relief sought, defendant appeals and complainants cross-appeal. Modified and affirmed.

Suit for injunction to restrain infringement of Grant patent, No. 554,675, and for accounting for infringement of such patent. The Grant patent was issued February 18, 1896, and its validity was sustained by the Supreme Court April 10, 1911. See Diamond Rubber Co. v. Consolidated Rubber Tire Co., 220 U. S. 428, 31 Sup. Ct. 444, 55 L. Ed. 527. This patent traveled a rocky road, its validity being constantly questioned; no less than 15 courts being required to pass upon its validity. It was twice held invalid (Goodyear Tire & Rubber Co. v. Rubber Tire Wheel Co., 116 Fed. 363, 53 C. C. A. 583; Rubber Tire Wheel Co. v. Victor Rubber Tire Co., 123 Fed. 85, 59 C. C. A. 215); both decisions being by courts in the Sixth circuit, where several large rubber manufacturing companies were located. In all other suits, the patent was sustained. In addition to this litigation over its validity, the scope of the patent was passed upon by 17 courts. We are, perhaps, at present concerned only in one, the decision of the United States Supreme Court. Woodward Co. v. Hurd, 232 U. S. 428, 34 Sup. Ct. 409, 58 L. Ed. 670. In various accountings for the infringement of this patent, appellee has secured favorable decrees in 5 different courts, to which reference will be made later. Little is left undecided, but each suit presents somewhat different facts.

This history to a certain degree bears upon the amount of damages that should be allowed in this suit. The asserted doubt surrounding its validity affected the sum which the master found to be the "reasonable royalty" upon which the decree is predicated. The master fixed the same sum per pound of rubber manufactured by the infringer as was fixed by the court in the opinions reported in Consolidated Rubber Tire Co. v. Diamond Rubber Company of New York, 226 Fed. 455 (approved by the Circuit Court of Appeals in 232 Fed. 475, 146 C. C. A. 469), and 232 Fed. 508. The opinion of the District Judge, approving the report of the master in this suit, appears in 237 Fed. 893. Appellant by this decree was required to pay as damages the sum of $262,298.95, with interest from the date of the master's report.

The suit was begun August 21, 1908. Because of the pendency in the Supreme Court of the United States of litigation between appellee and the Diamond Rubber Company of New York, involving similar issues, the suit was not pressed for trial until after the validity of the patent was determined by that court. Thereafter this suit was dismissed by the District Court (195 Fed. 764), but later sustained by this court (202 Fed. 1021, 120 C. C. A. 663). The issues were then referred to a master, who took much testimony and made the findings upon which this decree is predicated. 237 Fed. 893.

Both parties have appealed. The B. F. Goodrich Company, herein referred to as appellant, is aggrieved because a reasonable royalty was fixed at 5 cents per pound on all rubber manufactured and sold in the United States.

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Its contention is that 2 cents per pound would be a liberal allowance. Plaintiffs in the court below, herein called appellees, complain for several reasons: (a) They assert that 10 cents per pound fairly represents the reasonable royalty. (b) They ask interest upon damages from date of infringement. (c) They ask for increased damages under sections 9464, 9467, U. S. Comp. Stat. 1916, because of the willful and aggravated character of the infringement. (d) They ask that royalty be figured on the 1,909,000 pounds of rubber manufactured by appellant and sold abroad.

Infringement extended from June, 1902, excepting for one year (when license was obtained), down to March 30, 1912. During this period appellant manufactured and sold 7,416,176 pounds of Grant rubber tires, of which 242,770 pounds were sold under license, and 1,909,000 pounds were sold abroad. During this same period, appellant's total business amounted to $127,404,644, of which $3,433,133 came from making and selling Grant tires. During this total period its net profits were $19,339,202.

The master's report is full and complete and evidences much study. While too long to be set forth in full, it is in its entirety a most persuasive statement. We quote a few of the findings and conclusions:

"I find as a conclusion of fact: That the profits, or the approximate profits, made by the Goodrich Company on the manufacture and sale of Grant tires, is not disclosed by any of the three accounts already mentioned. The conclusions shown in all of said accounts are based on averages, apportionments, estimates, and assumptions to such an extent, and costs, expenses, credits, and profits were so handled, that such accounts are of no real value as guides in arriving at profits made by the defendant on Grant tires. That owing to the confusion and intermingling in manufacturing and selling of Grant tires with the other products of defendant's factory, and the manner in which the books and records of the business were kept, it is impossible to determine with approximate or reasonable accuracy the profits made on Grant tires during the accounting period. * * *

"I find as a conclusion of fact that, considering the nature of the invention of the Grant patent, its utility and advantages, and the fact that considerable number of licenses were granted, none of them carrying a lower rate of royalty than 5 cents a pound on the rubber tire made and sold, and some carrying a higher rate, at the time the Goodrich Company began to infringe, 5 cents a pound on the rubber tires manufactured and sold by the defendant would have been a reasonable royalty for the Goodrich Company to have paid."

Findings of Law.

"It appears from the findings of fact that 7,739,749 pounds of rubber tire were manufactured and sold by the Goodrich Company in this country and abroad during the accounting period; that of this amount 1,909,000 pounds were sold abroad, and 242,770 pounds were sold in this country between August 28, 1903, and August 28, 1904, the period during which the pooling agreement was in force. Of the amount sold abroad, 1,115,852 pounds were sold in England.

"I find as a matter of law that 5 cents a pound on the rubber tire manufactured and sold in this country would have been a reasonable royalty at the time the defendant commenced to infringe, and that it would have continued to be a reasonable royalty throughout the accounting period.

"I find that the complainants are entitled to recover of the defendant $262,298.95 as damages, based on a reasonable royalty at the rate of 5 cents a pound on 5,245,979 pounds of rubber tire sold in this country (Dowagiac v. Minnesota, 235 U. S. 641 [35 Sup. Ct. 221, 59 L. Ed. 398]; Frumentum v. Lauhoff, 216 Fed. 610 [132 C. C. A. 614]; Bemis v. Brill, 200 Fed. 749 [119 C. C. A. 229]; that the complainants are not entitled to recover anything as damages on account of the rubber tire manufactured and sold abroad (Bullock v. Westinghouse, 129 Fed. 105 [63 C. C. A. 607]; Goodyear v. Rubber Tire Wheel Co. [C. C.] 164 Fed. 869; Rushmore v. Manhattan [C. C.] 170 Fed. 188). * * *

"Findings of fact have been made upon which profits may be computed on the principle of apportionment, and this method has met the approval of courts in cases where no separate account was kept of the infringing trans-

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actions and no other satisfactory method could be found by which to measure profits. The Tremolo Patent, 23 Wall. 518 [23 L. Ed. 97]; Rubber Co. v. Goodyear, 9 Wall. 788, 19 L. Ed. 566; Corbin v. Taussig [C. C.] 137 Fed. 151. I have chosen to recommend that compensation be awarded in this case on the basis of reasonable royalty, believing that, in view of the number of infringers that entered the field soon after May 6, 1902, when the decision of the Circuit Court of Appeals of the Sixth Circuit was rendered holding the patent invalid, and at about the time the Goodrich Company became an infringer, the ends of justice will be better served by awarding damages based on a reasonable royalty than by awarding profits based on the theory of apportionment."

Prior to becoming an infringer, appellant made these tires exclusively for appellee, and became acquainted with appellees' business and customers, and it is claimed that, when appellant turned infringer, it took advantage of its knowledge thus acquired and appropriated the business. There was some evidence tending to show the net profit to appellant on this solid rubber tire branch of its business, but intelligent conclusions cannot be drawn therefrom. Appellant's expert accountants made three different reports, no one of which tallied with the other. Its final position seems to be that extreme doubt exists as to whether the solid rubber tire business was not conducted at a loss. Appellees manufactured solid rubber tires under the Grant patent, and it claims that its manufacturing business showed a profit per pound of 6.7 cents.

There was much evidence received tending or intending to establish a "reasonable royalty." It appeared that from 1896 to 1902 the patentee granted many licenses, numbering over 200, wherein a fixed royalty was disclosed. It appeared that at first the royalty was fixed at 10 cents per pound, but after two or three years it was raised to 20 cents per pound, and this sum was continued for four or five years. There were privileges granted and restrictions imposed upon the licensees, so that the persuasive character of these figures is impaired. After May 2, 1902, when Judge Lurton declared the patent invalid, the business became demoralized, and licenses were no longer sought, and royalty was no longer paid. Various companies thereafter, on August 28, 1903, entered a pooling agreement based on the manufacture of the patented article, and provided for pooling half of the royalties, limiting the production, raising the price, and fixing the royalty at 2 per cent. There was at this time great uncertainty as to the validity of the patent, and the pooling agreement expired in a year. This pooling agreement was at first held invalid, as contrary to public policy, but upon appeal it was upheld. A further statement of the facts will appear in the opinion.

Charles Neave, of New York City, and Samuel E. Hibben, of Chicago, Ill., for appellant.

Charles W. Stapleton, of New York City, for appellees.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVAN A. EVANS, Circuit Judge (after stating the facts as above). The two important questions that must first be determined are: (a) Is there sufficient evidence in the record to justify the adoption of a reasonable royalty as the basis for recovery? (b) If this question be answered in the affirmative, is 5 cents per pound a reasonable royalty?

[1-3] While the learned counsel for appellant does not dispute the court's right to apply the doctrine of reasonable royalty, where there is sufficient evidence to justify it (Dowagiac Mfg. Co. v. Minnesota Plow Co., 235 U. S. 641, 35 Sup. Ct. 221, 59 L. Ed. 398), contention is made that in this case there is an utter absence of competent evidence to make it possible to reach an intelligent conclusion as to what would be a reasonable royalty. We are convinced that there is evidence in this case that justified the court in its determination to meas-

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ure appellees' damages on the basis of a reasonable royalty. This evidence will be but briefly alluded to.

(a) There was evidence of established royalty for six years prior to appellant's infringement. These license contracts contained many added agreements, some of which detracted from, while others added to, the rights of the licensees as such. None of these agreements, excepting one, hereinafter discussed and made shortly after the Lurton decision, fixed a royalty lower than 5 cents per pound. Some were as high as 20 cents per pound. The exception, the so-called pooling agreement, which was obviously made in view of the then existing uncertainty as to the validity of the patent, may also well be considered, although it is no more conclusive than the licenses fixed prior to the Lurton decision.

(b) The extent of the business and the success of the patent, and its widespread and well-nigh universal use, clearly appears and has a bearing on the question. There is no doubt but that this Grant tire dominated the trade. Immediately after the patent was issued it went into widespread use, and has continued even to the present day as a most satisfactory response to the solid rubber tire demand.

(c) Appellees' business, though conducted in competition with the large and successful rubber manufacturing companies, and at a time when it was unprepared to meet this competition, showed a profit of 6.7 cents per pound.

(d) On account of appellant's failure to so keep its books as to enable the court to ascertain what its profits were, notwithstanding this suit for damages was pending, it becomes necessary, if a reasonable basis may be found, to adopt another basis for computation that will adequately and fairly compensate the patentee.

(e) The Circuit Court of Appeals for the Second Circuit, in the case of Appellees v. Diamond Rubber Co., 232 Fed. 475, 146 C. C. A. 469 (affirming 226 Fed. 455), after reviewing evidence very similar to the proof in this case, affirmed a finding that 5 cents per pound is a fair sum that the infringer should pay for manufacturing and selling this solid rubber tire in violation of the rights of the patentee.

Is there evidence to support the master's findings? The master saw and heard the witnesses, and in some repects was in far better position to determine this question of fact than the reviewing court. Numerous witnesses testified as expert accountants for the appellant. Three different reports are furnished by it, which differ materially and radically, and the existence of these differing and conflicting reports might well make the credibility of appellant's witnesses a material factor in determining the basis of computation.

It is well-nigh inconceivable that this large and successful business concern should engage in this unlawful business, year after year, in defiance of the patentee's rights, with a suit for damages pending, if the business was conducted at a loss. It is highly improbable that this concern, with its record of success and its stupendous figures of net profits for ten years, would have conducted, as a part of that most successful business, a branch of no inconsiderable size that was run at a loss. Nor should appellees be compelled to go forth without relief, if there be any

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other reasonable basis for measuring damages, simply because appellant has so kept its books that the court, as the master found, is unable to accept its figures, and unable to determine from these books the profit actually enjoyed. Likewise in this case appellees should not be compelled to accept their own profits as the basis for determining a reasonable royalty. Originally the owner of the patent did not contemplate manufacturing all its solid rubber tires. To obtain its output it made an exclusive contract with appellant. When the latter company turned infringer, appellees were in no position to engage in the manufacturing business and conduct it at a profit. They did not, like the appellant and other infringers, have unlimited capital and an established business, extending to every corner of the United States, to support their venture. It is worthy of notice that appellees' profit of 6.7 cents per pound was based on its business during the first half of this period. During the last four or five years there is evidence tending to show appellees' profits from the manufacture of this solid rubber tire exceeded 10 cents per pound. While it should be added that the reliability of these figures is vigorously assailed by appellant, we are convinced that the reasonable royalty varied somewhat during this period due to the holdings of the courts.

The royalty fixed in the first licenses was likewise not controlling, because after the Lurton decision the patent was not as valuable as before. The same royalties were no longer obtainable. In fact, after this decision the 2 per cent. royalty found in the pooling agreement is fully as fair as the price that had been fixed before there was any successful attack upon the patent. But the master was covering, not the period beginning with 1902 and ending in 1903, but the entire period of ten years, from 1902 to 1912. If the 2 per cent. royalty represented the fair royalty in 1903, well might the appellees argue that after 5 other judges, representing different courts, had held the patent valid, the original price of 20 cents per pound was more nearly the sum a licensee should pay for the right to manufacture and sell this product. By 1907 this patent had been sustained in at least 8 different courts. After that date could it be said that doubt as to its validity existed?

Again, the decree in the case of Appellees v. Diamond Rubber Co., supra, is entitled to much weight. In that case it was the identical issue as here presented that was up for determination. It may be that the facts were not exactly similar to those here presented, but an examination of the opinion confirms the impression that there was but little or no difference in the proof. We do not hesitate to say that the findings of the District Court, affirmed by the Circuit Court of Appeals for the Second Circuit, as to a reasonable royalty in a suit involving the same identical patent, covering practically the same period of time, is entitled to much weight and consideration by this court.

Difficulty in determining the reasonable royalty does not alone bar the court from adopting this rule. Dowagiac Mfg. Co. v. Minnesota Plow Co., supra. Such a method of measuring damages doubtless widens the field of investigation, and makes possible a longer hearing; but if the fact determinative of the question here in issue is thereby more certainly established, and more satisfactorily reached, good reason exists for applying the rule.

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[4] *Amount.*—Nor can we say that the evidence does not support the finding that 5 cents per pound is a reasonable royalty. The most serious objections to the allowance of the 5 cents per pound as the measure of damages in this case are: (a) The effect of the Lurton decision upon the value of the patent, together with the right acquired under that decision by the Goodyear Rubber Company, a large and formidable competitor in the rubber business during the period under consideration. (b) The infringement was merely for one of the elements that went to make up the patent.

Both of these objections present serious questions. There can be no doubt but what the reasonable royalty was affected by the fact that a large competitor, the business of which extended to every corner of the United States, was free to manufacture and sell the patented article. Likewise, if it were commonly understood among the trade (both manufacturers and retailers) that the patent was invalid, or even that there was grave doubt as to its validity, the royalty would be reduced. Such a reputation would invite infringement, with a resulting demoralization in the price. These facts we have carefully considered in determining whether the sum fixed by the master is reasonably well supported by the evidence. Certainly, if there was not present conclusive proof of other facts, this argument would doubtless lead us to a modification of the decree. But this was no ordinary patent, if we judge its success by the extent to which it shortly occupied the field for which it was conceived. Most unusual is the indorsement that it received. The following quotations are but a few of the tributes:

"Few patents have received such immediate and well-nigh unanimous recognition. It is the standard rubber tire of today." "It is improbable that Grant's construction will be improved upon in our day." "It has been accepted as the termination of the struggle for a completely successful tire." "The Grant tire immediately established, and has ever since maintained, its supremacy over all other rubber tires, and has been commercially successful, while they have been failures."

Surely much of the real doubt and uncertainty disappeared by 1907. For the last five years of the period in question, nothing but the great strength and tenacity of a few large manufacturing companies marred appellees' control of a great industry that was the product of the genius of the patentee. Nor does appellant occupy an enviable position in first helping to demoralize the trade, and then asserting that by reason of such demoralization, appellees' damages should be merely nominal.

As to the other objection, that the infringement was of a single element of a combination patent, and therefore the master erred in holding appellant liable for the reasonable royalty of the entire patent, we conclude the contention fails for want of support in fact. The master's finding on this subject is:

"I find as a conclusion of fact that * * * 5 cents per pound on the rubber tires manufactured and sold by the defendant would have been reasonable royalty * * * for the company to have paid."

We have considered the character of the other elements, the state of the proof as to the possible division of the royalty on the entire patented article, as well as the other facts bearing upon this question, and

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conclude that the master was fully apprised of the need of considering this argument, and gave it due weight, and that his ultimate finding of 5 cents per pound, not on the patented article, but on the rubber tires, finds ample support in the evidence.

[5, 6] *Interest.*—No interest was allowed, excepting from the date of the report of the master. Appellant contends that the court properly refused to allow interest beyond the date of such report, while appellee seeks to recover interest from the time the royalty should have been paid, had appellant been operating under a license. It is now recognized that, where profits are awarded, interest is not allowed until the amount has been judicially determined. On the other hand, interest is allowed from the date when infringer would have paid royalty, if licensed, where the damages are measured by established royalty. It is asserted, however, that the rule respecting interest is not well established in that class of cases where damages are based upon "reasonable royalty."

We see no valid reason for withholding interest where the damages are based upon a reasonable royalty. In fact, precedent, and not the logic of the situation (Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664), is all that prevents the allowance of interest in case of damages based on the infringer's profits. The allowance of interest, and the reasons for such allowance or rejection, have been announced in innumerable decisions where questions analogous in character to patent infringement suits have been under consideration. Such decisions are instructive and in the absence of other authorities may well be accepted as conclusive on the question. In this case the reasonable royalty is fixed, not for a single year, but for a period of ten years, and represents the average royalty for that entire period. It is therefore impossible to determine upon what sum appellant should have paid interest on this basis during any one year. We conclude, however, that interest should run on the amount thus found due from the end of the period, to wit, March 30, 1912.

[7] *Treble or Increased Damages.*—The trial judge who had this matter under consideration, notwithstanding all the aggravating circumstances under which the infringement occurred, refused to increase the compensatory damages found by him. For refusing to allow increased damages, appellees assign error. Unfortunately, the argument of the appellant to the effect that the trial judge saw and heard the witnesses, and is therefore in closer touch with the facts than the appellate court, fails, because of the reference, which resulted in the oral testimony being presented to the master. The trial judge neither saw nor heard the witnesses.

There were many circumstances in connection with appellant's infringement that indicated willfulness, malice, and a wanton disregard of the rights of the patentee. We believe that there is ample justification for the allowance of increased damages in this suit. We are also, however, impressed with the fact that at an early day in the history of this patent, the Circuit Court of Appeals for the Sixth Circuit declared it invalid, and this adjudication was naturally accepted by the manufacturers in that circuit as final.

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It is, of course, the rule that, if the manufacturer honestly believed that he had a right to manufacture this rubber tire, he should not be mulcted in punitive damages. We are not willing to announce any hard and fast rule that good faith exists because a favorable decision in some court is obtained, yet we are not so clearly convinced that this same good faith is absent in this case as to warrant the imposition of additional damages. In the Diamond Rubber Co. Case, supra, additional damages in the sum of $50,000 were inserted and the Court of Appeals sustained the decree. In this case we have the benefit of the conclusion of the learned District Judge, who gave the matter careful consideration and his opinion is entitled to much weight. We are unwilling to disturb his decision on this phase of the case.

[8] *Foreign Sales.*—Appellees contend that they should receive royalties upon the foreign sales made by appellant. We can dispose of this contention without considering the legal propositions advanced in support of it. Appellant did not sell any patented product abroad. It sold merely one element in appellee's patent. No infringement is shown by reason of the fact that appellant manufactured one of the infringing elements and shipped it abroad.

It is contended that appellee secured a patent in England; but there is no proof in the record to show what patent was there obtained, nor when it was granted. We conclude, therefore, that the court properly refused to allow royalties on these foreign sales.

The decree is modified, by adding interest at the rate of 5 per cent. from the 30th day of March, 1912, to the amount fixed by the District Court as damages, and, as so modified, is affirmed. Appellees shall recover their costs in this court.

REPUBLIC RUBBER CO. v. CONSOLIDATED RUBBER TIRE CO.

(Circuit Court of Appeals, Seventh Circuit. April 9, 1918.)

No. 2523.

Appeal and Cross-Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit in equity by the Consolidated Rubber Tire Company and the Rubber Tire Wheel Company against the Republic Rubber Company. From a decree (237 Fed. 893) overruling exceptions to report of master, defendant appeals, and plaintiffs cross-appeal. Modified.

Russell Wiles and George A. Chritton, both of Chicago, Ill., for appellant.
Charles W. Stapleton, of New York City, for appellees.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVAN A. EVANS, Circuit Judge. This suit was heard by the District Court and disposed of at the same time as No. 2529, B. F. Goodrich Company v. Consolidated Rubber Tire Co. et al., 251 Fed. 617, — C. C. A. —, decided on appeal by this court at this session. The District Court rendered but one opinion in both cases. We consider no lengthy separate discussion of the issues necessary. What was said in the B. F. Goodrich Case applies generally to this appeal. While it is apparent that the testimony and the situation of the parties are not the same in both cases, such difference as exists does not warrant our reaching a different conclusion on the main questions involved.

Evidence of appellant's profit per pound of rubber manufactured differed from that in the Goodrich Case. Likewise the extent and character of the

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infringement is not the same as in the other case. Appellant persisted in infringing the Grant patent, even after the Supreme Court had declared it valid. On the other hand, there was no evidence of betrayed confidence or violated trade secrets, such as appellees claim existed in the other case. Upon the entire record, we conclude that the master properly decided to compute the damages on the basis of a reasonable royalty and made no error in fixing 5 cents per pound on each pound of solid rubber tire manufactured as such reasonable royalty. We are unwilling to disturb the decision of the trial judge, who refused to allow the extra or additional damages authorized by sections 9464, 9467, Comp. Stat. 1916. Interest, which was denied in the lower court, should be allowed at the rate of 5 per cent. upon the total amount fixed and determined by the master from the 18th day of February, 1913.

The decree is modified, by allowing the appellees to recover the sum of $114,054.55, together with interest thereon at the rate of 5 per cent. from the 18th day of February, 1913, and also the costs and disbursements in the District Court. Appellees shall also recover their costs in this court.

WOLF, SAYER & HELLER, Inc., v. U. S. SLICING MACH. CO.

(Circuit Court of Appeals, Seventh Circuit. April 9, 1918.)

No. 2544.

PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—RIND-REMOVING APPARATUS.

The Nayer and Perkins patent, No. 968,590, for a rind-removing attachment for meat-slicing machines, *held* valid, but not infringed by the device of the Stiles patent, No. 1,028,796.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit by Wolf, Sayer & Heller, Incorporated, against the U. S. Slicing Machine Company. Decree for defendant (243 Fed. 410), and complainant appeals. Affirmed.

Max W. Zabel, of Chicago, Ill., for appellant.

Frank T. Brown, of Chicago, Ill., for appellee.

Before BAKER, KOHLSAAT, and EVANS, Circuit Judges.

KOHLSAAT, Circuit Judge. Appellant brought a suit against appellee to enjoin infringement of patent No. 968,590, granted Nayer and Perkins, August 30, 1910. The answer charged invalidity and denied infringement. The trial court sustained the validity, but found no infringement, and dismissed the bill for want of equity. That action is assigned as error.

Both parties are corporations engaged, among other pursuits, in the manufacture of so-called meat-slicing machines. The present suit has to do only with such machines having rind-removing devices associated therewith. Appellee operates under patent No. 1,028,796, granted to E. M. and T. H. Stiles, June 4, 1912. Claim 1 of the patent in suit is mainly relied on by appellant, and may fairly be accepted as typical of the subject-matter in contest. It reads as follows, viz.:

1. A device of the class described, comprising a suitable table, a rotary slicing blade mounted to reciprocate on said table, means for reciprocating said blade, means for rotating said blade, a knife mounted to reciprocate with said rotary blade and adapted to cut off a slice from the bacon rind, and means for regulating the thickness of the slices, substantially as described.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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The two patents were copending in the Patent Office for seven months and not placed in interference. The results of both may be attained by hand. In both the advance upon the prior art consists mainly in the provision made for the separating of rind from the slice of bacon or other rind-bearing sliceable substance at practically the same time as the slicing of the bacon itself is accomplished, operating in rigid relation to the movement of the slicing wheel; that of the patent in suit following the slicing act, and that of defendant slightly preceding the action of the slicer. In the patent in suit the cutting wheel and the rind knife operate on the table. Defendant's device operates alongside of the table and slightly below it. Appellant's purpose could not be accomplished by allowing its slicing wheel to overhang the table top, as the rind must be held down upon the table top by the action of the cutting edge of the slicer, in order to facilitate the rinding act, thus giving special significance to the question of location of the slicer. Neither slicer, as such, is new. In appellant's device, the slicing wheel rotates and reciprocates; in appellee's the slicing wheel rotates, but does not reciprocate. In the former, the table top is stationary; in the latter, it reciprocates. In the former, the cutting wheel comes to a standstill after each slice is cut and reverses, and, at the end of each journey back to position for resumption of cutting again, stops and reverses, thereby eliminating momentum. Appellee's slicing wheel does not reverse, but gathers momentum so long as the handle is operated. Appellant's device completely severs the slice from the body of the bacon, and the slice from the rind, but does not slice the rind. Appellee's machine cuts the bacon from the rind and body of bacon and slices the rind. The difference in accomplishment of the two necessitates the difference in arrangement thereof. These, together with the fact that the examiner did not deem it necessary to declare them in interference, the presumption arising from the two independent grants, taken in connection with other distinguishing features hereinafter set out, justified the District Court, we think, in finding absence of infringement.

Appellee thought it safer to, and did, go into the question of priority. As we look at it, that was not necessary. In view of the want of infringement, this action by appellee has confused appellant, who deems it a confession of the failure of the defense of noninfringement. We do not so regard it. The field is not wide. Appellant's application is not broadly for a slicing knife in combination with a rind-removing device, when read in the light of the proceedings before the examiner, and the state of the prior art, as exemplified in Feiten patent, No. 734,840, granted July 28, 1903, for a fat-separating machine, and in patent No. 638,238, granted to J. A. and A. M. Haley, December 5, 1899, for a machine for trimming fat from skin, but is for such express invention as appears in the patent, and for such variations and modifications as come within the scope of the claims. If appellant's assignors conceived broadly the idea of slicing and rinding at the same time and by the same movement, which is not intended to be hereby conceded, it failed to appropriate it in such manner as to keep others off of every portion of the premises. We are not impressed by the greatly emphasized fact that the cutting edge of the

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knife *15* intersects the cutting plane of the rotary cutting disc knife in both patents. It is a necessary and evident prerequisite to the complete severing of the slice from the mass and from the rind in one movement. Nor are we convinced by the fact that appellee's rinding knife initiates the slicing act, while appellant's completes it. Appellee discovered, probably from the patent in suit after issue, that the latter was limited to a phase of the subject-matter, as distinguished from the whole, and proceeded to attempt, at least, to appropriate the broader idea, as witness, among other matters, claim 12 of patent No. 1,028,796. The defense here is not based on a prior publication. Appellant must rely upon its particular combination. It is not basic to such a degree as to be entitled to include appellee's machine, or claims within its range of equivalents. We are clear that the two patents here involved do not conflict, and that both are valid, and that appellee's device does not infringe.

The decree of the District Court is therefore affirmed.

WOLF, SAYER & HELLER, Inc., v. U. S. SLICING MACH. CO.

(Circuit Court of Appeals, Seventh Circuit. April 9, 1918. Rehearing Denied June 4, 1918.)

No. 2545.

PATENTS ⊜328—VALIDITY AND INFRINGEMENT—RIND-REMOVING ATTACHMENT.

The Stiles patent, No. 1,028,790, for a rind-removing attachment for meat-slicing machines, *held* valid and infringed.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Arthur L. Sanborn, Judge.

Suit by the U. S. Slicing Machine Company against Wolf, Sayer & Heller, Incorporated. Decree for complainant (243 Fed. 410), and defendant appeals. Affirmed.

Max W. Zabel, of Chicago, Ill., for appellant.

Frank T. Brown, of Chicago, Ill., for appellee.

Before BAKER, KOHLSAAT, and EVANS, Circuit Judges.

KOHLSAAT, Circuit Judge. In this suit appellee sought to restrain appellant from infringing its patent, No. 1,028,790, granted Stiles and Stiles, June 4, 1912, for a rind-removing attachment for meat-slicing machines, by the manufacture and sale of a machine placed in evidence on the hearing, which appellant has assumed is made in accordance with the teachings of its patent No. 968,590, while appellee contends that said machine was made, so far as here involved, under the disclosures of its said Stiles patent.

In case No. 2544, decided herewith (251 Fed. 626, — C. C. A. —), we held that the two patents—i. e., Nos. 1,028,790 and 968,590—did not cover the same ground and were both valid. This we now reaffirm. The alleged infringing machine being made, as we find, in accordance with the disclosures of the Stiles patent, was protected thereby, and appellant's act was properly treated as an infringement of appellee's Stiles patent, and enjoined accordingly.

The decree of the District Court is affirmed.

⊜For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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GARTON TOY CO. v. A. MECKY CO.

(Circuit Court of Appeals, Seventh Circuit. May 16, 1918. Rehearing Denied June 4, 1918.)

No. 2517.

PATENTS ⟸328—VALIDITY—INFRINGEMENT.

The Pursglove patent, No. 1,021,476, for a wheel hub for a child's velocipede, claim 3 of which specified a tubular hub member proper having on the end thereof a shoulder whose exterior is angular, and whose interior comprises an angular socket, etc., *held* valid, and not anticipated, and also infringed.

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

Suit by the A. Mecky Company against the Garton Toy Company. From a decree for complainant, defendant appeals. Affirmed.

Suit to enjoin future infringement of claim 3 of patent No. 1,021,476, granted March 26, 1912, to appellee as the assignee of one William T. Pursglove.

F. E. Dennett, of Milwaukee, Wis., for appellant.

J. Bonsall Taylor and E. Hayward Fairbanks, both of Philadelphia, Pa., for appellee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVAN A. EVANS, Circuit Judge. The patent in suit deals with a wheel hub for a child's velocipede. The inventor in his application described his invention as:

"Consisting of a wheel hub having a barrel or hub member proper and cranks fitted thereto and adapted to be interlocked therewith, and bound together with a bolt common to said parts, forming a comparatively one-piece construction of less weight and expense than heretofore, the parts being adapted to be readily dismantled, for packing, storing and shipping, and as easily assembled."

Claim No. 3 the only one involved, is for the following combination (Figures, letters, and paragraphing ours):

"In a hub,

"1. A tubular hub member proper (*A*), same having on an end thereof a shoulder (*B*), whose exterior is angular, and whose interior comprises an angular socket (*C*).

"2. A crank (*F*), having on its horizontal limb (*G*) a nose (*H*), whose exterior is angular and is adapted to enter and interlock with said socket (*C*).

"3. A tightening bolt (*M*), adapted to pass through said crank (*F*), the nose thereof (*H*) and said hub member proper (*A*), and

"4. A spoke-carrying sleeve (*D*), which is interlockingly fitted on the exterior of said shoulder (*B*)."

It thus appears that the patent is for a combination of four elements, and while the claim does not refer to the presence of two shoulders at the opposite end of the wheel hub, or that there are two spoke-carrying sleeves, it is admitted that the elements described should be so construed. The asserted advance in the art represented by this invention was in response to a demand for a "take-apartable" crank wheel in a wire wheel velocipede in connection with the other elements mentioned.

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The only oral testimony received on the trial came from the lips of appellee's president and mechanical expert. It appears that the construction immediately sprang into favor and in less than five years 330,000 velocipedes of this construction were sold. Prior to this invention, the witness stated, manufacturers made a "solid crank, built in the wheel."

"The cranks were a part of the wheel, were put into the same when the wheel was assembled, and made it very cumbersome to manufacture and sell on account of having the cumbersome crank to handle, also necessitated quite a different line of machinery, and also made a very bulky package."

Appellant relies upon the prior art represented by various patents; the one to Will & Uebele, No. 219,551, granted August 29, 1878, being its leading citation. This patent dealt with a wheel with wooden spokes, a fact which the District Judge properly observed "of itself called for a construction of a hub fundamentally different." The one single claim of the patent reads:

"The combination with the wheel of a velocipede, of the box (*B*), angular shafts of the crank (*C*) and the rod (*E*), all parts being adapted to each other and to the standards of the wheel as set forth."

This patent is distinguishable from the one in suit, not only because made for a wooden wheel, but because the sleeve or box is not provided with shoulders. None were needed. Moreover, in the Will & Uebele velocipede, the cranks were not removable from the wheel until the wheel was removed from the fork. Element 4 in the claim under consideration is entirely absent in the Will & Uebele patent and no mechanical equivalent of element No. 1 exists.

The patent to Quinn, No. 1,579,770, also cited as an anticipation, is obviously distinguishable from the patent in suit. It covers numerous improvements in velocipedes, and only one claim is at all worthy of consideration. This patent also dealt with the wooden wheel velocipede, but entirely lacks both elements 1 and 4, and the crank shaft (*C*) is different from the one under consideration. Other citations need not be separately considered. Recognizing as we must that the claim is for a combination, serving a special purpose, and in view of its practical success, we conclude claim No. 3 is valid.

Noninfringement.—Appellant's structure, we think, was clearly an infringement and no extended discussion is necessary. The expert witness described the similarity as "absolute," and the District Court observed that "he did not believe there is a shadow of distinction" between the two products. Appellant's argument seems based upon the proposition that because it adopted an element from the prior art it did not infringe, ignoring the fact that appellee's patent is for a combination, only one element of which may have been thus taken from the prior art.

If appellant's finished product can be distinguished from appellee's hub, constructed under this patent, such distinction lies in the fact that the former substituted teats for flanges to stop any inward movement of the spoke-carrying sleeve. No doubt exists in our mind but that in this structure, under these conditions, the teats are the mechanical equivalent of the flange.

The decree is affirmed.

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SANDUSKY FOUNDRY & MACHINE CO. v. DE LAVAUD et al.

(District Court, N. D. Ohio, E. D. May 29, 1918.)

No. 372.

1. PATENTS ⟸288—FEDERAL COURTS—JURISDICTION.
Aliens are not inhabitants of any district, and the restrictions in Judicial Code, § 51 (Comp. St. 1916, § 1033), do not apply to them; likewise, in patent cases, the restrictions prescribed by section 48 (Comp. St. 1916, §§ 1024, 1030) do not apply, and aliens may be sued in any district within which process can be served on them.

2. PATENTS ⟸288—INFRINGEMENT SUIT—NATURE OF—"TRANSITORY ACTION."
A suit arising under the patent laws is transitory, and not local in character, and, except for the limitations of Judicial Code, § 48 (Comp. St. 1916, §§ 1024, 1030), might be brought in any district in which the defendant might be served.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Transitory Action.]

3. PATENTS ⟸288—FEDERAL COURTS—JURISDICTION.
Judicial Code, § 48 (Comp. St. 1916, §§ 1024, 1030), prescribing the districts in which suits for patent infringement may be begun, should have the same construction as section 51 (Comp. St. 1916, § 1033): hence, where defendants appeared and answered to the merits before moving to dismiss a suit for patent infringement on the ground that it was begun in a district other than that of their residence, or in which they did business, those objections are waived.

4. PATENTS ⟸288—INFRINGEMENT SUIT—PROOF.
Where the bill alleged that defendants infringed within the district where suit was brought and elsewhere in the United States, and defendants by their answer to the merits waived any right to object that suit was brought in a district other than that in which they had a place of business, etc., it is open to plaintiffs to show infringement in any place in the United States.

In Equity. Suit by the Sandusky Foundry & Machine Company, a corporation, against D. Sendaud De Lavaud and others. On motion to dismiss. Motion denied.

Squire, Sanders & Dempsey, of Cleveland, Ohio, for complainant.

Francis J. Wing and Albert Lynn Lawrence, both of Cleveland, Ohio, for defendants.

WESTENHAVER, District Judge. Defendants, D. Sendaud De Lavaud and Fernando Arens, Jr., move to dismiss complainant's bill for want of jurisdiction, on the ground that they are not inhabitants of this district, that they did not infringe, and have no established place of business therein.

Complainant's bill was filed September 15, 1916. It alleges that the defendant corporation is organized and existing under and by virtue of the laws of the republic of Brazil, and that the two individual defendants are citizens and residents of that republic. All three defendants are jointly charged with infringing complainant's patents within the Eastern division of the Northern district of Ohio, and elsewhere in the United States. Process was returned served on the individual defendant D. Sendaud De Lavaud only.

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On October 5, 1916, the two individual defendants appeared by counsel and moved to dismiss the bill of complaint, for the reason that it is multifarious and that the allegations contained therein are not sufficient to constitute a cause in equity against them. This motion was not acted upon, but later, on October 30, 1916, an amended bill was filed by leave of court. The jurisdictional allegations therein are the same as those of the original bill, as above stated. Thereafter, on November 24, 1916, an answer was filed by the two individual defendants, who appeared and filed the motion to dismiss. Later, on August 6, 1917, the defendants, by leave of court, filed interrogatories, which were duly answered by complainant. These answers stated that the charge of infringement is based upon the manufacture and public exhibition by defendants, or their agents, of a centrifugal casting machine, embodying the features of complainant's patents in suit, and of pipe alleged to have been made by said exhibited machine; that this exhibited machine was manufactured at Buffalo, and that it has been installed and used in a foundry in Newark, N. J.; that the use of the machine in this district consisted in exhibiting it and pipe alleged to have been made by it, at the Foundrymen's Convention at the city of Cleveland, Ohio, in September, 1916, prior to the filing of the bill of complaint; that the machine was not operated at the said convention to cast pipe or other articles; and that no proof of any other infringement will be introduced at the trial, so far as the answering officer of complainant was then informed. On the hearing of this motion counsel for complainant announced that it was not expected to offer any other proof of infringement.

The two individual defendants on November 10, 1917, filed the present motion. In support of this motion it is urged that neither of the defendants is an inhabitant of this district, but that both are alien citizens of the republic of Brazil; that none of the defendants has a place of business within this district, and that the tender of proof of infringement does not show that the defendants, or any of them, have committed acts of infringement within this district; or, if the exhibition of the infringing machine within the district is to be considered in law an act of infringement, it is so trivial as to be beneath the cognizance of a court of equity. I am of opinion that this motion should be overruled on two grounds:

[1] 1. The defendants who have appeared are aliens. It seems to be settled law that they are not inhabitants of any district, and may be sued in any district within which process can be served on them. It was so held under what is now section 48 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1100 [Comp. St. 1916, §§ 1024, 1030]) in United Company v. Duplessis Company (C. C.) 133 Fed. 930. Such is said to be the law in Walker on Patents (5th Ed.) § 389. The same holding has been repeatedly made under section 51 of the Judicial Code (Comp. St. 1916, § 1033) as applied to causes of action other than suits arising under the patent laws. In re Hohorst, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211; Barrow Steamship Co. v. Kane, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964; Wind River Lumber Co. v. Frankfort Marine Ins. Co., 196 Fed. 340, 116 C. C. A. 160; Keating v. Penn-

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sylvania Co. (D. C.) 245 Fed. 155. The reasoning applies equally to both classes of cases against alien defendants.

[2-4] 2. A suit arising under the patent laws is transitory and not local in character, and, except for the limitations of section 48, Judicial Code, might be brought in any district in which the defendant could be served. General jurisdiction is conferred by section 24, Judicial Code (Comp. St. 1916, § 991), over all actions arising under the patent laws of the United States. The jurisdiction, therefore, of this court exists, no matter where the infringement was committed, unless section 48 takes away that jurisdiction. The proper rule, in my opinion, is that section 48 should have the same construction as section 51 of the Judicial Code; that is to say, it does not take away the jurisdiction of the District Court in patent cases, but prescribes merely the district in which such a suit may be brought, and is a privilege conferred upon a defendant, which he may waive. In other words, in suits arising under the patent laws, a defendant has a right to insist on the privilege of being sued in a district of which he is an inhabitant, or in a district where he shall have committed acts of infringement and have a regular and established place of business; in other causes of action, the defendant is entitled to insist that he shall be sued in the district of which he is an inhabitant, or, if jurisdiction is invoked only because of diversity of citizenship, in the district of which either the plaintiff or defendant is a resident. This, however, is a personal privilege respecting only the forum within which the action may be maintained. It is a privilege upon which the defendant only may insist, and which he may waive. He will be held to have waived it if he does not, prior to entering a general appearance to the action, take objection in proper form to the jurisdiction of the court over him. This holding has been made in actions arising under the patent laws in the following cases: General Electric Co. v. Wagner Electric Co. (C. C.) 123 Fed. 101; U. S. Raisin Co. v. Phœnix Raisin & Packing Co. (C. C.) 124 Fed. 234; Thomson-Houston Electric Co. v. Electrose Mfg. Co. (C. C.) 155 Fed. 543; U. S. Expansion Bolt Co. v. Kroncke Hardware Co. (D. C.) 216 Fed. 186. See, also, Walker on Patents (5th Ed.) § 389.

The question involved is common to all causes of action cognizable in a federal court, and this holding has been made in actions other than those arising under the patent laws in the following cases: First National Bank v. Morgan, 132 U. S. 141, 10 Sup. Ct. 37, 33 L. Ed. 282; Central Trust Co. v. McGeorge, 151 U. S. 129, 14 Sup. Ct. 286, 38 L. Ed. 98; Interior Construction Co. v. Gibney, 160 U. S. 217, 16 Sup. Ct. 272, 40 L. Ed. 401; In re Moore, 209 U. S. 491, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164; Western Loan Co. v. Butte Mining Co., 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101; Kreigh v. Westinghouse Co., 214 U. S. 249, 29 Sup. Ct. 619, 53 L. Ed. 984.

In this case, as appears from the facts above stated, the two individual defendants appeared generally to the action and answered to the merits before the motion to dismiss was made. From this it follows that the objection that the defendants are sued in a district in which they are not inhabitants, or in a district in which they did not infringe and did not have an established place of business, is waived. It is open

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to complainant to prove infringement anywhere within the United States. The proof tendered probably does not show an act of infringement within the Northern district of Ohio, but the bill alleges that defendants infringed within that district, and elsewhere in the United States, and defendants were therefore advised that an issue was not being tendered of infringement within the Northern district of Ohio alone. Whether or not, in a case where the defendant had an established place of business within the district, and the bill limits the charge of infringement to that district, and the answer had denied this charge, the complainant's action would fail for want of proof, as was held in Gray v. Grinberg, 159 Fed. 138, 86 C. C. A. 328, does not arise in the present state of the record, and no opinion with respect thereto need be or is expressed by me.

Defendants' motion to dismiss will be overruled.

UNION SULPHUR CO. v. FREEPORT TEXAS CO. et al.

(District Court, D. Delaware. April 18, 1918.)

No. 336.

1. PATENTS ⟸26(2)—COMBINATION OF OLD ELEMENTS.
That elements entering into mechanical combination, considered apart from each other, are old and well known, does not negative patentability, where, through inventive faculty, they are assembled so as to produce a new and useful result; the same being true of the various steps entering into a patented process.

2. PATENTS ⟸32—RESOLUTION OF DOUBT IN FAVOR OF PATENTABILITY.
Where extreme importance of raising sulphur from great depths to surface of ground was widely recognized prior to an invention, yet the inventor alone achieved the result, the law requires that whatever question may exist as to the patentability of his improved apparatus and process, so far as consistent with reason, should be resolved in favor of patentability.

3. PATENTS ⟸328—NOVELTY—SULPHUR MINING.
Frasch patents, Nos. 799,642 and 800,127, for fusing sulphur underground and raising it to surface in that condition, by means of an air lift pump, in combination with other elements entering into patented combination, *held* valid and not anticipated.

4. PATENTS ⟸328—PATENTABLE NOVELTY—SULPHUR MINING.
Frasch patent, No. 1,008,319, claims 7, 26, and 28 covering apparatus and process for mining sulphur, by fusing it underground and raising it to surface in that condition, *held* devoid of patentable novelty; new use of old device in connection with sulphur, instead of salt, oil, or other liquid, not conferring patentability.

5. PATENTS ⟸109—APPLICATION—ALLOWANCE OF AMENDMENT.
Action of Patent Office, in allowing amendment of application for patent by addition of claims within scope of invention disclosed in original application, was proper.

6. PATENTS ⟸109—AMENDMENT OF APPLICATION—PRIOR PUBLIC USE.
Amendment of application for patent, to add claims within scope of invention disclosed in original application, related back to time of filing of original application; and that claims may be defeated by two years' prior public use, such use must have extended over at least two years before filing of original application.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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7. PATENTS ⊂=75—EXPERIMENTAL USE AS "PUBLIC USE."
Experimental use is never "public use," within the meaning of the statute, if conducted in good faith to test the qualities of the invention, and for no other purpose not naturally incidental.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public Use.]

8. PATENTS ⊂=283(1)—EXPIRED PATENTS—INFRINGEMENT.
If the sulphur mining apparatus and process employed by defendants were the apparatus and process of old expired patents, and nothing more, the charge of infringement cannot be sustained.

9. PATENTS ⊂=46—PATENTABILITY—NECESSITY FOR IMPROVEMENT.
An invention may be patentable as possessing utility in the sense of the law, though an improvement may be necessary to its commercial success.

10. PATENTS ⊂=328—VALIDITY, ANTICIPATION, AND INFRINGEMENT—SULPHUR MINING.
Claims 2, 3, 6, 12, 19, 21, and 22, of Frasch patent, No. 799,642, and claims 2, 3, 7, 11, and 24 of Frasch patent, No. 800,127, both covering apparatus and process for mining of sulphur by fusing it underground and raising it to surface in that condition, claims relating to air lift, double delivery of hot water, and forcing of hot water through walls of mine cavity, *held* valid, not anticipated, and infringed.

11. PLEADING ⊂=327—SUIT FOR INFRINGEMENT—BILL OF PARTICULARS—EFFECT.
In suit for infringement of patents, where plaintiff voluntarily furnished bill of particulars, which stated particulars were given without waiving right to rely on any infringing acts, no exception or objection having been taken to reservation, plaintiff, on question of infringement, is not restricted to defendants' wells—patents covering apparatus and process for mining sulphur by fusing it underground and raising it—mentioned by number in bill of particulars.

12. PATENTS ⊂=227—INFRINGEMENT—KNOWLEDGE OF INFRINGER.
An infringer of patents is chargeable with knowledge of the infringing acts.

13. PATENTS ⊂=312(3)—INFRINGEMENT—RESPONSIBILITY FOR ACTS OF OTHER—SUFFICIENCY OF EVIDENCE.
In suit for infringement of patents covering apparatus and process for mining sulphur by fusing it underground and raising it in that condition, evidence *held* to prove beyond all reasonable doubt the responsibility of one defendant for infringing acts on the part of the other.

14. PATENTS ⊂=287—INFRINGEMENT—LIABILITY FOR OTHER COMPANY.
Community as to officers, directors, and stock is not of itself sufficient to render one company liable for acts of infringement of patent committed by another company on the premises occupied by it.

15. PATENTS ⊂=287—AGENCY—JOINT INFRINGEMENT.
The doctrine of agency applies to patent infringements; also the principle that one doing an act which naturally causes another to commit an infringement is responsible for it; further, that where several persons co-operate in acts of infringement, they are joint tort-feasors and as such jointly and severally liable in solido.

16. PATENTS ⊂=283(1)—INFRINGEMENT—PAYMENT OF COST.
The circumstance that another person pays the cost of an infringement of patent can never serve as justification to the infringer.

17. PATENTS ⊂=312(3)—INFRINGEMENT—LACK OF EXPERT TESTIMONY.
In suit for infringement of patents, where plaintiff in prima facie case introduced large volume of competent and convincing evidence as to nature and operation of apparatus and process of patents, its failure to produce any patent expert witness does not prevent court from rendering decision, if in its discretion it feels sufficient testimony has been adduced.

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In Equity. Suit by the Union Sulphur Company against the Freeport Texas Company and the Freeport Sulphur Company. Decree in accordance with the opinion.

See, also, 234 Fed. 191, 194.

Charles Neave, Maxwell Barus, and Henry A. Wise, all of New York City, for plaintiff.

Samuel R. Betts, James R. Sheffield, John W. Peters, and Delancey Nicoll, all of New York City, and Thomas F. Bayard, of Wilmington, Del., for defendant Freeport Texas Co.

BRADFORD, District Judge. The Union Sulphur Company, a corporation of New Jersey, brought its bill against the Freeport Texas Company, a corporation of Delaware, hereinafter referred to as the defendant, and the Freeport Sulphur Company, a corporation of Texas, charging infringement of United States patents Nos. 799,642, 800,127 and 1,008,319, and praying the usual relief. It is admitted that the plaintiff is the owner and holder of these three patents. The Freeport Sulphur Company not having been served with process and not having appeared, the only defendant before the court is the Freeport Texas Company.

The patents in suit relate to the mining of sulphur and cover certain alleged improvements in apparatus and process used in that art. The first patent, 799,642, is dated September 19, 1905, and was granted to Herman Frasch for "Improvements in Processes of Mining Sulfur."

In the description it is stated:

"This invention relates more particularly to the removal of sulfur from deposits in the earth which consist of or contain free sulfur by fusing the sulfur in the underground deposit and raising it in a melted condition."

The second patent, 800,127, also bears date September 19, 1905, and was granted to Frasch for "Improvements in Apparatus for Mining Sulfur." The description contains precisely the same statement hereinabove quoted from the first patent. The third patent, 1,008,319, is dated November 14, 1911, and was granted to Frasch, assignor to the Frasch Sulphur Process Company, for "Improvements in Mining Sulfur." The description states:

"This invention relates more particularly to mining sulfur by fusing the latter in its natural underground deposit and removing it to the surface while it is in the melted condition."

The fusion and raising of sulphur in and from deposits deep in the bowels of the earth had never been effected or attempted prior to the inventions of the patents in suit and of certain other patents granted to Frasch in 1891. Prior to the patents in suit the mining of sulphur was principally confined to Sicily, where the sulphur deposits were found at or comparatively near the surface of the ground. For obtaining such of the sulphur as was not at the surface shafts were sunk and from them the sulphur ore was brought to the surface, where the sulphur was separated from the ore. While this mode of sulphur mining was practicable and convenient where the sulphur deposit was comparatively near the surface, it was otherwise where the

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deposit was located at a great depth. In the latter case the cost of sinking shafts was so increased as to become prohibitive, and the presence of quicksand and water presented serious obstacles to the securing of the sulphur, and was fraught with grave peril to life. So long ago as 1869 the sulphur deposits in Calcasieu Parish, Louisiana, now mined by the plaintiff, were discovered, and were recognized as being very rich. These deposits were at such a depth as to present a mining problem. Whatever its difficulty, it was regarded at the time by mining engineers as comparatively simple. In that year, Professor Hilgard, of the University of Mississippi, in a report to the president of the Louisiana Petroleum & Coal Oil Company, published in the Engineering and Mining Journal of September 28, 1869, said with respect to a sulphur deposit on the premises now mined by the plaintiff:

"There are, undoubtedly, considerable practical difficulties to be overcome in sinking this shaft of 443 feet to the surface of the sulphur bed; but they are such as, in the hands of a skilful practical mining engineer with sufficient means at command, can readily be overcome. To begin the work with limited means would be certain failure. *That*, once successfully accomplished, it is my conviction that the working of the mine would be easy and in the highest degree remunerative—capable, in view of the difficulty under which the production of Sicilian sulphur labors, of controlling the sulphur market of the world, and adding to the prosperity of the whole country by cheapening the production and improving the quality of that great fundamental agent, 'sulphuric acid'; the preparation of which from impure pyrites is so often a source of annoyance and loss to all kinds of manufacturers."

After Hilgard's report the Calcasieu Sulphur & Mining Company acquired the property containing the sulphur. A. Granet, the chief engineer of that company, in 1871, made a report as to the sulphur deposits and the methods of mining them. In this report he states:

"A first exploring shaft, sunk originally with a view to discover the stratum of the petroleum oil, indicated by the surface of the soil, found a stratum containing too little petroleum to be worked profitably; but on the other hand, after coming at a depth of 380 feet upon a sheet of sulphurous water, it struck and went through, at the depth of 443 feet, a stratum of sulphur of great value, having a thickness of 108 feet. * * * The fragments withdrawn from the bottom, after each stroke, have demonstrated in a clear and precise manner that the entire stratum is, from the top to the bottom, of exceptional richness, and that it is very easy to work it. As for the well which is to be bored for the purpose of extracting the sulphur, I have every reason to believe that there is no serious obstacle in the way. * * * I cannot expatiate here upon the technical details of the various processes of sinking shafts through crumbling or water-bearing strata; but I will simply state, that an extracting shaft, although difficult to execute, nevertheless presents no obstacles and no problems of construction which a competent engineer cannot either solve or overcome. As to the working of the sulphur bed itself, this is attended with no difficulty, as the rock without being very hard to break, is nevertheless sufficiently compact and self supporting to allow of the safe construction of all the galleries which may be required, without the need of props or wood-work in the interior. * * * The sulphur stratum recently discovered is 428 feet below the surface of the soil, and the shaft to be sunk in order to reach it through the various superincumbent strata, can be constructed without any serious difficulty. The mineral constituting this stratum, contains an average of 77 per cent. of pure sulphur; when the extracting well shall be in operation, the working of it shall be very simple and cheap."

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Pursuant to Granet's recommendation, the company obtained at large expense from France and Belgium machinery and apparatus for sinking a shaft. The project was a failure, for after the shaft had been sunk only a short distance below the surface the quicksand and water presented such obstacles as to compel the abandonment of the enterprise by the company. In 1879 the Louisiana Sulphur & Mining Company acquired the same property now mined by the plaintiff, and, like the Calcasieu Sulphur & Mining Company, vainly attempted to mine sulphur by means of shafts. In or about 1890 the same property was acquired by the American Sulphur Company, which, after unsuccessfully carrying on operations abandoned in 1893 the attempt to mine after meeting with difficulty from quicksand, and also from sulphurous gas in the shaft, resulting in the death of five men. The last-named company expended from $300,000 to $350,000 in the purchase of the mining property and in its effort to secure sulphur, and then abandoned the enterprise simply because it was believed impracticable to extract the sulphur by means of mine shafting, the only method then or theretofore used in obtaining sulphur deposited at any considerable depth below the surface. E. J. Schmitz, a mining engineer of the American Sulphur Company, in a report to that company June 3, 1893, said:

"While I have only small hopes that the property of your company can be ever mined with success by the common methods (shafts, etc.) on account of the porous and cavy structure of the formation and the water masses present in the Sulphur deposits and formation—I think it but proper that the directors of your company should do no decisive step as to the abandonment of the property until they have fully satisfied themselves that the waters of the Sulphur Horizon below the Big flows are too large to be controlled, and as well that there exists no other practical methods of extracting the Sulphur than by the common Shaft methods."

The repeated and long continued unsuccessful attempts, covering a period of more than twenty years, by the various companies above mentioned to secure sulphur from the deposits in Louisiana afford conclusive evidence of the widely recognized importance of discovering some means of securing the desired result—a result so desirable as to constitute a powerful incentive to all those interested in the sulphur industry to devise effectual means to secure its attainment. Yet it appears from the evidence that until after the American Sulphur Company abandoned its attempt in 1893, with the exception of Frasch, no one had any conception or idea of fusing sulphur in its natural bed or deposit in the earth and bringing it to the surface in a melted condition. All efforts theretofore had been confined to its extraction through means of the sinking of shafts. Frasch, however, several years before the abandonment by the American Sulphur Company of its enterprise as above mentioned formed the broad conception of obviating all necessity for the mining of sulphur through shafting by fusing the sulphur in its natural deposit and bringing it while so fused to the surface through piping; and his broad conception, though mistaken in some respects, was embodied in three patents, commonly referred to as the expired Frasch patents, granted to him October 20,

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1891, being Nos. 461,429, 461,430 and 461,431. In No. 461,429 Frasch states:

"This invention relates to the removal of sulphur from deposits in the earth which consist of or contain free sulphur and is particularly useful in the removal of the sulphur from deposits which are overlaid with beds of quicksand, and which therefore cannot be mined in the usual way by sinking a shaft. * * * The invention consists in the fusion or melting of the sulphur in the mine or underground deposit and its removal in a fused or melted condition. To fuse the sulphur, use is or may be made of a heat-conveying fluid or vehicle, preferably a cheap liquid, such as water, although the invention extends to the use of a heat-conveying fluid or vehicle in general. Further, the invention includes, generally, the fusing of the sulphur in the underground mine or deposit as an aid to its removal from the mine."

In No. 461,430 Frasch, after stating the subject to which the invention related, as in No. 461,429, says:

"The present invention consists in apparatus whereby the removal of the sulphur from the mine or underground deposit in a liquefied state is effected or facilitated. In accordance with the said invention a well is sunk into or through the underground sulphur deposit or mine, and a pump or other known or suitable means of forcing circulating or elevating liquids is employed to remove the liquefied sulphur or the liquefied sulphur and vehicle by which it is liquefied."

In No. 461,431, after stating the subject to which the invention related, as in Nos. 461,429 and 461,430, Frasch states:

"The invention consists in liquefying the sulphur in the mine or underground deposit by means of a solvent vehicle and lifting the solution to the surface by a pump or other known or suitable means of raising liquids. * * * Further, the invention consists in inducing a circulation of a solvent in the underground cavity (whether wholly or partly full) by introducing the fresh liquid near the bottom of the cavity or point at which the sulphur solution is removed. If the liquid be hot when introduced, the high temperature makes it specifically lighter than the liquid already in the cavity, so that it tends to rise, and thus induces a circulation of the whole fluid mass. The solution of the sulphur in the vehicle also makes the liquid in the cavity specifically heavier, and consequently increases the differences in density between the inflowing and the present liquid."

While as above stated, the broad conception of fusing sulphur in its underground bed and raising it to the surface was embodied in the expired Frasch patents, it appears from the evidence that the process and apparatus described in them were devoid of commercial utility. On the other hand, the fusion and raising of sulphur by the apparatus and process covered by the patents in suit have been accomplished with phenomenal success. This is sufficiently indicated by the amount of sulphur obtained by the plaintiff during a series of years under the apparatus and process of the patents in suit; it being as follows: 1902, 4,983 tons; 1903, 23,715 tons; 1904, 79,187 tons; 1905, 218,950 tons; 1906, 287,590 tons; 1907, 185,882 tons; 1908, 367,896 tons; 1909, 270,725 tons; 1910, 246,510 tons; 1911, 204,220 tons; and 1912, 786,605 tons. The development of the sulphur mining industry in this country exclusively under the apparatus and process of the patents in suit has been such that Sicily is no longer a competitor in the American market, and large quantities of sulphur are annually exported from the United States.

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The first patent in suit, 799,642, is for a process, and the principal features of the apparatus for conducting the process are as follows: There is a pipe or casing *A*, sunk or driven down through the surface of the ground to the stratum of rock above and covering, mediately or immediately, the sulphur deposit. Inside of this pipe and concentric with it is a smaller pipe *D*, which extends from the surface of the ground through, and, in a drilled hole of the proper diameter, beyond the bottom, of pipe *A*, through the stratum of rock and into and nearly through the sulphur deposit. In operating the apparatus hot water is forced down through the pipe *A*, referred to as "top" water, and is also forced down through the pipe *D*, referred to as "bottom" water. Within the latter pipe and concentric therewith is a third pipe *E*, which extends from the surface downward through a plug sealing the lower end of the pipe *D*, to a point within a strainer *D''*, the latter being an extension of the pipe *D*. The pipe *D* has perforations above the plug sealing its lower end for the discharge of hot water into the sulphur bed. Pipe *E* is intended for the passage of melted sulphur from the deposit to the surface. Within and concentric with the last named pipe and extending from the surface down to a point near the lower end of the pipe *E* is an air injecting pipe *F*, provided at its lower end with a perforated piece of zinc or other metal not corrodible by sulphur. Through this pipe air is forced downward through the perforations into the melted sulphur in pipe *E*, lessening the specific gravity of the contents therein and facilitating the raising of the sulphur through the pressure of the hot water in the well and the difference in specific gravity between such hot water and the aerated contents of the sulphur pipe. The water heated to the proper temperature, which is forced down through the pipe or casing *A*, on reaching its lower end escapes therefrom and passes down around and on the outside of pipe *D*, until coming in contact with the sulphur it melts the same and begins the formation of a cavity. The hot water which is forced down through pipe *D* escapes through perforations near its lower end, as above stated, into the sulphur, melting the same. The "top" water from pipe *A*, together with the "bottom" water from pipe *D*, if of proper temperature will melt the sulphur and bring it in contact with the strainer connected with the bottom of pipe *D*, and cause it to pass into the strainer. The melted sulphur being of greater specific gravity than the water will remain in the strainer until through its accumulation it seals the lower end or rim of the sulphur pipe *E*; and as long as pipe *E* extends below the surface of the sulphur pool the melted sulphur can be forced or lifted up through pipe *E* to the surface of the ground. In conducting the process of the patent the hot water, whether heated under pressure, by steam, or otherwise, must be of a temperature sufficiently high and must be forced down into the mine in sufficient quantity, not only to melt the sulphur at the bottom, but to maintain it in a melted condition until it reaches the surface. The degree and quantity of heat and the quantity of water requisite for the efficient carrying on of the process are subject to variation to a considerable extent under different conditions. Where, as is the case with

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the plaintiff's sulphur bed, and also the sulphur bed on the premises occupied by the Freeport Sulphur Company, the sulphur formation is permeated with water it is necessary to increase the volume or temperature, or both, of the hot water pumped down to such an extent as to force back the subterranean cold water in order to insure the melting of the sulphur in sufficient quantity and to maintain it at a proper degree of temperature to permit it to be raised in a melted condition to the surface. But while it is necessary that sufficient heat should be applied to the sulphur to permit it to be raised to the surface in a melted condition, it is absolutely necessary that the melted sulphur should not be so hot as to pass the darkening point and become pasty or unduly viscous. Such superheating is absolutely destructive of the process. The proper application of heat to the sulphur presented one of the most difficult problems for solution by Frasch.

The second patent in suit, 800,127, is for apparatus for carrying on the process of the patent just considered. The patents were divisional, and in view of what has been said about the process patent it is unnecessary at this point to indulge in what would be practically a repetition.

The third patent in suit, 1,008,319, is for "Improvements in Mining Sulfur." In the description it is stated:

"I have discovered that the operation of melting the sulfur out of porous rock is liable to detach masses of rock, which in falling will choke the inlet and outlet openings of the mine piping (or of one or more of such openings); and I have further discovered that this condition can be remedied or ameliorated by providing the well hole within the deposit with a perforated lining which will prevent detached masses of rock from reaching the interior mine piping. Such masses may close some of the perforations in the said lining; but these are, or may be, so numerous and so widely distributed that only a general cave in would be apt to close enough of them to shut off the inflow of the sulfur or the outflow of the fusing liquid. Moreover, when the lining is present, a mass of rock detached from the upper part of the deposit is apt to lodge there against the lining; whereas, without such lining it might fall to the bottom of the well hole, where it would be objectionable. Again, a mass of rock lodging against the lining does not close the well hole; but it would do so to a greater or less extent if lodged against the interior mine piping."

The interior piping shown in the drawings of this patent, though differently lettered, is the same as that set forth in the first and second patents in suit. Surrounding the interior piping below the service of the rock and concentric therewith is a pipe containing orifices and referred to as the perforated lining *e*. The hot water is forced down the pipes *a* and *q*, corresponding to the pipes *A* and *D*, in the first and second patents in suit. The hot water which "passes down the exterior pipe or casing *a* enters the upper part of the deposit, being distributed over a certain vertical distance by the perforated lining *e*." The hot water from the pipe *a* escaping through the perforations of the lining "melts the sulphur in the upper part of the deposit"; while the hot water passing down the interior pipe *q*, corresponding to pipe *D* in the first and second patents in suit, "escapes near the bottom of the deposit through the openings in the wall of said

pipe above the annular plug *t*, and also through the openings in the perforated lining," and melts the sulphur at the lower end of the well. The melted sulphur is then raised to the surface by means of apparatus and in a manner corresponding to the apparatus and process employed in the first and second patents in suit. The essence of the invention covered by the third patent in suit, so far as pertinent to the mining of sulphur under those two patents, consists in the provision and use of a perforated lining to obviate or minimize the difficulty resulting from the stoppage of the free flow of hot water into the sulphur deposit through the giving way and falling in of the walls of the well. The employment of the perforated lining is unquestionably useful in that in addition to the avoidance in large measure of the ill effects resulting from the stoppage of the free flow of the hot water, it distributes the same in the sulphur bed throughout a greater vertical distance, the sulphur being melted contemporaneously at a greater number of points therein.

The claims in issue of No. 799,642, the first patent in suit, are Nos. 2, 3, 6, 12, 19, 21 and 22, as follows:

"2. In sulfur-mining in porous rock, the improvement consisting in forcing water heated above the temperature at which melted sulfur begins to darken into the underground deposit and out through the walls of the mine-cavity, so that it flows away through the surrounding rock, and removing the melted sulfur which separates itself by gravity from the water in the mine, substantially as described.

"3. As an improvement in sulfur-mining, and in conjunction with the fusion of the sulfur in the underground deposit, the introduction into a column of the melted sulfur of air or other aeriform fluid, so as to form a column of melted sulfur of diminished density to be raised by pressure in said deposit, substantially as described.

"6. In sulfur-mining in porous rock, the improvement consisting in forcing hot water into the underground deposit and out through the walls of the mine-cavity, so that it flows away through the surrounding rock, allowing the melted sulfur which separates itself by gravity from the water in the mine to collect until it seals the end of the sulfur-pipe, and introducing air or other aeriform fluid into the column of melted sulfur so as to reduce its density and allow it to be raised by the pressure in the mine-cavity, substantially as described.

"12. As an improvement in sulfur-mining by fusion underground, in conjunction with the removal of the melted sulfur, the introduction concurrently with said removal of the hot water for fusion into the underground sulfur deposit above and in proximity to the intake for the melted sulfur and also at a higher level near the upper part of the mine-cavity, substantially as described.

"19. In mining by fusion in porous rock, the improvement consisting in melting the material being mined in the underground deposit by means of fusion liquid introduced thereinto, which fluid is forced out through the walls of the mine-cavity into the rock beyond, and removing the melted material, substantially as described.

"21. In mining by fusion, the improvement consisting in introducing fusing fluid into an underground deposit near the top and bottom of the mine-cavity contemporaneously, substantially as described.

"22. In mining by fusion, the improvement consisting in introducing fusing fluid into an underground deposit near the top and bottom of the mine-cavity contemporaneously and forcing the said fluid out through the walls of said mine-cavity into the rock beyond, substantially as described."

The claims in issue of No. 800,127, the second patent in suit, are Nos. 2, 3, 7, 11, 21 and 24, as follows:

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"2. Apparatus for mining by fusion, consisting, in combination with means for removing the melted material, of mine-piping connected with means for forcing water at the fusing temperature through said piping into an underground porous deposit, and means whereby said deposit is closed against the return of the hot water to the surface of the ground, so that the said water is forced to flow away through the surrounding porous rock, substantially as described.

"3. Apparatus for mining by fusion, consisting of a mine-pipe connected with means for forcing water at the fusing temperature through said pipe into an underground porous deposit, and means whereby said deposit is closed against the return of the hot water to the surface of the ground, so that the said water is forced to flow away through the porous rock, in combination with a mine-pipe up which the melted material is raised from said deposit, and a pipe conveying aeriform fluid and discharging the same into the said mine-pipe up which the melted material is raised, substantially as described.

"7. Apparatus for mining by fusion, composed of two pipes for conducting hot water into the underground deposit, terminating one at a higher and the other at a lower level, a pipe up which the melted material is raised from said deposit, and a pipe conveying compressed aeriform fluid and discharging it into the said mine-pipe up which the melted material is raised, substantially as described.

"11. Apparatus for mining by fusion, having mine-piping with delivery-openings at the upper and lower parts respectively of the mine-cavity, in combination with means whereby fusing fluid is delivered through said openings simultaneously to the upper and lower parts of said mine-cavity, out of which latter the water flows during such simultaneous delivery, substantially as described.

"21. Apparatus for mining by fusion, having a mine-pipe provided at its lower end with a strainer, in combination with a mine-pipe opening into said strainer, the first-mentioned pipe having a discharge above the lower end of the last-mentioned pipe and a closure between said discharge and said strainer, substantially as described.

"24. Apparatus for mining by fusion, having means for introducing fusing fluid into the deposit and for removing the melted material, which means includes provisions for delivering compressed aeriform fluid into the pipe through which the melted material is removed, substantially as described."

The claims in issue of No. 1,008,319, the third patent in suit, are Nos. 7, 26 and 28, as follows:

"7. The process of mining by liquefaction underground of the substance to be mined, consisting in inserting in the deposit a stout perforated lining of approximately at least the diameter of the well bore, introducing liquefying fluid into the interior of said lining, causing it to flow out into the deposit through the perforations in said lining, which thus distributes the outflowing fluid over a greater depth of the deposit than it would occupy but for said lining and which also prevents the stoppage of said flow outward by the falling in of masses too great to be carried away by the current of said fluid, and removing the liquefied substance, substantially as described.

"26. A well sunk into a deposit of naturally solid but liquefiable substance and provided with each of the three features following, namely, a stout perforated lining in said deposit of approximately at least the diameter of the well bore, an interior fluid delivery pipe with outlet below a large part of the perforations of said lining, and means for supplying liquefying fluid for delivery into the deposit in part after delivery into said lining above the outlet of said interior pipe and passage through perforations in said lining and in part after conveyance through said interior pipe to a lower level, substantially as described.

"28. The process of mining by liquefaction underground of the substance to be mined, consisting in inserting in the deposit a stout perforated lining of approximately at least the diameter of the well bore and an interior fluid delivering pipe with outlet below a large part at least of the perforations of

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said lining, introducing liquefying fluid into the deposit in part after delivery into said lining above the outlet of sad interior pipe and passage through perforations in said lining and in part after conveyance through said interior pipe to a lower level, and removing the liquefied substance, substantially as described."

[1] There is no denial on the part of the defendant of the utility of the three patents in suit, or that signal success in the mining of sulphur has not resulted from the use of the apparatus and process covered by them. Nor is it denied that Frasch was the only person whose inventive genius has produced the revolution in the sulphur mining industry through the substitution for the old system of sinking shafts of the infinitely better methods devised by him. But it is contended that the three patents in suit are invalid in view of the prior art, including Frasch's earlier expired patents, or through anticipation by those patents. It is true, as before stated, that the broad conception of fusing sulphur in its natural bed or deposit in the earth and bringing it to the surface in a melted condition was not embodied for the first time in any of the patents in suit. It was disclosed in the expired Frasch patents. The patents in suit are only for improvements in the apparatus and process of the earlier Frasch patents, but the improvements covered by the patents in suit marked the difference between success and failure in sulphur mining. Much stress has been laid by the defendant upon the fact that most, if not all, of the parts constituting the apparatus of the patents were old and well known. That the various elements entering into a mechanical combination, considered separately and apart from each other, are old and well known, does not negative patentability where through the exercise of the inventive faculty they are so assembled as to produce a new and useful result. Patentable invention is often displayed in the selection and adjustment of old and well-known devices to be used in combination to produce such a result. And by analogy the same is true of the various steps entering into a patented process.

It is urged that on the expiration of the earlier Frasch patents the practice of the inventions covered by them was open and free to the world, and that the difference between those inventions and the inventions of the patents in suit was not sufficient to admit of the patentability of the latter. It is thus necessary to ascertain some of the features distinguishing the apparatus and process as improve under the later patents from the apparatus and process of the expired patents, which converted failure into success.

The apparatus disclosed in the patents in suit differs in material points from that disclosed in the expired patents. One of the most important differences is to be found in what is known as the "air-lift" or air-lift pump. No one of the expired patents shows anything corresponding to the pipe *F* through which air is forced down the well and into the melted sulphur contained in the pipe *E*, thereby lessening the specific gravity of the contents and facilitating the raising of the sulphur to the surface. This "air-lift" constituted a difference of much importance between the apparatus of the patents in suit and that of the expired patents, and produced a radical difference between their respective functions. Another important difference between the ex-

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pired patents and the patents in suit relates to the delivery of hot water into the well; the later patents providing for its delivery through two hot water pipes simultaneously, one of them delivering "top" water and the other "bottom" water, whereby the melting of the sulphur is increased by a double delivery of hot water, which not only serves to maintain the required degree of heat in the water reaching and intended to operate upon the sulphur in the cavity, but to force the cold water in the sulphur bed back to such distance from the well as not to interfere with the melting of the sulphur. The apparatus of the third patent in suit, No. 1,008,319, differs from that of the expired patents in having the perforated lining already described, insuring the protection of the well and a more extensive distribution throughout a vertical distance of the hot water into the sulphur bed at a large number of points.

[2] With respect to patentability it is unnecessary at this point to consider differences between the apparatus and process of the patents in suit and those of the expired patents other than those arising from the employment of the air-lift, the double delivery of hot water, and the perforated lining. In these three particulars the patents in suit substantially differ from Frasch's earlier inventions. Operations under the expired patents lacking these improvements fell far short of realizing the aims and expectations of the inventor, but under and with the improved process and apparatus of the patents in suit attained a commercial success that could hardly have been anticipated. After many and uniformly unsuccessful attempts to raise sulphur from the Louisiana beds Frasch secured the earlier patents covering his broad conception of the melting of sulphur underground and bringing it to the surface. But broad and meritorious as was that conception he had still fallen short of providing the means for its successful realization. And it was only after the lapse of a number of years from the date of the earlier patents that he found the means for the full accomplishment of his aims. The extreme importance of effecting the raising of sulphur from great depths to the surface of the ground was widely felt and recognized. It had long claimed the attention of scientific men and mining engineers. Yet it was Frasch, and he alone, who reached the long sought goal. Under these circumstances the law requires that whatever question may exist as to patentability in the improved apparatus and process covered by the patents in suit should, so far as consistent with reason, be resolved in favor of patentability. The conclusion of patentability is not, however, exclusively to be based upon the presumption arising from the grant of letters patent, or from the meeting of a long-felt need, or the utility of mining sulphur under the improved methods of the patents in suit, but also upon the essential character of the improvements as respects invention, novelty and utility.

[3] The defendant denies that there was anything patentable in the air-lift, and contends that it appears from the descriptions of the expired patents that Frasch understood and contemplated that an air-lift pump might or should be employed in raising the melted sulphur to the surface. Frasch, it is true, states in patent 461,429 that "the liquefied sulphur need not be forced up by the heat-conveying liquid,

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but may be pumped up in any ordinary or suitable way"; and further, that "the term 'pumping' is intended to cover the movement by means of a pump or any known or suitable substitute for a pump. A column of liquid, as hereinbefore indicated, is one such substitute." The column of liquid referred to was hot water in the pipe *B*, which, being subjected to pressure was intended to force melted sulphur together with hot water up through the sulphur pipe *C*. It is urged that at the time of the granting of the expired patents there were only three methods or kinds of pumping known for use in deep wells, one by hydrostatic pressure, shown in the expired patents, another by a "sucker-rod" pump, also shown therein, and a third by an air-lift pump; and, therefore, that as the expired patents disclose hydrostatic pressure and a sucker-rod pump, pumping "in any ordinary or suitable way" must necessarily have been intended to apply to an air-lift pump. This contention, however, imputes to Frasch an intent or understanding either existing or chargeable to him as a practical engineer, touching the use of an air-lift pump, from which the conclusion is unwarrantably drawn that the provision in the patents in suit of an air-lift pump wholly lacked patentability. There is no direct evidence whatever that Frasch used the expression "pumped up in any ordinary or suitable way" with reference to an air-lift pump. It is true that such pumps had been used in other branches of industry, but never in connection with the mining of sulphur. They had been used in deep wells, including salt and oil wells, and possibly some others, but such prior use of the air-lift did not present or suggest the problem of its application to sulphur wells. The problem to be solved was a difficult one and arose from the character of the plaintiff's sulphur formation as well as the nature of the conditions under which alone an air-lift pump could be successfully used in sulphur mining. At the time of and for a number of years after the granting of the expired patents Frasch had been led to believe by the reports of scientific men that the sulphur deposit of the plaintiff was a dry, water-tight formation, such as those known to exist in Sicily. This belief accounts for some of the most dominant ideas disclosed in the description of the earlier patents. Acting upon the theory of a water-tight formation, and that, therefore, water pumped down into the sulphur deposit must return to the surface, he provided in patent 461,429 the two pipes *B* and *C*, the former being the pipe down which hot water was pumped into the sulphur well, and the latter being the pipe through which the sulphur melted by the hot water was intended to be forced to the surface through the pressure to which the column of water in the hot water pipe was subjected, in conjunction with a sucker-rod pump. There were two reasons why such a process was necessarily a failure so far as commercial success was concerned. One was that the sulphur deposit was not water tight, as was supposed, but porous, and consequently the hot water forced down into the mine would escape through the porous formation to such an extent as to so diminish the pressure of the hot water upon the sulphur pool as to seriously impede, if not wholly prevent, the raising of the melted sulphur to the surface. The other was that, the sulphur having about twice the specific gravity of the hot wa-

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ter, when the melted sulphur and the hot water were in the sulphur pipe the sulphur had a tendency to sink to the bottom of the pipe, while the hot water was delivered at the surface instead of sulphur. In patent 461,430 Frasch sought to avoid the necessity of attempting to raise melted sulphur and hot water commingled in the same pipe to the surface, and to that end provided an additional pipe *T*, up which the hot water should be forced to the surface under the pressure of the column of hot water forced down into the sulphur chamber or cavity. The lower end of this pipe *T* was above the level of the surface of the sulphur pool and so adjusted that, while the melted sulphur would seal the pipe *C* and under the pressure of the column of hot water in the pipe *B*, in conjunction with a sucker-rod pump, would be raised to the surface, the pipe *T*, so placed that it could not be sealed by the melted sulphur, would afford a vent to the hot water under the pressure of the water in the chamber or cavity transmitted through the column of hot water in the pipe *B*. Undoubtedly this was a step in the right direction, but by no means solved the problem confronting Frasch. What has just been said relative to the feature of the escape of the hot water pumped down into the mine through the porosity of the formation also applies here. Experiments prior to the application for any of the patents in suit demonstrated that the sucker-rod pump was a failure as applied to the raising of melted sulphur. Unlike its use in deep salt wells, oil wells, or water wells, where a change in the temperature of the liquid to be pumped did not affect its efficiency, its use in connection with the pumping of melted sulphur rendered it liable by reason of comparatively slight changes of temperature to become clogged and rendered useless through the cooling and congealing of the sulphur even in slight degree. The air-lift had never before been used for raising any liquid the continuous flow of which was dependent upon its maintenance at a very high temperature. Nothing can be more unreasonable than to assume that Frasch when he took out his original patents had the slightest idea of the applicability of the air-lift to the raising of melted sulphur. If he had supposed that the air-lift could be so employed he would, in view of its marked efficiency, undoubtedly specifically have claimed or shown it in those patents. The successful use of an air-lift pump in connection with the mining of sulphur could be had only under conditions rendering its applicability to that industry far from obvious. The necessity of maintaining the melted sulphur in a condition of such fluidity and in such quantity as to permit of the operation of the air-lift presented problems of peculiar difficulty. It was necessary to the proper fluidity of the sulphur that its temperature should be kept within comparatively narrow limits. If not sufficiently heated the required degree of fluidity could not be obtained. If heated beyond a certain point the sulphur becomes unduly viscous or pasty. In either event the operation of the apparatus and the process becomes impracticable. Further, the air forced into the bottom of the sulphur pipe under great pressure, in expanding with its ascent through the pipe is attended with such a fall in temperature as has a tendency to congeal the liquid sulphur and defeat the process. Not to mention other details it is evident that the use of an air-lift

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pump in the mining of sulphur is attended with difficulties of such a character as to render its selection and efficient operation as one of the co-operating elements in the patented combination the result of an exercise of the inventive faculty. In view of the great desirability and importance of the air-lift pump and of Frasch's admitted inventive genius, specifically directed to the development of efficiency in the process and apparatus employed in the sulphur mining industry, I can only conclude that more than a mere engineering problem was involved, and that novelty and patentability were present in the adoption and adaptation by Frasch of the air-lift pump in combination with the other elements entering into the patented combination.

The expired patents provided for the delivery of the hot water in the well normally through only one hot water pipe or casing *B*, and with respect to this pipe Frasch states, in patent 461,430, that "instead of having casing *B* terminate at the rock above the sulphur, it may be extended into the mine and form a conduit for the introduction of the hot water." The process patent, 461,429, contemplated the forcing, in a certain contingency, of hot water down into the well through the sulphur pipe *C*. In the description of that patent it is stated:

"In case the temperature should become so low in the well that the sulphur does not melt rapidly enough, water of a higher temperature * * * may be pumped down the tubing *C* (instead of casing *B*, as usual), and this water on its escape at the bottom of the well, and during its ascent to and through the casing, heats the mass and raises the average temperature. When this has reached the desired degree, the hot water * * * is forced again down the casing *B* and sulphur is forced up the tubing *C*."

If, however, the water forced down the casing *B* was sufficiently hot it was intended that it should be continuously supplied to the well through that pipe. It is clear from the drawings and description of the patent that no simultaneous double delivery of hot water into the well was contemplated or possible in the process of this patent. And the same may be said of the apparatus covered by No. 461,430 for the conduct of the process. The theory of the earlier Frasch patents was, as stated in 461,429, that there was "a closed circuit which includes a chamber in the sulphur or sulphur-bearing rock, and through which water at a temperature sufficient to fuse the sulphur is forced." Both the sulphur pipe and the casing *B* were parts of this "closed circuit"; and so long as the hot water continued to be forced down the casing *B* hot water could not be forced down the sulphur pipe *C*, and so long as hot water should continue to be forced down the sulphur pipe it could not be forced down through the casing. Hence, the contemporaneous use of both the casing and the sulphur pipe for the introduction of hot water into the well could not be effected. This is in accord with the statement made by Frasch in patent 461,430, that "this arrangement enables the water to be forced into the mine through either the casing *B* or the tubing *C*." In the first patent in suit Frasch says:

"In my said patent No. 461,429, the hot-water pipe (therein termed a 'casing'), by which the hot water is carried down into the mine opens at the bottom into the upper part of the cavity from the bottom of which the melted sulphur is removed; but in my apparatus, patent No. 461,430, * * * it is shown also as being extended into the sulphur deposit and terminating

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a short distance above the lower end of the pipe up which the melted sulphur is raised. In both cases, however, the hot water is introduced at one place only and there is only one hot-water pipe. A feature of the present invention consists in delivering the hot water into the sulphur deposit at different levels—namely, at a short distance above the intake for the melted sulphur and at the upper part of the sulphur bearing deposit. * * * By the upper delivery a flow of the hot water over the walls of the cavity is secured, while the lower delivery prevents the chilling of the sulphur."

While the first two patents in suit permit and provide for a simultaneous double delivery of hot water into the well at higher and lower levels, such a step was impossible under the expired patents. Prior to the patents in suit, in order to secure a delivery of hot water in the well during the pumping of sulphur only one pipe could be employed, and that pipe extended either to the bottom of the well or to the top of the sulphur deposit, and if adjusted for a delivery of hot water at one level the hot water could not be delivered at another level without a readjustment of the apparatus. Frasch was the first to conceive and put in operation the double and simultaneous delivery of hot water at different levels. This invention not only was novel but possessed much merit. If bottom water only had been delivered to the well a large portion of it by reason of its lessened specific gravity would have risen into and through the cold water of the formation and becoming chilled could not have melted the sulphur for any considerable vertical distance. On the other hand, if top water only had been delivered to the well it would not have sunk to the bottom of the cavity and the process would have been defeated. But by virtue of the apparatus and process of the patents in suit the simultaneous and double delivery of hot water at different levels under pressure not only brings hot water possessing melting temperature in contact with the entire walls of the cavity, but by reason of the pressure forces the same out through the walls of the cavity, driving the cold water to such a distance as not to interfere with the melting of the sulphur. The double delivery under properly adjusted pressure, in connection with the other elements of the process and apparatus combinations of the patents in suit, when compared with the delivery of the hot water under the expired patents, so clearly discloses patentability as to render further elaboration on this point unnecessary; there being neither anticipation nor anything in the prior art negativing it.

The apparatus of the second patent in suit discloses a strainer *D''* into which the sulphur pipe *E* opens. Frasch in the description states:

"The hot-water pipe *D*, as shown, has a plug *D''* with a perforation therein through which the sulphur-raising pipe *E* passes. On said plug *D'* the collar *E'* of said pipe *E* rests. The lower end of the pipe *E*, as shown, opens into a strainer *D''*, formed by an extension of the pipe *D*. The wall of the pipe *D* just above the plug *D'* is perforated for the escape of the hot water into the mine. The wall of strainer *D''* is perforated, so as to let in the melted sulphur, but to keep out any solid particles. * * * The water from the pipe *A* * * * flows around the walls of the mine-cavity and fuses the sulfur in said walls, which sulfur flows to the bottom of said cavity and forms a pool around the strainer *D''* and lower end of the sulphur pipe *E*."

Strainers were old and well known, but had never been applied to apparatus used in the mining of sulphur. The strainer in question is

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of undoubted utility and enters into the patented combination and so co-acts with other elements therein as to be patentable, I think, as part of the whole.

[4] The claims in issue of the third patent in suit are, I think, devoid of patentable novelty. Perforated linings had for many years been used in deep wells, such as salt wells, oil wells and water wells. Their function was the same as that of the perforated lining of the third patent in suit, namely, the protection of the well against the falling in of the natural walls, and the facilitation of the passage of water or other liquid through the perforations, their number and size being adjusted to the exigencies of the case. The perforated lining of the third patent in suit is a mere addition to the other elements of the combination covered by it, serving only to accomplish the usual purpose of perforated linings, and involved no change in the function or operation of the other elements in the combination. The other elements in combination were covered by the first two patents in suit. That water escapes and is distributed through the perforations of the lining, and that its discharge through such perforations may be varied through the choking of some of them by material falling from the walls of the well, are purely incidental to the use of the perforated lining in a deep well whether used in the recovery of salt or of sulphur. The new use of the old device in connection with sulphur instead of salt, oil or other liquid, did not confer patentability. It is admitted that the perforated lining of the third patent in suit is useful; but it lacks patentable novelty, whether separately considered or as employed in the combination of that patent.

It is contended by the defendant that claims 2, 6, 19 and 22 of the first patent in suit, and claims 2, 3 and 11 of the second patent in suit, relating to forcing water through the walls of the mine cavity, are void by reason of two years prior public use. The date of the original application, on the division of which the first two patents in suit were granted, was May 27, 1897. The application was divided November 23, 1903, and on the same day the application, either in its original form or as divided, was amended by the addition of claims including those which became claims 2, 6, 19 and 22 of the first patent in suit, and of claims including those which became claims 2, 3 and 11 of the second patent in suit. It clearly appears that the subject matter of the above specified claims with respect to both process and apparatus was within the scope of the invention disclosed in the original application. The drawings accompanying that application were precisely the same in all respects as the drawings in those two patents. In the description contained in the application it appears that hot water under high pressure was forced down through the pipe or casing *A*, and through the drill well surrounding the interior piping of the mine; that it was also forced down through the pipe *D* to the bottom of the well in such manner as to be brought in contact with and fuse the sulphur deposit in connection with the hot water forced down through the casing *A* and the drilled well beneath; that the water so forced down and under high pressure was brought in contact with the walls of the sulphur cavity; and that as a necessary consequence the

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hot water would be forced through the walls of the mine cavity in so far as cracks, fissures or porosity would permit, thus forcing back the subterranean cold water and preventing it from interfering with the proper fusion of the sulphur. The patent examiner rejected the proposed amendment so far as pertinent to the claims above specified on the ground that it contained "new matter and to that extent changes the identity of the invention." In answer to the objection made by the examiner Frasch's attorney well said:

"The original description, therefore, expressly recognizes that fusion water can flow away underground; it expressly describes operations and effects which would not occur unless the fusion water should flow away underground; and in actual working in a deposit of the specified character with the apparatus shown according to the directions of the original description of the fusion has and always will flow away underground."

This contention proved persuasive to the examiner, for January 21, 1905, he reversed his decision that it was proposed to introduce new matter, saying:

"This case has been further considered as amended and argued November 26, 1904. In view of the argument bearing on the question of the introduction of new matter by amendment of Nov. 23, 1903, the objection is withdrawn," etc.

[5-7] I am satisfied that the action of the patent office in allowing the amendment was proper. Such allowance was the normal exercise of authority by that office more adequately to secure to the inventor the benefit of his invention. This case is not complicated, if that were possible, by any assertion on the part of third persons that after the filing of the original application and prior to the amendment they had invented the subject-matter of the amendment. The amendment relates back to the time of the filing of the original application, and in order that the claims may be defeated by reason of two years prior public use that use must have extended over a period of at least two years before May 27, 1897. The evidence, however, does not disclose such prior public use. Whatever use Frasch made of the inventions of the first two patents in suit two years or more before the date of the application was experimental, and, as stated by Walker, "Experimental use is never public use within the meaning of the statute, if it is conducted in good faith for the purpose of testing the qualities of the invention, and for no other purpose not naturally incidental to that" (Walker on Pat. § 95).

In the answer it is alleged on information and belief that the patents in suit "are null and void because, while the respective applications for said letters patent were pending in the patent office, and after said alleged applications were filed, the said Frasch and the plaintiff were guilty of laches in prosecuting the same and abandoned the said alleged applications and the alleged inventions thereof and of each of said letters patent, and dedicated the same to the public." This statement is not borne out by the evidence. And further, it appears from the briefs of argument on the part of the defendant that with respect to whatever delays there were in the prosecution in the pat-

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ent office of the applications Frasch was within his rights, and the plaintiff in no wise guilty of laches.

[8] Since the organization of the defendant in September, 1913, and prior to December, 1914, twenty-five wells were sunk and operated on the premises now occupied by the Freeport Sulphur Company at Bryan Mound, Texas, and since that date and prior to the institution of this suit certain other wells for the same purpose exemplified by wells 143 and 146, and alike in all particulars, were also sunk and operated on those premises. The question for determination at this stage is whether or not the apparatus used in connection with the operation of the wells above referred to and the process carried on by means of it were not infringements of the first two patents in suit. All of the wells referred to were equipped with pipes corresponding to all of the pipes hereinbefore mentioned in the wells operated by the plaintiff under and in accordance with the patents in suit, and the process of mining sulphur by means of the above mentioned wells at Bryan Mound was, unless for certain alleged differences hereinafter discussed, the same as the process conducted by the plaintiff. It is, however, contended by the defendant that the apparatus and process there employed were the apparatus and process of the expired Frasch patents which, on their expiration, became free to the world. If the apparatus and process employed at Bryan Mound were the apparatus and process of the old Frasch patents, and nothing more, the charge of infringement could not be sustained. But if such apparatus and process at Bryan Mound be the apparatus and process employed by the plaintiff under the patents in suit, the charge of infringement cannot be avoided by some additional apparatus or operation necessitated by the difference between the formations containing the sulphur respectively at Bryan Mound and on the premises of the plaintiff, so long as such additional apparatus and operation do not change the nature or elements of the combination process under the patents in suit or the apparatus thereunder for the conduct of such process, but are resorted to merely for the purpose of enabling the apparatus and process of the patents in suit to be used with effect. There is much evidence tending to show that the deposit of sulphur at Bryan Mound is enclosed in a practically water-tight formation, and hence that for the mining of the sulphur it is necessary to provide a vent for the escape of water from the mine. And it is contended by the defendant that as the sulphur formation at Bryan Mound "is tight, and any water admitted into the mine must return to the surface," bleed wells extending from the surface of the ground into the sulphur deposit are provided for the purpose of performing the same function as the pipe *T* of figure IV of the expired patents. To this end bleed wells at a greater or less distance from the sulphur wells are provided at Bryan Mound, there being in the sulphur deposit cracks, fissures or channels permitting the water pumped down into the mine to become diffused in such manner as to reach and be forced up through such bleed wells. The existence of these vents renders it possible for the hot water pumped or forced down the sulphur wells to pass through the walls of the mine cavity and force back the cold water in the sulphur deposit

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as contemplated in the patents in suit. The evidence is to the effect that the plaintiff's sulphur formation, unlike that of Bryan Mound, is of an open as distinguished from a closed nature, not requiring the existence of bleed wells in order to permit the hot water passing down into the sulphur mine to escape through and force cold water back from the walls of the mine cavity. And the statement is made by counsel for the defendant:

"That difference between a closed formation, where there is no influx of water and no outflux of water, except coming up to the surface of the ground, and an open formation where there is both an influx and an outflux of water (as almost a subterranean river) makes the difference between the methods of operation of the defendant and the complainant to a very large extent, and makes the difference between the operation of the defendant and the operation under the patents in suit, which patents in suit were taken out expressly in view of an open formation, of the open formation which they found there at Sulphur."

The expired Frasch patents proceeded on the erroneous theory that the sulphur deposit was not porous and water laden; that it was necessary that the hot water pumped down into the sulphur well should return to the surface; and, therefore, that a vent or bleed well should be provided for that purpose. Frasch, prior to the patents in suit, having discovered the erroneous nature of the above theory, did not include in them any provision for bleed wells; but, on the contrary, stated, in the second patent in suit, that "no provision is made for the return of hot water from the mine-cavity to the surface of the ground; but the same is forced out through the walls of said cavity and flows away through the surrounding rock." The operation of bleed wells in a closed or water-tight formation is practically, for the purposes of this suit, to convert the sulphur deposit into a porous, water laden bed. The defendant's expert Waterman says:

"The evidence shows that if the term 'mine cavity' is to be applied to the conditions existing at Freeport, that cavity consists of the net work of crevices and fissures interconnected throughout the sulphur-bearing strata. Into this cavity the Freeport Sulphur Company inserts its producing well and from this cavity it takes the mine water by bleed wells (*T*, Fig. IV., patent 461,430), this water being forced out of the bleed wells by pumping pressure applied to the producing wells. Of course, no one knows precisely what is found hundreds of feet underground, but that the rock structure consists of a system of cracks and crevices extending through the sulphur-bearing strata is conclusively shown by the facts disclosed in the testimony."

It is, I think, clear to a demonstration that if the apparatus and process used at Bryan Mound were employed in the mining of sulphur in an open formation like that of the plaintiff and, as so employed, either with or without the use of bleed wells, would infringe the process and apparatus of the patents in suit, they would, as used at Bryan Mound only in connection with bleed wells, equally infringe the process and apparatus of the patents in suit. Bleed wells are sunk at Bryan Mound for the purpose of tapping the water in the sulphur deposit; otherwise there would be no reason for their existence. And in fact water from the sulphur formation passes up through these vents and escapes. It is wholly immaterial whether the sulphur deposit at Bryan Mound was or was not originally water laden. If not orig-

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inally water laden, it necessarily became so through the provision of bleed wells and the continued forcing of the water down the sulphur wells, as the water so forced down could only reach the bleed wells through the porosity of the sulphur rock or deposit. The hot water forced down the sulphur wells and passing through the interstices or connecting fissures of the sulphur formation would necessarily become cooled in its passage, whereby comparatively cold water would surround the bottom of the sulphur wells, creating a situation whereby the apparatus and process of the first two patents in suit are necessary in order to drive the cold water from close proximity to the sulphur wells. The defendant, however, contends that while in the plaintiff's sulphur bed the mine cavity is produced by the action of hot water upon the sulphur and is represented by a space left in the sulphur deposit after the melting of sulphur therein by the action of the hot water, the mine cavity at Bryan Mound is represented by numerous crevices or fissures interconnected and extending throughout the sulphur bed, the whole constituting the cavity through which the water circulates, which finally escapes through bleed wells, and it is argued that the process of forcing water through the walls of the mine cavity and driving the cold water back as contemplated in the patents in suit is inapplicable to the formation at Bryan Mound. But the distinction drawn sacrifices substance to shadow, and confounds mere words with things. Hot water of the required temperature is pumped down the sulphur wells at Bryan Mound, and that hot water passing into the cracks and fissures drives back the cold water so as to permit the proper melting of the sulphur. Whatever may be the form or character of the surface of the sulphur rock or bed through the cracks or fissures of which hot water is forced at Bryan Mound, it corresponds to and must be treated as the walls of the cavity formed by the melting of the sulphur in proximity to any given sulphur well. The defendant's definition of what constitutes the cavity at Bryan Mound has no practical significance, and tends only to confuse and mislead. The position that the process conducted at Bryan Mound does not infringe because it is necessary to its operation, in view of the structural character of the formation to afford an artificial escape for the surplus of water pumped down into a closed or tight formation, is palpably unsound; for on the defendant's own showing the opening of bleed wells is only a resort to means by which those carrying on operations at Bryan Mound may successfully employ the apparatus and process of the plaintiff (assuming that aside from the necessity for bleed wells there would be infringement), with respect to the driving back of the cold water in the sulphur deposit by means of the forcing of a sufficient quantity of hot water of the required temperature down the well and through the walls of the cavity. If the defendant be right in its theory of a closed and water-tight formation from which sulphur cannot be mined at Bryan Mound without resorting to bleed wells, it may be the misfortune of those carrying on operations there, but it cannot serve as a justification for a resort by them to such wells as the means whereby they may be enabled to secure the forcing into the mine of a sufficient amount of hot water to drive the cold

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water back and infringe the patents in suit. It is to be noted in passing that the patents in suit do not state or indicate how far the hot water pumped into the well is to penetrate or pass through the walls of the cavity so long as it is forced so far through the walls as to drive the cold water back and prevent its interference with the conduct of the process.

[8] Having reached the conclusion that the employment of bleed wells at Bryan Mound cannot of itself differentiate the apparatus and process there employed from the apparatus and process employed by the plaintiff the discussion of infringement is much simplified. It appears from the evidence that the sinking of wells at Bryan Mound began in April, 1912, at the instance of certain persons who subsequently secured the incorporation of the Freeport Sulphur Company and the defendant, and that the work thus commenced was done in contemplation of the incorporation of those two companies. E. F. Simms, who had become the owner of or acquired options for land including Bryan Mound, entered November 30, 1911, into a contract with S. M. Swenson & Sons (of which firm Eric P. Swenson was a member, who was at the time of the commission of the alleged acts of infringement and now is the president of both the defendant and the Freeport Sulphur Company), whereby, for the considerations therein mentioned, he agreed to sell to that firm certain tracts of land including Bryan Mound. The contract contained, among others, the following provision:

"As a further consideration for this contract and the performance thereof by said Simms, said Swenson & Sons agree that they, their heirs, executors, administrators or assigns, shall within one (1) year from June 1st, 1912, erect or cause to be erected and put in operation upon the land mentioned and described * * * a complete plant consisting of one unit in accordance with the process operated at the Union Sulphur Works in Louisiana, under the expired Frasch patents."

At the time of the execution of this contract the business of the plaintiff in conducting operations under the patents in suit was a demonstrated success and had attained vast proportions. S. M. Swenson & Sons were among the persons who secured the incorporation of the Freeport Sulphur Company and the defendant, the former becoming incorporated in July, 1912, and the latter in September, 1913. Sulphur mining operations at Bryan Mound have been carried on continuously from April, 1912, to the present time. There has been much controversy as to the significance of the above-quoted portion of the contract of November 30, 1911, as bearing on the question of infringement; the plaintiff contending that the provision for the erection and operation of a plant "in accordance with the process operated at the Union Sulphur Works in Louisiana, under the expired Frasch patents" contemplated the employment of the apparatus and process of those expired patents as modified and improved in accordance with the patents in suit, and evidenced an intention to infringe the latter, and the defendant contending that the contract contemplated the employment of the apparatus and process of the expired patents without any modification or improvement not open to the world. Prior to

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application for the patents in suit the apparatus and process of the expired patents as employed on the premises of the plaintiff became a demonstrated failure so far as commercial success is concerned. No evidence has been adduced that the apparatus and process of the expired patents were or could be used with success at Bryan Mound without modification and improvement. Without change such apparatus and process could not be used at Bryan Mound with any greater effect than they were on the plaintiff's premises, and must equally have resulted in failure. This is apparent from what has hereinbefore been stated and requires no further discussion. Hence, it is but reasonable to conclude that the provision in the contract for the installation of a plant "in accordance with the process operated at the Union Sulphur Works in Louisiana, under the expired Frasch patents" contemplated an employment of the original Frasch apparatus and process as changed by some modification or improvement. In providing for the installation of a plant in accordance with the process operated by the plaintiff "under the expired Frasch patents" the dominant idea was that the process to be conducted in the plant should accord with the process employed by the plaintiff at the date of the contract. Any other conclusion, I think, would involve an absurdity. But notwithstanding the fact that the apparatus and process of the expired patents had fallen short of attaining commercial success, they covered the broad conception of melting sulphur deep in the earth and raising it in a melted condition to the surface, and were not nullities. An invention may be patentable as possessing utility in the sense of the law, although an improvement may be necessary to its commercial success. Walker on Pat. § 79. Thus, it may be possible that the parties to the contract in requiring the plant to accord with the process "under the expired Frasch patents," may have had in mind that process as modified and improved under the patents in suit. If that was in contemplation they may or may not have intended to violate any monopoly possessed by the plaintiff. If they had such intention they meditated infringement. So, if they believed that the plaintiff was not under the patents in suit possessed of a patent monopoly with respect to any modification or improvement of the original apparatus and process of the expired patents, but nevertheless intended to perform or secure the performance of acts which without their knowledge or any wrongful intent on their part would in fact violate the monopoly, they must, aside from any question of the measure of damages, be treated in the same manner as if actually intending to infringe. Walker on Pat. § 377.

The conduct of operations at Bryan Mound has been attended with marked success. They were not commenced until long after the failure of the apparatus and process of the expired patents as employed at the sulphur bed of the plaintiff. As before stated, such apparatus and process, unless modified and improved, could not be used beneficially at Bryan Mound. In the operations commenced at the latter place ex-employés of the plaintiff were employed who were familiar with the improvements in apparatus and process covered by the patents in suit. The vital inquiry at this stage is as to the character of

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the improvements in the apparatus and process of the expired patents which have rendered possible the attainment of such success in mining operations at Bryan Mound, and whether or not they infringe the patents in suit. Absalom Webber, the field manager of the Freeport Sulphur Company, formerly in the employ of the plaintiff as a driller of wells, testified without contradiction with respect to the equipment and operation of the plant at Bryan Mound, as follows:

"XQ. 269. Now, when you first came to Freeport and equipped your first well for the Freeport Sulphur Company, you equipped it in just exactly the same way as you had learned to equip wells for the Union Sulphur Company at Sulphur, Louisiana, did you not? A. Practically the same. XQ. 270. And when you came to steaming that well, it was steamed in exactly the same way as you had observed wells being steamed at Sulphur, Louisiana, was it not? A. Practically the same way. XQ. 271. And when you came to pumping that well, you pumped it in just the same way as you had observed wells being pumped at Sulphur, Louisiana, did you not? A. Practically the same way. XQ. 272. And with the exception of the unsuccessful variation that you made in some wells, you equipped all the wells up to 143 in the same way that you equipped well 103, did you not? A. With the exception just stated that I don't remember having used a closure between the eight-inch perforated liner and the five-inch pipe, in all wells, that is, speaking of wells prior to 143. XQ. 273. And when you steamed these twenty-nine wells that you steamed prior to well 143, you steamed them in the same way that you steamed well 103, did you not? A. With the exception of many experiments I made, which are so numerous I don't remember them. XQ. 274. And when you pumped these twenty-nine wells, with the exception of the fact that you varied the quantity of the water supply in the six-inch pipe in the well during pumping operations, you pumped them in the same way that you pumped well 103, did you not? A. In the same general way, except to vary the quantity of compressed air in many instances."

The witness further testified:

"RDQ. 519. * * * Will you please give a list of the principal changes which you made in both equipment and method of operation between the time you experimented with well 103 and produced successful operation with well 143? A. (1) I discontinued the use of the seat in the 8-inch liner; (2) I opened wells to allow the escape of water from the formation; (3) I forced the water in with booster pumps instead of allowing it to flow in by pressure; (4) I discontinued the use of the 14-inch casing; and (5) I discontinued the use of pumping water to the bottom of the well while pumping sulphur."

The first change made by discontinuing the use of the seat in the 8-inch liner is not pertinent to the consideration of this case. The second change relates to bleed wells, which have already been considered. The third change relating to the forcing of hot water down the sulphur wells by booster pumps instead of allowing it to flow down by pressure is immaterial for the purposes of this suit. It effected no change in the apparatus or process of the well beneath the surface of the ground. The fourth change was the discontinuance of a 14-inch casing, which is wholly foreign to the issues here involved. The fifth change was the alleged discontinuance of the practice of pumping water to the bottom of the well during the pumping of the melted sulphur.

The defendant contends that on the assumption that the air-lift employed by the plaintiff in combination with the other elements of the apparatus was patentable, the air-lift used in the mining operations at

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Bryan Mound does not infringe the patents in suit for the reason that while the plaintiff's air-lift is constituted by forcing air into the melted sulphur near the lower end of the sulphur pipe, aerating the sulphur and reducing the specific gravity of the contents of that pipe below that of water, the air-lift at Bryan Mound is constituted by introducing air into the sulphur pipe near its lower end in such manner that instead of the production of aeration the air forms bubbles in the sulphur pipe with a piston-like function, layers of melted sulphur alternating with layers of air contained in those bubbles, as a result of which the contents in the sulphur pipe will rise toward the surface of the ground. But this is nothing more than reducing the specific gravity of the contents of the sulphur pipe below that of water, and performing the same function as the aeration of the melted sulphur by the plaintiff. Conceivably the air-lift employed at Bryan Mound may be an improvement on that of the plaintiff, but the patents in suit covering specifically the air-lift as one of the elements in the patented combination, no air-lift in connection with sulphur mining having theretofore been used, the air-lift used at Bryan Mound cannot be substituted for the former without infringement.

Another contention of the defendant is that the double delivery of hot water of the patents in suit is not to be found in the process employed at Bryan Mound. The apparatus there employed contains piping similar to that of the plaintiff, and provides the means by which simultaneous double delivery of top and bottom water may be effected, and in point of fact simultaneous double delivery is effected in "steaming" the well, and during that process by means of the double delivery sufficient hot water is pumped into the well to melt the sulphur until it forms a pool rising high enough to seal the bottom of the sulphur pipe. When the sulphur pipe is so sealed and the air-lift begins or is about to begin to operate, the bottom water is shut off by means of a stop-cock; while the top water continues to be forced down and to melt the sulphur. Whenever by reason of the insufficiency of the top water alone to melt the sulphur to such an extent as to maintain the surface of the sulphur pool sufficiently high to seal the sulphur pipe and that pipe begins to "blow," the stop-cock on the bottom water pipe is turned on and both bottom and top water are forced down in order to insure the efficient and sufficient melting of the sulphur. The witness Webber testifies:

"RDQ. 518. In answer to XQ. 375 you state that you never take the hot water off the 4-inch line from the plant; why do you keep the hot water circulating in that line during the time you are not using it in the well? A. We want to keep the pipes hot to prevent the expansion and contraction along the line and to have hot water available in that line for use at short notice."

The witness Austin testified to the same effect. The apparatus at Bryan Mound will permit the operation of the air-lift during the simultaneous forcing of bottom and top water down the well provided the lower end of the sulphur pipe is sealed by sulphur, but it is not the practice, so long as enough top water is forced down to insure the melting of sufficient sulphur to permit the air-lift to operate, to turn on and force down bottom water. Whether the disuse of the bottom

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water be prompted by motives of economy or for the purpose of avoiding the formation of granular sulphur products is immaterial, for the fact remains that the simultaneous delivery of both top and bottom water is practiced in so far as necessary to the efficient and sufficient melting of the sulphur. Whether or not the process as conducted at Bryan Mound is an improvement upon the process of the plaintiff with respect to the delivery of hot water at the bottom of the mine is immaterial. A purpose for the accomplishment of which the apparatus and process both of the plaintiff and of those conducting operations at Bryan Mound were designed was the forcing down into the mine of sufficient hot water to secure the desired result—a result secured by the plaintiff through a normal simultaneous delivery of top and bottom water, and at Bryan Mound by a simultaneous delivery of top and bottom water whenever necessary to secure that result. With respect to this feature of the apparatus and process of the patents in suit there is clear infringement.

[10] The claims in issue of the first and second patents in suit are, as before stated, Nos. 2, 3, 6, 12, 19, 21 and 22 of patent 799,642, and Nos. 2, 3, 7, 11, 21 and 24 of patent 800,127. Claim 21 of the last named patent relates to the strainer. For reasons already given this claim must be sustained and held to have been infringed. All the rest of the claims in issue under the first and second patents in suit relate to the air-lift, the double delivery of hot water, and the forcing of hot water through the walls of the mine cavity. It is unnecessary to discuss them in detail. For the reasons already given I think they are valid and have been infringed.

The defendant contends that on the issue of infringement the plaintiff must be restricted to the apparatus used and the process employed in connection with defendant's wells 143 and 146 at Bryan Mound or to apparatus and process similar to those used and employed in those wells. The bill alleged generally that the defendant and the Freeport Sulphur Company wrongfully and without license or consent of the plaintiff manufactured and used the apparatus and process embodying the inventions set forth in the patents in suit in mining sulphur, without any enumeration or specification of the wells in which such infringement occurred. Rule 20 of the rules prescribed by the Supreme Court (198 Fed. xxiv, 115 C. C. A. xxiv) provides that "a further and better statement of the nature of the claim or defense, or further and better particulars of any matter stated in any pleading, may in any case be ordered, upon such terms, as to costs and otherwise, as may be just." The defendant shortly after the filing of the bill gave notice to the plaintiff that it would apply to this court May 15, 1915, for an order requiring the plaintiff to furnish to the defendant a bill of particulars and better statement of the plaintiff's claim; setting forth and specifying, among other things:

"The character of the apparatus, devices and appliances, or the particular apparatus, devices or appliances which plaintiff claims that the defendant, Freeport Texas Company, has manufactured, used or operated, or conspired to manufacture, use or operate, or authorized or directed to be used, manufactured or operated, within six years last past, in the mining of sulphur and in infringement of or embodying the alleged inventions of any of said claims of

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any of the patents in suit, as alleged in the 9th, 10th and 12th paragraphs of the bill, and which apparatus, devices or appliances the plaintiff intends to rely upon at the trial of this suit as evidence of such alleged infringement," etc.

Prior to the day designated in the above notice for the making of application to the court for a bill of particulars and better statement of plaintiff's claim, the latter voluntarily and without any order of court, furnished to the defendant a bill of particulars, which, among other things, contained the following:

"3. The character of the apparatus and devices alleged to infringe in the 9th, 10th and 12th paragraphs of the complaint is exemplified by mines and appurtenances such as defendants' wells 143 and 146 and their appurtenances, situated on Bryan Heights at Freeport, Texas.

"4. The character of the processes alleged to infringe in the 9th, 10th and 12th paragraphs of the bill of complaint is exemplified by the processes used in the operation of such mines as defendants' wells 143 and 146, aforesaid."

[11] The bill of particulars further set forth that "these particulars are given without waiving the plaintiff's right to rely, in this or other suits, upon any infringing acts of these defendants or either of them," etc. No exception or objection appears to have been made or taken to this reservation in the bill of particulars; nor did the defendant demand any further bill of particulars. Rule 20 contemplates the making of an order by the court for a further statement of the nature of the claim or further and better particulars. This court has not taken nor has it been asked to take any action with respect to the filing of a bill of particulars or further statement. The bill of particulars was, as before stated, voluntarily furnished, and has not been objected to. The reservation in the bill of particulars means something or nothing. It reserves the right of the plaintiff to complain of "any infringing acts." It cannot be assumed that it was intended to have no effect; and, if any effect is to be given to it, it must be to reserve to the plaintiff the right to complain of infringing apparatus and process other than those exemplified by the apparatus and process used and employed in connection with wells 143 and 146. And this appears to have been the practical interpretation given to the reservation by the parties during the taking of the testimony. Evidence was adduced not only by the plaintiff but by the defendant touching other wells antedating wells 143 and 146 without objection on either side. It is true that toward the close of the testimony on the part of the defendant objection was made by it to the consideration on the issue of infringement of apparatus or process in wells other than 143 and 146, as being excluded by the bill of particulars. This objection followed a statement on the part of the plaintiff as follows:

"That there may be no doubt as to plaintiff's position in regard to infringement under the statements of its bill of particulars, plaintiff gives notice that it will rely upon the equipment and processes used in connection with the twenty-five wells which the witness Webber testified were equipped similar to well 103 and similarly operated after the formation of the defendant company, as well as on the equipment and operation of wells 143 and 146, and all similarly equipped and operated wells, if there is in the defendant's mind any distinction, which is relevant, between the operations used in wells 143 and 146 and the wells of the type of 103."

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[12] Under the circumstances the position taken by the defendant that on the question of infringement the plaintiff must be restricted to wells 143 and 146 cannot be sustained. Further, in view of the fact that the infringer is chargeable with knowledge of the infringing acts, this conclusion cannot be viewed as subjecting the defendant to any hardship or undue burden. The extent and particulars of infringement are thus left open for the master's action.

[13, 14] There has been much controversy on the question whether the defendant is responsible for whatever acts of infringement of the patents in suit, or any of them, were committed at Bryan Mound. The bill alleges that the defendant and the Freeport Sulphur Company "conspired and contrived together" to use the inventions embodied in the patents in suit; that "conspiring together, and acting in concert," they wrongfully used the apparatus and processes embodying the said inventions; and that the defendant has "committed such acts of infringement in that it has authorized, directed and controlled" the infringing acts of the Freeport Sulphur Company. The evidence proves, I think, beyond all reasonable doubt the existence of responsibility on the part of the defendant for such infringing acts. At the time of their commission the officers of the defendant were the officers of the Freeport Sulphur Company; a majority of the board of directors of the latter company constituted a majority of the defendant's board; and practically all of the stock of the Freeport Sulphur Company was owned by the defendant. This community as to officers, directors and stock of the two companies would not of itself be sufficient to render the defendant liable for acts of infringement committed on the premises occupied by the Freeport Sulphur Company. The law is authoritatively settled on this point. But the responsibility of the defendant rests upon a wider and firmer basis than such community of officers, directors and stock. The evidence, direct and circumstantial, conclusively shows knowledge on the part of the defendant of the infringing acts committed on the premises in question without any repudiation of them by the defendant, and also active procurement by it of and participation by it in such infringing acts. While the evidence does not disclose actual knowledge on the part of the defendant of everything that was done in connection with the construction and operation of the sulphur wells on the premises, it does show beyond all peradventure that it procured for and furnished to those premises apparatus and devices with the understanding and intention on its part that the same should be used in the construction and operation of such wells in violation of the rights of the plaintiff under the patents in suit with respect both to process and apparatus.

[15, 16] The doctrine of agency applies to patent infringements, and also the principle that one doing an act which naturally causes another to commit an infringement is responsible for it; and further, that where several persons co-operate in acts of infringement they are joint tort feasors and as such jointly and severally liable in solido. It is wholly immaterial whether the cost of such apparatus and devices was or was not ultimately paid by the Freeport Sulphur Company. The circumstance that another person pays the cost of infringement can

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never serve as a justification to the infringer. Nor can the fact that such other person is a joint infringer serve to protect the former. The evidence wholly fails to disclose any repudiation, disavowal or disclaimer on the part of the defendant of all or any infringing acts committed at Bryan Mound. On the contrary it appears that Westinghouse, Church, Kerr & Co., engineers and constructors, were employed by the defendant, and in that capacity furnished and constructed the plants in which the acts of infringement were committed. Under these circumstances the question of technical control by the defendant of the Freeport Sulphur Company, or of technical conspiracy between the two companies, becomes unimportant, as the infringing acts were in contemplation of law committed by the defendant.

At the conclusion of the plaintiff's prima facie case the defendant moved that the bill be dismissed on the following grounds:

"First. That the plaintiff's evidence fails to establish or show a prima facie or any cause of action against the defendant.

"Second. That assuming the plaintiff's evidence to be beyond dispute, it does not establish any use or infringement by this defendant or any one of any of the alleged inventions of any of the claims in issue of any of the patents in suit.

"Third. That assuming that the plaintiff's evidence establishes a use or infringement of any of the claims in issue of any of the patents in suit, such evidence does not establish that such use was made or infringement committed by this defendant, or that it is liable therefor, or had any legal control over the acts constituting such alleged use or infringement."

At the time of making the motion the defendant gave to the plaintiff notice as follows:

"That this motion will be urged at the hearing and at such other time or times as may be proper; that defendant will object to any attempt hereafter made by the plaintiff, on rebuttal or otherwise, to cure the defects or supply the insufficiencies of its opening evidence herein, and that any evidence of the defendant hereinafter taken by the defendant will be introduced without waiving and without prejudice to the foregoing motion to dismiss."

[17] Accordingly the defendant has insisted that the bill be dismissed. It is unnecessary to discuss the third ground of the motion in view of the fact that the court has already found that the defendant and the Freeport Sulphur Company are joint tort feasors with respect to the infringement of the patents in suit; each of them being liable for acts of infringement by the other. The second ground of the motion is in effect that there has been a failure by the plaintiff to establish infringement by any person of any of the patents in suit. It is unnecessary to discuss this ground, for the reason that the court has found to the contrary. The first ground, while general in its nature, appears from the argument of counsel to have been based substantially upon the failure of the plaintiff in making its prima facie case to produce and examine any patent expert witness as to the meaning and construction of the claims in issue of the several patents in suit. As it rests with the court and not with experts to decide this case, the objection taken is one essentially addressed to its discretion. If the evidence be of such a character that the court feels that it is able to render an intelligent and just decision without the assistance of patent

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experts I know of no principle of law or of common sense restraining the court from discharging its proper functions without requiring what it deems unnecessary. There may be exceptional cases involving such scientific or abstruse problems as to require a court for an enlightened exercise of its functions to have the benefit of witnesses technically known as patent experts, but the law regards substance and not shadow; and where witnesses from their experience and observation are competent to give an intelligent and adequate opinion and explanation of patented process or apparatus their testimony is not to be rejected because they are not labeled experts or hold degrees from institutions of learning. The professional expert is only too often the thick and thin advocate of the party employing him, whose chief aim is to win the case for his client, and in doing so oftentimes to befog it for his adversaries by resorting to technicalities and hairspun distinctions. Of course, there are many professional experts not justly subject to this criticism, but as a general rule greater dependence should be placed upon intelligent witnesses, not professionally employed, who from their practical knowledge and experience are competent to testify as to the nature and practice of patented inventions and who are free from suspicion as to the fairness of their opinions. In Hardinge Conical Mill Co. v. Abbe Engineering Co., 195 Fed. 936, 939, 115 C. C. A. 624, 627, where a motion to dismiss a bill in a patent cause for the failure on the part of the plaintiff to produce a patent expert in making its prima facie case had been denied, Judge Lacombe, in delivering the opinion of the circuit court of appeals for the second circuit, affirming the action of the court below, said:

"Its [the defendant's] contention here is that the patent is a puzzling one difficult to comprehend, and that an expert should have been called to show just what is the structure, mode of action, and result of the patented apparatus and also of defendant's; that in no other way could it be made to appear that there is such identity of structure and function as would sustain a finding of infringement. We do not agree with defendant's counsel. We find nothing difficult, intricate, or puzzling about the specifications, the drawings, or the single claim, on which complainant relies. Possibly an expert, if allowed to talk long enough, might have made them seem puzzling by the use of a multitude of words, and the reading into the description of propositions emanating from the expert's own brain, unsuggested by anything in the specifications."

The plaintiff introduced in its prima facie case a large volume of competent and convincing evidence as to the nature and operation of the apparatus and process of the patents in suit. Under these circumstances, the first ground of the motion to dismiss the bill is, I think, wholly destitute of merit, and the motion must accordingly be denied.

For the reasons above given the bill must be sustained as to claims Nos. 2, 3, 6, 12, 19, 21 and 22 of patent 799,642, and claims Nos. 2, 3, 7, 11, 21 and 24 of patent 800,127, but must be dismissed as to patent 1,008,319. A decree in accordance with this opinion may be prepared and submitted.

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In re CAPITAL CITY CAP CO.

(District Court, D. New Jersey. May 28, 1918.)

BANKRUPTCY ⟹184(2)—TRUSTEE—RIGHTS OF.

Where a creditor of a New Jersey bankrupt did not file an unrecorded conditional sale agreement until after the filing of the petition, such agreement was void as against the trustee in bankruptcy, for 2 Comp. St. N. J. 1910, pp. 1561–1563, makes such agreements void as against judgment creditors not having notice, and the status of the trustee as a creditor holding a lien by legal or equitable proceedings given by Bankruptcy Act, § 47a2 (Comp. St. 1916, § 9631), is fixed by the filing of the petition, and not adjudication; this being so despite section 70a (Comp. St. 1916, § 9654).

In Bankruptcy. In the matter of the bankruptcy of the Capital City Cap Company. On review of referee's order denying the claim of M. D. Knowlton & Co. Order affirmed.

Theo. L. Frothingham, of New York City, for claimant.

Frank S. Katzenbach, Jr., of Trenton, N. J. (Nathan Bilder, of Newark, N. J., of counsel), for trustee.

RELLSTAB, District Judge. At the time of the filing of the petition in bankruptcy the bankrupt was in possession of property, the title to which, as between it and M. D. Knowlton & Co., was reserved to the latter under an unrecorded "conditional sales agreement." Subsequently, and before the entry of adjudication, this agreement was recorded in the proper office.

The question on review is whether the referee erred in holding that such reservation of title was void as against the trustee. At the close of the argument I stated that I thought the referee's findings were correct. However, at his solicitation, petitioner's counsel was given opportunity to file additional briefs, and the matter has been given further consideration. Such consideration has strengthened my first impression.

In Bailey v. Baker Ice Machine Co., 239 U. S. 268, 275, 36 Sup. Ct. 50, 60 L. Ed. 275, it was held that the status of the trustee as "a creditor holding a lien by legal or equitable proceedings," given by section 47a2 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 557 [Comp. St. 1916, § 9631]), in so far as it referred to the property in the custody of the bankruptcy court, related back to the filing of the original petition in bankruptcy. This was reiterated in Martin, Jr., etc., v. Commercial National Bank of Macon, Georgia, 245 U. S. 513, 38 Sup. Ct. 176, 62 L. Ed. 441. True, in neither of these cases would the result have been different (the recordation having been made before the filing of the petition in bankruptcy), if the trustee's status for such purpose had been fixed as of the date of adjudication. Nevertheless, the reasons given in the Ice Machine Company Case for holding the date of filing the petition as the time of cleavage are controlling. It is not the passing of the title to the bankrupt's property, under section 70a, but the passing of such property gremio legis for

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purposes of liquidation, which fixes the time when the trustee is regarded as having acquired the status of a lienholder under section 47.

With the filing of the petition in bankruptcy, the rights of creditors and claimants to property then in the possession of the bankrupt are held in abeyance, to be determined as of that date, if adjudication follows. The New Jersey statute, which makes unrecorded agreements of the character under consideration "absolutely void as against the judgment creditors not having notice thereof" (2 Comp. St. N. J. pp. 1561–1563, §§ 71–73), through section 47a2 of the Bankruptcy Act, became operative on the property in the possession of the bankrupt at the time the petition was filed.

The invoking of the Bankruptcy Act secured rights to the general creditors which, in the event of an adjudication, could not be avoided by any act of either Knowlton & Co. or the bankrupt subsequent to the filing of the original petition in bankruptcy. Adjudication having been obtained, the recording of the "conditional sales agreement" after the filing of that petition, in legal effect, is the same as if a judgment had been previously recovered against the bankrupt and levy made on the property in question. This result works no legal hardship to Knowlton & Co. It was chargeable with knowledge that the policy of the law, as expressed in the federal and state statutes, was to subordinate undisclosed rights in property to the rights of creditors holding liens thereon by legal or equitable proceedings. It was within the power of Knowlton & Co. to record this agreement at any time after its execution and bring itself within that policy. It delayed doing so for more than eight months, and not until after the bankruptcy court had its grip upon property which, as far as appearances indicated, belonged to the bankrupt. The recording of this "conditional sales agreement" came too late to save the rights reserved under it.

The order of the referee is affirmed.

SUSQUEHANNA COAL CO. v. PRATT & YOUNG, Inc., et al.

(District Court, D. Massachusetts. May 1, 1918.)

No. 883.

GARNISHMENT ⊂=22—PERSONS SUBJECT TO GARNISHMENT—CODEFENDANTS.

Under Rev. Laws Mass. c. 189, § 1, providing that "any person or corporation may be summoned as trustee of the defendant," one of a number of defendants jointly sued in tort may also be summoned as trustee of any or all of the others.

At Law. Action by the Susquehanna Coal Company against Pratt & Young, Incorporated, and others. On motion by trustees to dismiss. Denied.

Hale, Grinnell & Swaim, of Boston, Mass., for plaintiff.

Hurlburt, Jones & Hall and Henry F. Hurlburt, all of Boston, Mass., for defendants.

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MORTON, District Judge. This is an action in tort, brought by the Susquehanna Coal Company against Pratt & Young, Incorporated, a corporation, R. K. Pratt, and J. W. Young. The ad damnum is large ($500,000), and many corporations and persons are summoned as trustees (or garnishees) of the principal defendants. Among the trustees so summoned are the three principal defendants. The corporation, Pratt & Young, Incorporated, is summoned as trustee of the individual defendants; Pratt is summoned as trustee of the corporation and of Young; and Young is summoned as trustee of the corporation and Pratt. The identity of the said trustees with the defendants appears on the face of the writ and was admitted by counsel for the plaintiff at the hearing on the motion. Each of the defendant trustees has moved that the writ be dismissed as to it or him, as trustee, upon the ground that the same person cannot be made both defendant and trustee in the same writ.

The liability asserted against the principal defendants, being in tort, is a joint one. The question is whether one of three defendants jointly sued may also be summoned as trustee of the other two defendants. The statute on which the writ is based (Rev. Laws Mass. c. 189) provides that "any person or corporation may be summoned as trustee of the defendant." Section 1. The person summoned as trustee is required to disclose by answer "what goods, effects, or credits, if any, of the defendant were in" his hands at the time when the writ was served upon him. Section 9. "The answer and statements of a trustee, under oath, shall be considered as true in determining how far he is chargeable." Section 15. All "goods, effects, or credits of the defendant which have been intrusted to, or deposited in the hands or possession of, a person who is summoned as his trustee" are, with certain exceptions, subject to attachment in this way. Section 19.

The question presented seems not to have been decided in Massachusetts. In Denny v. Metcalf, 28 Me. 389, an action was brought against two persons as partners. One of the defendants and two third persons, partners in another firm, were summoned as trustees. It was held that the alleged trustees could not be charged as such, upon the ground that no action could have been maintained by one firm against the other. If the test be, as suggested in the decision just cited, whether an action could be maintained by the principal defendant against the trustee, the attachments under consideration are valid. The statute in question says explicitly that "*any* person or corporation may be summoned as trustee of the defendant." Section 1, supra. No practical difficulty prevents giving the statute its full effect in the case at bar. If the property of a joint tort-feasor in the possession of a third person is subject to trustee attachment, it is difficult to see why it should not also be subject to such attachment in the hands of one of the other tort-feasors. I therefore reach the conclusion that the attachment is good, and that the motion to dismiss must be denied.

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In re NEUMAN.

(District Court, D. Montana. October, 1917.)

1. BANKRUPTCY ⇐407(5)—DISCHARGE—GROUNDS FOR REFUSAL—FALSE STATEMENT TO OBTAIN CREDIT.
 Where bankrupt made a materially false statement in writing as a basis for credit, and obtained credit, it is not sufficient to show that the statement was not relied on, and, to entitle bankrupt to a discharge, that the creditor noted "Caution" thereon as a guide to his salesman.
2. BANKRUPTCY ⇐225—REFEREES—EXCLUSION OF EVIDENCE.
 A referee is without authority to exclude evidence on objection.

In Bankruptcy. In the matter of J. S. Neuman, bankrupt. On objections to bankrupt's discharge. Discharge denied.

Wm. F. O'Leary, of Great Falls, Mont., for bankrupt.
Freeman & Thelen, of Great Falls, Mont., for objecting creditors.

BOURQUIN, District Judge. [1] The referee found the bankrupt, a small merchant, made a materially false statement in writing to secure credit; but, because the creditor noted "Caution" upon the statement, instructed its local branch to limit the credit to about $350, and presented no direct testimony that it relied on the statement, the referee found that some $800 of credit subsequent to the statement was not in reliance upon and induced by it. These findings upon undisputed evidence are rejected.

The property statement involved, in appearance and substance, bore the stamp of carelessness and inefficiency, and doubtless that and the fact that title to all the realty, the great bulk of the property, was in other Neumans, aroused some misgiving. But these statements are made to secure credit, are relied on, and induce credit, always subject to some limit. In the instant case, so far as appears, the credit was the first given, was based on no information but the statement, and would not have been given otherwise. Direct testimony of reliance and inducement is not indispensable. The rule is that, after positive proof of false material representations to induce action, and that the action was taken, it will be inferred the action was in reliance on and induced by the representations; and the burden shifts to the falsifier to overcome the inference. Hicks v. Stevens, 121 Ill. 186, 11 N. E. 243; Wilson v. Administrator, 91 Va. 183, 21 S. E. 245, 50 Am. St. Rep. 824; Fishback v. Miller, 15 Nev. 443; Randall, etc., Co. v. Mineral Water Co., 120 Minn. 268, 139 N. W. 606, 43 L. R. A. (N. S.) 706; Pom. Eq. Jr., § 891. These will guide to some cases contra.

This is the common law, wherein, in actions of deceit and the like, reliance, inducement, intent, mental condition, etc., are arrived at by logical inference from circumstances; parties not being qualified witnesses. That parties may now testify thereto does not annul the rule. And it may be observed that, if the circumstances do not warrant the inference, parties' testimony thereto, being to personal consciousness inaccessible to other testimony, is of doubtful value. Of course, fraud is not presumed, and must be proven; but this general

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and abused phrase does not import that after positive proof of the representations, their falsity, and action taken, reliance, and inducement as consequence, cannot, like other issues, be proven by logical inference.

[2] It is reasonable to believe, and it is believed, that Neuman's statement was relied upon by his creditor, and induced in whole or in part the credit that followed it. Accordingly it is so found, the objection is sustained, and discharge denied. The referee assumed to sustain objections and to exclude evidence. These proceedings are in equity, and subject to its rules. Referees, like masters, for obvious reasons, have no such authority.

THE SARNIA. THE ROBERT PALMER. THE E. T. DALZELL.

(District Court, E. D. New York. April 9, 1918.)

COLLISION ⇐71(2)—STEAMER ENTERING SLIP AND MOORED VESSEL—FAULT.

A collision between a steamer, being warped into a slip with her own steam and the help of two tugs, under direction of the master of one of the tugs, and a lighter moored on the opposite side of the slip, *held* due to the fault of the steamer and one of the tugs.

In Admiralty. Suit for collision by the Wright & Cobb Lighterage Company, owner of the lighter Crescent, and others, against the steamer Sarnia, the Sarnia Steamship Corporation, claimant, with the tugs Robert Palmer and E. T. Dalzell, impleaded. Decree for libelant against the Sarnia and Palmer.

Foley & Martin and J. A. Martin, all of New York City, for libelant.

Hunt, Hill & Betts and George W. Betts, Jr., all of New York City, for the Sarnia.

Burlingham, Montgomery & Beecher and Chauncey I. Clark, all of New York City, for tugs Barrett, Palmer, and Dalzell.

CHATFIELD, District Judge. This action is brought for damages caused in the sinking of the lighter Crescent, on the northerly side of Pier 5, Brooklyn, on the afternoon of June 9, 1916. The Crescent had been towed to this pier in the morning and made fast a little inside of the end of the pier. She was loaded with cement and fastened by four lines. Her captain testifies that he was in the cabin of the vessel at the time, and that these lines had not been shifted nor the boat moved prior to the accident. The deckhouse on the Crescent floated off as she sank, and the collision injury, as shown by the pictures, consisted of a straight up and down gash a few feet forward of the stern on the port side of the vessel. This injury was evidently caused by the stem of the steamer Sarnia, and the mode of happening is not seriously in dispute. The Crescent's bowlines broke and the boat moved inshore, so as to free her from contact, and so as to allow the Sarnia to rotate away from the point of impact as soon as her own headway was checked. The issue turns upon responsibility for the movements of the Sarnia.

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The Sarnia, which is over 300 feet long, had come up from Bedloe's Island. The tide was still running flood, and the captain of the tug Palmer, who was in charge of the docking, was on the bridge in command of the vessel. The Sarnia went up the river beyond the Brooklyn Bridge, where she turned to come down against the flood tide and make a landing on the end of Pier 4. At this time the tug Palmer took her position with her stem against the starboard bow of the Sarnia, while the tug Dalzell came under the port quarter of the Sarnia, in order to shove the stern down stream against the flood tide. All witnesses except the captain of the Palmer, who was on the bridge of the Sarnia, estimate the flood tide to have been running with considerable strength, and to have made necessary the presence and working of the Dalzell in order to swing the stern of the Sarnia, which was projecting out into the tide.

A line was made fast to the southwesterly corner of the pier and another line extended some 200 feet from the bow of the Sarnia to the third mooring spile on the south side of the pier. The vessel was thus lying at an angle of about 45 degrees across the southwesterly corner of Pier 4. In this position both the Dalzell and the Palmer exerted forces which would turn the vessel or warp her around the corner of the pier, but which at the same time would move her forward in the slip, if not so applied as to be limited to a rotating motion. All the witnesses testify that the Sarnia did proceed ahead as she swung into the slip until she struck the lighter on her port side. The vessel continued to swing and to move ahead as she cleared the lighter, until she moved into her berth on the south side of Pier 4.

The action is brought by the owner of the lighter against the Sarnia, which has impleaded, under rule 59, the owner of the tugs Dalzell and Palmer. The captain of the Sarnia was absent at the time, but the other officers of the vessel were on duty on her bridge and at the bow. The actual orders for the movement of the ship were given by the tug captain in charge of the docking, and the witnesses for the Sarnia claim that he miscalculated the distance which the Sarnia would require for the turn when moving ahead after rounding the end of the pier, and after her crew began to haul upon the line which ran from the bow of the vessel.

The tug captain testifies that the lighter was away from the pier at one end, and that he had an impression that the lighter was being moved; but this idea on his part seems to be unfounded. The slip is 170 feet wide, the lighter was about 30 feet wide, and the bow of the Sarnia was about 20 feet away from the lighter when the first officer of the Sarnia, stationed right at her bow, gave a warning to the pilot and to the third officer, who were upon the bridge, that they were getting too close to the lighter.

The testimony of the witnesses and the engineers shows that the engines of the Sarnia had been reversing and going ahead at short intervals ever since the vessel started to turn around above the Brooklyn Bridge. The collision is fixed in the neighborhood of 3:19 p. m. The third officer of the Sarnia and the tug captain testify that the Sarnia was then operating under a signal half speed astern. The tug captain

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testifies that just at this moment, and as he thinks before the hail from the first officer, he gave the signal full speed astern to the engine room, but that the Sarnia continued to move ahead. He then repeated the full speed astern signal twice in succession, but gave no signal to either of the tugs, and the Sarnia did not lose her headway until she struck the lighter. The first officer of the Sarnia evidently also believed that the Sarnia did not respond to the signal to go astern, and has entered in his log that the pilot gave a signal to reverse, which was answered from the engine room, but that the engines went ahead.

There can be no question about the physical movement of the boat, but considerable dispute has arisen as to the actual operation of the engines. The chief engineer and his first assistant, who were in the engine room, spent some minutes inspecting a thrust block which had nothing to do with the movements of the engines, but took them away from where they could observe the telegraph or the writing of signals upon the blackboard. The second and third engineers and the oiler were receiving the signals, and one or the other of these assistant engineers was operating the levers, while the oiler wrote the orders upon the board. These were subsequently copied into a scrap log and the figures then erased from the blackboard. This was not done until after some question had been raised as to the collision. But there is nothing to indicate that the destruction of the original entries upon the blackboard was for any ulterior purpose, or that they were not correctly copied into the scrap log. The scrap log was taken up to the chief engineer, who had already written up his smooth log, and who did not change that, as the scrap log showed nothing contradictory. But the witnesses do not entirely agree as to just when and how these various writings were completed.

These incidental disputes are probably immaterial. The scrap log is in accord with the testimony of the witnesses that no series of three successive hard astern signals were received in the engine room. The tug captain testifies that he had given the order half speed astern before the Sarnia began to go ahead around the corner of the pier. If so, the engines of the Sarnia would be working with the tide, against the tugs, throwing her bow to starboard, as she was under a starboard helm, and setting her back the opposite way from which she wished to go. The pilot then testifies that, while the Sarnia's engines were still working half speed astern, he saw that the steamer was going ahead. He testifies that the telltale registered "astern" when he went and looked over the side at the quickwater, because he noticed that the steamer was sliding ahead along the dock. When he looked aft along the side, he and the third officer concluded that the engines were going ahead, although the only signal had been, as has been stated, a half speed astern. Then, according to the pilot's testimony, came the three signals for full speed astern, which either were not answered, or did not overcome the way of the Sarnia, before she covered the 20 feet and struck the lighter.

According to the testimony of the engineers of the Sarnia, her way could not be stopped within that distance, if she were proceeding at the rate of one knot an hour, which they all agree was about the rate of motion at which she was moving into the slip. But, further than this,

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it seems apparent that the Sarnia was to a considerable extent controlled by the movement of the tugs. The Palmer was placed against the starboard bow of the Sarnia, and yet did not come in contact with the lighter, which the Sarnia struck almost at its farther end. The various witnesses for the Sarnia all agree that the Palmer was working at an angle not greatly off from a line parallel with the line of the Sarnia herself, and although the Palmer was undoubtedly working under a strong starboard helm, and with her screw so operating as to turn the Sarnia, there would be a decided forward thrust to the force which she was exerting upon the Sarnia. This would have to be taken into account in order to overcome the Sarnia's momentum. That this momentum was considerable is evidenced by the fact that the line running from the Sarnia's bow, and upon which men were hauling with a winch, in order to pull her around into the slip, was pulled away from these men—that is, they were compelled to allow it to run out further —just before she struck the lighter.

It is evident that by the combined force of the tide, the tugs, and of the Sarnia's own engines (which by reversal threw her head to starboard) pressure was exerted against the corner of the pier, such that the Sarnia yielded in the only direction in which she could move, and went ahead, instead of rotating on a pivot, before she slid into the slip. It is difficult to see how the captain of the tugs expected to swing the Sarnia, and move her alongside the pier, without having her advance into the slip. In fact, it would not seem that he did so anticipate. He apparently expected her to swing more rapidly than she did, and thus he miscalculated the distance which the Sarnia would move ahead before she could be swung clear of the lighter. According to the testimony, the Sarnia was projecting beyond the pier some 80 or 100 feet at the time the maneuver started. When she struck the lighter, she was reaching across some 140 feet of water and had moved into the slip nearly 150 feet. As the Sarnia was over 300 feet long, there is nothing impossible in her so doing; but it shows conclusively that she was moving ahead at a considerable rate before the pilot realized that she was getting too close to the lighter.

The engine room force of the Sarnia testified that a partial movement of the signal lever might be insufficient to ring the gong, and that thus a half motion of the lever might not be heard. But it is impossible to see how a signal of half speed astern, followed by three full motions of the lever signal full speed astern, could be mistaken or misread by any one so as to be entered in the following form:

"Astern full 3:03 stop and ahead slow 3:04 astern full 3:05 stop and ahead 3:06 astern half 3:07 full 3:08 stop 3:09 ah half & stop 3:10 ast half 3:11 stop 3:12 ahead slow 3:13 stop 3:16 ah slow 3:17 stop 3:18 astern full 3:19 stop 3:19½ ahead slow 3:20 stop 3:20 ah slow 3:21 stop 3:22 ah slow 3:23 stop 3:24 ah slow 3:26 stop 3:28 ah slow 3:30 stop 3:32 ast slow 3:34 stop and all finish with engine at 3:35 p. m."

But, if three signals for full speed astern were given, they followed the time, at 3:19 p. m., when the pilot says that he saw the water going away from the ship and the ship going ahead, which was after the signals for half speed astern and full speed astern. According to this

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testimony, the signal which was mistaken must have been his first full speed astern signal, and it is evident from the testimony of all the witnesses that then the Sarnia was but 20 feet away and her headway could not be stopped. But the third officer, who also says the signals to reverse were given, entered in the ship's log the following:

"1:59 p. m. anchor away slow astern 2:03 stop and half speed ahead 2:30 stop off end of Pier 4 3:15 alongside of dock warping ship into berth slow speed ahead 3:18 half speed astern and then full speed astern telegraph answering astern but engine going ahead Telegraph rung astern three times successively and answered from engine room but no change in engine Tugboats J. A. Bouker on starb. hand and Edward Dalzell on port quarter Ship colliding and sinking barge 3:30 finished with engines 3:45 ship all fast to dock."

He gives three-fourths of an hour off the end of the dock, and then starts the engines "slow speed ahead," which contradicts Capt. Slauer, the pilot. He also testifies that the engines seemed to go ahead, but he and Slauer were looking over the side, where the Palmer was working her engines ahead. Both the third officer and Slauer were surprised to see the boat moving ahead, either along the dock or through the water. Slauer immediately went back to ring the astern signals, and the third officer was watching the return signals from the engine room, so that neither of them had time, before the collision, which occurred immediately, to devote any more time to observing the quick water at the stern of the steamer. Evidently the steamer's way was stopped, and the log shows from 3:20 on nothing but "ahead" movements of the engines.

No one in the engine room knew of any collision until after going on deck, but the third assistant engineer, Vogel, testifies that he happened to notice upon the telegraph, after receiving the full speed astern signal at 3:19, a repetition of that signal, which did not ring the bell, which he describes as like a jingle bell, and in which the indicator did not move clear across the dial. At this time, according to his testimony, the first assistant engineer had returned from examining the thrust block and was working the engine. Vogel is the man who copied the entries from the blackboard into the scrap log. He copied these upon a page which had been prepared for the weather and other reports of June 10th and 11th, and copied them because the chief engineer was talking with the first assistant, and asked if any one had copied the entries from the blackboard. There is no explanation of why these entries were copied in the logbook, if, as Vogel says, he had no knowledge of the collision at the time. The log does not show the full astern signal, which Vogel says was received; that is, if there was one signal full astern, followed by a half signal which did not register, and then a third full astern signal, there should be at least two in the log. None of those on the stern deck of the steamer knew of the collision, and no one upon the tug Dalzell knew that a collision happened until after the steamer was docked.

No fault has been shown on the part of the lighter, and the libelant should recover damages and costs. The Sarnia has attempted to prove that the fault lay entirely with the captain of the tug Palmer, who evidently mistook the force of the tide, was in fault as to the movements

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of the Sarnia when held to the corner of the dock by lines and by the pressure of the tide, who also failed to appreciate the effect of setting the Sarnia's engines astern when she was under a starboard helm and when she was bound by forces which restricted free movement, who allowed her to approach too close to the barge under the circumstances, and who failed to control the movements of the helping tugs, so as to prevent the collision.

But the Sarnia is in the position of having the burden of proof in support of her petition. If the engines of the Sarnia were operated under mistake, even to the extent of interpreting a full speed astern signal as a signal to stop, or if in any way Capt. Slauer's calculations were set at naught by some slip on the part of the engine room force of the Sarnia, it is impossible to hold that the Sarnia successfully bears the burden of showing that the entire blame for the collision should rest upon the tug captain. The production of a log written in an unusual way, after the event, contradicted by a log entry of the third officer, who stood on the bridge, and the conflicting testimony of the witnesses themselves, make it impossible to free the Sarnia, to the extent of holding that it has successfully passed all responsibility for the collision to the parties brought in by its petition.

No fault has been shown on the part of the tug Dalzell, and she and her owners should be released.

The libelant should have a decree for half damages and costs against the claimant of the Sarnia, and half damages and costs against the claimant of the Palmer.

BUDRIS v. CONSOLIDATION COAL CO. (four cases).

BUDRIS et al. v. SAME.

(District Court, E. D. New York. May 7, 1918.)

1. COURTS ⇐276—FEDERAL COURT—DISTRICT OF SUIT—SPECIAL APPEARANCE—EFFECT.

A defendant does not consent to jurisdiction of federal court of particular district by special appearance, even when coupled with an application for extension of time to answer, if the plea be overruled.

2. COURTS ⇐276—FEDERAL COURTS—JURISDICTION.

A waiver by any act equivalent to a general appearance will confer jurisdiction upon a federal District Court to hear an action brought by an alien against a domestic corporation in a district other than that in which the corporation was organized and of which it was a citizen.

3. COURTS ⇐276—FEDERAL COURT—SPECIAL APPEARANCE—EFFECT.

The interposition in a federal District Court of a special appearance to question jurisdiction over the cause of action or of the person of the defendant waives any defect because of the serving a summons of the court in an adjacent district.

4. COURTS ⇐276—FEDERAL COURTS—SPECIAL APPEARANCE—WAIVER.

A special appearance in federal court for the purpose of securing dismissal of a particular action, because of lack of jurisdiction over defendant, will not be waived by the mere exercise of the jurisdiction with defendant's consent, necessary to hear the motion.

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5. COURTS ⟸276—FEDERAL COURT—SPECIAL APPEARANCE—ATTACK ON JURISDICTION.

Where defendant appeared specially in federal court, attacking the jurisdiction, a plea in bar on the ground of prior adjudication may also be interposed, as it is not a consent for the exercise of jurisdiction in the particular case, unless interposed before the making of the special plea, or as a waiver thereof, if subsequently made.

6. COSTS ⟸8—ALLOWANCE—JURISDICTION.

Where an action was dismissed on the defendant's special plea to the jurisdiction, the court is without authority to award costs.

7. COURTS ⟸276—FEDERAL COURT—OBJECTION TO JURISDICTION—WAIVER.

That defendant, who appeared specially, objecting to the jurisdiction of the federal court, prayed costs, which the court could not grant, if without jurisdiction, is not a waiver of objections to the jurisdiction.

8. COURTS ⟸274—FEDERAL COURTS—JURISDICTION.

The federal District Court for New York is without jurisdiction over a suit brought by nonresident aliens on a cause of action arising in Kentucky against a Maryland corporation, which maintained an agent in New York, on whom process was served.

At Law. Three actions by Alexander Budris against the Consolidation Coal Company, together with an action by Saloma Budris against the same defendant, and one by both Alexander and Saloma Budris against such defendant. Hearing on motions by plaintiffs for judgment, as well as on defendant's special pleas to the jurisdiction and motions to dismiss. Actions dismissed.

Baltrus S. Yankaus, of New York City, for plaintiffs.

Davies, Auerbach & Cornell, of New York City (Julien T. Davies and Martin A. Schenck, both of New York City, of counsel), for defendant.

CHATFIELD, District Judge. Motions have been made in the five above-named actions for judgment on behalf of the plaintiff, with costs, and for the impaneling of a jury to assess damages, upon the following grounds:

It is alleged that the defendant served a plea to the jurisdiction of the court, alleging that the suit was improperly brought in this the Eastern district of New York; that such plea was signed by the defendant's attorneys, without specifying a special appearance; that the defendant failed to deny the allegations of the complaint, outside of the paragraphs relating to the residence of the parties, and that the defendant has its main and general office in the state of New York, at 14 Wall street, New York City, while its coal mines are located in Kentucky, Pennsylvania, and West Virginia; that the cause of action arose in Kentucky; that the statute of limitations has run against the bringing of this action in the state of Kentucky; and that the defendant has a person designated upon whom service can be made in the state of New York, and has therefore filed its certificate and obtained authority to do business in this state. It also appears from the record that the defendant was organized under the Laws of the State of Maryland.

The defendant has made a motion in each case, asking that the action be dismissed upon a special appearance, in which the defendant

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denies that the plaintiff was or is a resident of the state of New York and the Eastern district; alleges that the defendant is not and was not a domestic corporation of the state of New York, but is a resident of the state of Maryland; denies that the defendant owns or owned property within the Eastern district of New York, and that it has any office for the transaction of business within the Eastern district; and demands judgment dismissing the complaint, with costs, for the reason that the court has no jurisdiction, and for the reason that suit has been improperly brought in the Eastern district of New York.

The five actions are as follows: Action No. 1, by Alexander Budris, for assault by the defendant's servants, resulting in the physical injury of the plaintiff, at Van Lear, Ky., on the 19th of July, 1916. Action No. 2, by Alexander Budris, for wrongful entry and ejection of plaintiff, accompanied by assault and unlawful imprisonment, in breach of covenant of lease; the entry and assault being alleged to have occurred on September 9, 1914, at Van Lear, Ky. Action No. 3, by Alexander Budris, who alleges that on the 4th of August, 1914, he was ejected from a train and beaten by the servants of the defendant, contrary to the contract of carriage entered into by the plaintiff as a passenger upon a train of the Miller's Creek Railroad Company, near Van Lear, Ky., which railroad train was operated by the defendant. Action No. 4, by Saloma Budris, wife of Alexander Budris, for unlawful entry and ejectment by force, by the defendant's servants, on the 9th day of September, 1914, from the premises at Van Lear, Ky., which had been leased to the said Saloma Budris and her husband. Action No. 5, by Alexander Budris and Saloma Budris, for breach of contract through failure to carry out the terms of the lease of premises at Van Lear, Ky., of which the plaintiff took possession on the 31st day of May, 1914, and from which, after the various alleged breaches of lease, the plaintiffs allege they were unlawfully ejected on the 14th of September, 1914.

The defendant has in each case pleaded in bar, alleging lack of jurisdiction, while stating that it does not appear generally and appears specially for that purpose. These pleas were filed upon the 16th of September, 1916, and on the 7th of February, 1918, notice was served that the special plea would be brought on for hearing, and that a motion would be made to dismiss the complaint for lack of jurisdiction, on the 13th of February, 1918. This notice was signed, as was the plea, by Davies, Auerbach & Cornell, as attorneys for the defendant, without any further statement that they appeared specially.

The plaintiffs' motions for judgment were noticed for the same date, viz., the 13th of February, 1918, and the matter came on for hearing, by adjournment, on February 27, 1918, when the defendant interposed two affidavits, in one of which the New York manager of the defendant alleges that the defendant is not a domestic corporation, is not a citizen or resident of the state of New York, was at all times a foreign corporation duly organized and existing under the laws of the state of Maryland, and that it does not own any property and has no office in the Eastern district of New York; also the affidavit of an attorney at law, associated with the attorneys for the defendant, setting forth that

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the plea is interposed in order to follow the practice in Lehigh Valley Coal Co. v. Yensavage, 218 Fed. 547, 134 C. C. A. 275, and also calling attention to the fact that, prior to the commencement of this action, the plaintiff began five actions in the Supreme Court of New York County, based upon the same facts and alleged causes of action as that in the present suits, that an answer was interposed setting up certain judgments of the state courts of Kentucky in bar, and on the 15th of January, 1918, a judgment was entered dismissing the complaints on the merits.

[1] It has now been settled, by the case of Meisukas v. Greenough Coal Co., 244 U. S. 54, 37 Sup. Ct. 593, 61 L. Ed. 987, that a defendant does not consent to jurisdiction by a special appearance, even when coupled with an application for extension of time to answer, if the plea be overruled.

[2] It has been settled by the same case, and by the case of Toledo Railways & Light Co. v. Hill, 244 U. S. 49, 37 Sup. Ct. 591, 61 L. Ed. 982, that a waiver by any act equivalent to a general appearance will confer jurisdiction upon a District Court of the United States to hear an action brought by an alien against a domestic corporation, in a district other than that in which the corporation was organized and of which it is a citizen.

[3] It is apparent that the interposition of a special appearance to question jurisdiction over the cause of action or the person of the defendant in this district waives any defect by serving a summons of this court in the Southern district of New York. The defendant did not specify whether the objection to jurisdiction was directed to jurisdiction over the person of the defendant, or jurisdiction over the particular cause of action. An objection to the exercise of jurisdiction over the defendant in this district is equivalent to an objection by the defendant against the trial of the case in this district. This is an objection against the exercise of jurisdiction over the person of the defendant, rather than over the cause of action; there being no question that this court has jurisdiction over such a cause of action, and over this particular cause of action, if the defendant be properly in court. The defendant claims that the court has no jurisdiction to hear this particular case, unless the defendant is properly in court, and admits thereby that the court has general jurisdiction over a cause of action of this sort.

It is evident, therefore, that the defendant is really asking, not for a dismissal of the cause of action, but for a dismissal of this particular suit. Such a dismissal preserves the right to renew the action, if proper service can be made. If the service alone is set aside, the court may leave the plaintiff's pleadings on file, and may set aside or hold as void merely the attempted use of process. Hence it is important to see if the defendant has come into court voluntarily, making the service of process unnecessary, and given the court the right to consider an issue of a sort over which it undoubtedly has jurisdiction, if the parties are properly before it. The motion to dismiss the action waives the defect in service of the summons out of the district, but does not thereby accept jurisdiction over the defendant for the purpose of the suit.

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[4] As was held in the case of Yanuszauckas v. Mallory Steamship Co., 232 Fed. 132, 146 C. C. A. 324, and in the case of Vitkus v. Clyde Steamship Co. (D. C.) 232 Fed. 288, a special appearance for the purpose of dismissing the particular action for lack of jurisdiction over the defendant, and not on the merits, would not be waived by the mere exercise of the jurisdiction, with the consent of the defendant, necessary to hear the motion.

[5] It was also held in the Vitkus Case that an incidental suggestion to the court that a plea in bar, on the ground of prior adjudication, could also be interposed, added nothing, and was not a consent for the exercise of jurisdiction in the particular case, unless interposed before the making of the special plea, or as a waiver thereof, if made subsequently.

[6-8] It should be held, therefore, that the court has not jurisdiction in this case over the person of the defendant, and this action, based on the attempted service, should be dismissed, but not on the merits, and the motions for judgment on the part of the plaintiff denied.

The prayer for costs cannot be granted, as the court has no jurisdiction over the case; but the inadvertent request for such customary relief is not a waiver of the right to object to the maintenance of the action itself. These actions apparently could have been maintained in Kentucky, in some court in that state, or they could have been brought in Maryland, if resort was desired to the United States court, or they could be brought in the Supreme Court of New York, and by removal transferred to the United States court in this district. In each of those cases a different situation would arise than when the action has primarily been begun in the United States court for this district, where apparently the defendant does not reside, and where it has not by consent given the right to this court to exercise its general jurisdiction over such causes of action.

In re NEJOUR.

(District Court, N. D. Georgia. September, 1917.)

1. BANKRUPTCY ⟸400(4)—REFEREE—REVIEW.

A decision of a referee in bankruptcy, allowing exemptions over objections that the bankrupt had made fraudulent transfers of his property, etc., when based on a hearing of testimony and a consideration of books, should not be interfered with on review, unless clearly and manifestly erroneous.

2. BANKRUPTCY ⟸228—REFEREE—REVIEW OF DECISION.

Where the referee in bankruptcy or master hears the witnesses, sees them examined and cross-examined, and knows their bearing and manner, the court will defer to his finding, because of his better opportunities.

3. BANKRUPTCY ⟸399(3)—HOMESTEAD—TRANSFER.

A bankrupt will not be denied a homestead exemption, because he transferred it to another party, where it was transferred back to him, and it did not appear that he was trying to prefer one creditor over another.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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In Bankruptcy. In the matter of the bankruptcy of Costa G. Nejour. On review of order allowing exemptions. Referee's report affirmed.

Dorsey, Shelton & Dorsey, of Atlanta, Ga., for objecting creditors.
McCallum & Sims, of Atlanta, Ga., for bankrupt.

NEWMAN, District Judge. This is an application for homestead exemption by the bankrupt, Costa G. Nejour, and $920, a part of the amount realized from the sale of the bankrupt's merchandise, was set apart by the trustee to the bankrupt as an exemption. This was referred to N. L. Hutchins, referee, for determination, and his report and opinion on the subject is as follows:

"On April 11, 1917, the trustee, R. C. Patterson, filed his report setting apart the bankrupt's exemption to the amount of $920; same being cash derived from the sale of stock and fixtures of the bankrupt. On April 14, 1917, John Silvey & Co. and others filed objections.

"The first ground of objection insisted upon was because said bankrupt, in January, 1916, made a written statement to R. G. Dun & Co., for the purpose of obtaining credit, in which he represented at that time that his assets were $11,500 and his total liabilities $4,000, showing a surplus of assets over liabilities in 1916 of $7,500. Fourteen months later, when he admitted in writing his willingness to be adjudged a bankrupt upon the filing of an involuntary petition against him, he scheduled liabilities of approximately $10,000, and his only live asset was a stock of goods and fixtures which inventoried approximately $4,000; that the only other assets scheduled were accounts receivable for goods sold, having a face value of approximately $6,500, whereas, in truth and in fact, his ledger and books showed that he had at the time of bankruptcy accounts receivable of only $5,400, and that these are all practically worthless. There therefore has been a shrinkage of assets in 14 months from a solvent condition of $7,500 to an insolvent condition of approximately $7,500, or showing a shrinkage in assets in 14 months of approximately $15,000.

"The second ground of objection insisted upon by objecting creditors was that in November, 1916, the bankrupt purchased the property where he lives at 417 East Fair street, paying with his own check the sum of $500 cash payment thereon. Shortly thereafter he transferred said property to his wife for love and affection, and that all that time the bankrupt was totally and wholly insolvent, and that said transfer was fraudulent, and made for the purpose of hindering, delaying, and defrauding his creditors, and amounts to a concealment of his property, and for that reason the bankrupt is not entitled to his homestead exemption.

"Third, the creditors' further objection is because, during the 3 months immediately preceding said bankruptcy, to wit, in December, 1916, and January and February, 1917, the bankrupt purchased and received in his store approximately $7,000 in new merchandise; that during the period of 3 months immediately preceding bankruptcy, said bankrupt sold or otherwise disposed of approximately $10,000 worth of merchandise; and that he has made no satisfactory explanation of what has become of said merchandise or the proceeds thereof.

"Fourth, that during the three months' period aforesaid his books showed that he turned over a large portion of merchandise to friendly Syrian peddlers and admits that some of it was practically at cost, and if he received the cash he has not satisfactorily accounted for it, he turned over to a friendly Syrian peddler $600 in new merchandise as credit on an alleged loan which he admits having been owing by him for over a year, and that the delivery of said merchandise amounted to a transfer of his property for the purpose of hindering, delaying and defrauding his creditors; that during the month of February, 1917, preceding bankruptcy he paid bona fide merchandise creditors the sum of

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$138.33, while during said month he paid to relatives and friends the sum of $1,553.75, and that the payment to friends and relatives was on alleged loans of long standing; that the bankrupt on the one hand was purchasing from the objecting creditors new merchandise, and with the other hand concealing said merchandise, or else selling it to his friends and relatives, all the while in contemplation of bankruptcy proceedings, for the purpose of defrauding his bona fide merchandise creditors.

"Fifth, said objecting creditors further insist that, although the report of the trustee setting apart the homestead exemption was not filed until April 11, 1917, said bankrupt undertook on April 15, 1917, to transfer, sell, and convey all his right, title, and interest in the homestead to be set apart to him to another, with instructions to the trustee to pay over to said party any amount which might be allowed him as a homestead exemption.

"The above matter came on for hearing before the referee under special reference on May 14, 1917, at Atlanta, Ga., in the federal building, beginning at 9 o'clock a. m. and being concluded at 3:30 p. m. of the same date. A lengthy investigation was then had and many witnesses were sworn and testified. It appears that Costa G. Nejour, the bankrupt, was a Syrian merchant on Decatur street, in the city of Atlanta, Ga.; that his business consisted of selling, principally at wholesale, supplies to Syrian peddlers. These peddlers seem to have been his principal customers. On January 13, 1916, the bankrupt made a statement to R. G. Dun & Co., in which it appears: That he had on hand at that time merchandise to the value of $7,000, outstanding accounts at a realizable value of $3,400, and cash in bank, $900, fixtures, furniture, etc., $200, making a total of $11,500. That at that time his liabilities amounted to $4,000. That he owed his merchandise creditors on open account $2,400; he owed the bank for loans $500; he owed friends and relatives $1,100, making his surplus $7,500 at that date.

"It appears from the testimony, from an examination of the bankrupt's books, journals, and ledger, his passbook at the bank, paid checks, etc., goods bought goods sold, etc., that starting with a stock of goods in January, 1916, at a value as shown by his books, of $6,711.67 accounts receivable at substantially $3,500, that between that time and the 1st of March 1917, the bankrupt had purchased in his business goods to the amount of $22,355.26 making a total amount of goods handled from January 13, 1916, to bankruptcy, of a little over $29,000; that a careful inventory made by the receiver, after bankruptcy, showed on hand stock of goods of the value of $3,172.97. It appears that during said period of a little over a year that the bankrupt, as shown by his checks, had paid to his merchandise creditors, as far as can be ascertained, the sum of $25,954.77. The best information obtainable from the evidence shows the bankrupt's current expenses at his store amounted to around $1,800 a year; that he paid out, in addition to amounts shown by his checks, for merchandise for which he paid cash, amounting to about $1,800; that he paid certain debts owing to friends with goods out of the store, about $700, to say nothing of his living expenses, which cannot be determined from the evidence. It therefore appears that during the year preceding bankruptcy the bankrupt had handled practically $25,000 worth of goods, and has paid out during the same period, in connection with his business practically the sum of $30,000. At the time of bankruptcy, therefore, with stock of goods inventorying $3,172.97, fixtures $840, accounts receivable, actual, $5,481.63, making his assets about $9,494.60; from his list of creditors and claims proven, it appears that at the time of bankruptcy he owed merchandise creditors $9,433.98. While it is true that bankrupt appeared to have received an unusual amount of goods during the early part of 1917, his explanation was to the effect that while he had purchased most of those goods several months previous, for delivery in October and November, 1916, the mills from whom he purchased delayed deliveries until January, 1917; that his stock of goods had been reduced down to about $2,000 to $2,400, during the month of December, 1916; that his customers, being principally peddlers, then came in for their spring supplies; that shortly thereafter it began raining, and rained for a long period, thereby preventing peddlers from going out on the road and selling the goods purchased from him, and they, being unable to pay for them

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before bankruptcy, placed him in such position that he could not collect, and therefore could not pay his general creditors; that his business had fallen off quite materially during the year 1916, on account of business conditions on Decatur street. From a careful review and examination of all the books, papers, etc., connected with the testimony taken at the hearing, I fail to find the evidence of such fraud as is contemplated by the statute sufficient to deprive the bankrupt of his exemption in connection with objection 1 of objecting creditors.

"Concerning the second objection, as insisted upon by creditors, the evidence furnishes what would seem to be the truth of the transaction in reference to the purchase of property at 417 East Fair street, from the bankrupt, his wife, the real estate dealer, and others, showing to the court that the money thus paid out was the separate property of his wife, and was not paid out of funds derived from his business.

"Objection No. 3 is disposed of in what has been said in connection with objection 1.

"In connection with objection numbered 4, the bankrupt appears to have made a satisfactory explanation of the goods turned over to a friendly Syrian creditor of $600 in new merchandise, on what appeared to be a bona fide loan made by a friendly Syrian to the bankrupt, and did not amount to a transfer for the purpose of hindering, delaying, and defrauding his creditors. While it appears that during the month of February, 1917, the bankrupt paid to his Gentile merchant creditors only the sum of $138.33, and that during said month he paid relatives and friends the sum of $1,553.75, or thereabouts, that the same were made in payment of loans of several months standing, yet it appears from the testimony of the bankrupt, checks exhibited, bank books, etc., in connection with the testimony of friends to whom moneys were paid, that said sum of $1,500, or about that amount, paid to friends and relatives, was for money previously borrowed which he had used in paying on his indebtedness to his general creditors: that $300 of this $1,500 was money held at the request of a Syrian preacher, who was making charitable collections along from time to time, and that amount was paid after the Christmas holidays, when called for by said preacher. The referee is of the opinion that this ground is insufficient to deprive the bankrupt of his right to exemption.

"In connection with objection numbered 5, whatever may have been bankrupt's intention in making transfer of his homestead, he had since obtained a transfer of the same back to himself. This condition seems to have been reported, since the hearing, to the District Judge, and by said judge ordered filed and to become a part of the record in this proceeding. So the referee is of the opinion that this ground is insufficient to deprive the bankrupt of his right to exemption.

"Conclusion.

"The referee, therefore, from books, papers, records, two examinations of the bankrupt, both at the first meeting of creditors, and the hearing before this referee, the briefs and arguments of counsel, is unable to determine that the debtor has been guilty of such 'willful fraud in the concealment of a part of his property from his creditors of which he is possessed when he seeks the benefit of exemption,' or failed to make that full and fair disclosure as would be sufficient to deprive him of his claim of exemption. So, having arrived at this conclusion, it appears that the trustee's report of exempted property should be confirmed, and the bankrupt's right to exemption claimed determined accordingly."

[1, 2] The petition to review the action of the referee and the argument before me were directed mainly to what is shown here as to the bankrupt's statement, early in 1916, to R. G. Dun & Co., of considerable assets and small liabilities, and the fact that, when put into bankruptcy, in 1917, about 14 months after this statement, his indebtedness was large and his assets small; and the cases of In re

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Dobbs (D. C. Ga.) 22 Am. Bankr. Rep. 801, 172 Fed. 682, and 23 Am. Bankr. Rep. 569, 175 Fed. 319, were cited as authority.

The decision in the Dobbs Case speaks for itself, and I was satisfied in that case that the evidence did not sufficiently account for the discrepancy in the assets from the one period to another. In this case the referee says:

"The referee, therefore, from books, papers, records, and examinations of the bankrupt, finds," etc.

This shows that the referee had before him the books and papers of the bankrupt, from which he was able to ascertain that there had been no such willful fraud in his business and as against creditors as would defeat his exemption. In the Dobbs Case I said, speaking of the bankrupt:

"He appears to have kept no satisfactory books of account from which the facts as to what he had done with his property and how there had been such a remarkable change in his business could be ascertained."

In the present case the referee finds a different situation, and that the showing made by the bankrupt is satisfactory, and thinks it satisfactorily shows that he made a full and fair disclosure of his property when he claimed his homestead exemption.

The decision of a master or referee, based on a hearing like this, should not be interfered with, unless it is clearly and manifestly erroneous, and another rule that is applicable here, and to which I have always adhered, is that where a referee or master hears the witnesses in person, sees them examined and cross-examined, and notes their bearing and manner, he is better able to judge whether they should be believed, or not, than one who takes such testimony on paper, as I have to do here; that is to say, the general rule is that one who sees the witnesses and hears them is better able to judge of their credibility than one who reviews their testimony as it appears only after having been reduced to writing.

[3] There is another objection to the allowance of homestead here, and that is based on the fact that the bankrupt had sold his homestead. The real facts about this are rather difficult to ascertain, but it seems to me that, while the bankrupt did transfer his exemption to another party, it was transferred back to him, and he now has it, and will receive it, if his exemption is approved. Of course, if it could be fairly gathered from this evidence, or if there was a reasonable necessary inference, that he was trying to prefer one creditor over another, it ought to defeat the exemption; but it does not so appear.

I do not think a case is made here in which I am justified, or would be justified, in differing with the referee about the conclusion reached by him. Consequently the report of the referee must be confirmed, and judgment rendered that the bankrupt is entitled to have his exemption; and it is so ordered.

BALTIMORE & O. R. CO. v. CARNEGIE STEEL CO.

(District Court, W. D. Pennsylvania. January 31, 1918.)

No. 1825.

1. COMMERCE ⇐89—FREIGHT—RATES—PROVINCE OF COURTS.
Rates of a railroad company, which conform to its published tariffs, cannot be contested in the courts as unreasonable.

2. CARRIERS ⇐188—CHARGES—RIGHT OF CARRIER—WASTE MATERIAL FROM MANUFACTURING PLANTS.
It is not a defense, to a suit by a railroad company to recover its established rates for transportation of slag, ashes, and other refuse delivered on private sidings "for wasting for the plant," that some of such material may have been used by the company for ballast.

3. WORDS AND PHRASES—"WASTE."
To "waste" means "to throw away."
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Waste.]

4. WORDS AND PHRASES—"SLAG."
"Slag" is a refuse from metallic ores after being smelted.

5. WORDS AND PHRASES—"REFUSE."
"Refuse" is that which is refused or rejected as useless or worthless.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Refuse.]

At Law. Action by the Baltimore & Ohio Railroad Company against the Carnegie Steel Company. On questions of law raised by affidavit of defense. Decision for plaintiff.

Geo. B. Gordon, of Pittsburgh, Pa., for plaintiff.
Reed, Smith, Shaw & Beal, of Pittsburgh, Pa., for defendant.

ORR, District Judge. To the verified statement of claim in this case, the defendant has filed an affidavit of defense for the purpose of raising a question of law. This is in conformity with the provisions of section 20 of the Pennsylvania Practice Act of 1915. P. L. 483–486. Under that section, if the question of law be decided against the defendant, the latter may file a supplemental affidavit of defense to the averments of fact within 15 days.

The action is brought by the railroad company to recover from the defendant compensation at its specific tariff rates for the transportation of slag, ashes, and refuse materials delivered by the defendant to the railroad and by the latter transported at the special instance and request of the defendant. Attached to and made part of the statement are the copies of the tariffs in force at the time of the various acts of transportation, the same having been duly filed and posted in accordance with the laws of the United States relating to interstate commerce, and of the commonwealth of Pennsylvania and the state of Ohio relating to intrastate commerce. There are also attached to and made part of the statement various schedules, showing the several interstate shipments and intrastate shipments, respectively, giving the points at which the shipments were received, the dates and numbers of the waybills, the

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initials and numbers of the cars, the contents, the destination, the weight, the rate, and the amount of charge for each car. The contents of each car included in the schedules are the subject of the tariffs to which special attention should now be given. Variations in the several tariffs need not be considered. Each of the published tariffs describes itself as:

"Rules, regulations and charges applying interstate (or as the case may be) for the wasting of slag, ashes and other refuse materials in carloads (as defined herein), when delivered to issuing carriers named herein at stations," etc.

Immediately preceding the list of stations in each tariff, there is found this language:

"The rules, regulations, and charges for waste refuse material as provided in this tariff will apply when the material to be wasted is delivered to the carrier at any of the stations named," etc.

After the list of stations, rules, regulations, and charges are set forth as parts of each tariff. They are five in number. The first two differ only in the character of the materials to be wasted and the charge per net ton. The first fixes the charge of 20 cents per net ton for "slag, flue dust, clean ashes, or refuse molding sand loaded into cars on private sidings of industries connected therewith, or on any team tracks, for wasting for the plant at some convenient point on their lines." The second fixes the charge of 35 cents per net ton for "ashes (mixed with other refuse), brickbats, dirt, and other refuse material." The third relates to the weight per car, etc. The fourth provides for an extra charge, if any material cannot be unloaded by one man, without the aid of a derrick or other similar mechanical appliance. The fifth contains the statement that the charges specified here are intended to be net to the carrier, without allowance for any terminal service. It will be noticed by a consideration of the entire tariff, but especially in rules 1 and 2, as first above mentioned, that the carriers are to accept the material "for waste for the plant at some convenient point on their lines." The total amount claimed by the plaintiff is based upon a great many different shipments extending over a period of several months.

The affidavit of defense sets up that the statement of claim does not set forth or disclose the cause of action for the following reasons:

(a) "There is no allegation or suggestion in the statement of claim that the material alleged by plaintiff to have been transported by it for defendant was wasted by plaintiff."

(b) "There is no allegation in the statement of claim as to where or when the said material was delivered by plaintiff, or as to what disposition was made of said material when so delivered by plaintiff."

[1] The arguments in this case upon the rule for judgment reveal the fact that the defendant relies upon this defense, to wit: If the railroad company used part of the materials it cannot recover for the transportation of that part, and, because the plaintiff does not say whether or not it used any of said materials, the statement of claim is insufficient. This defense and the objection to the plaintiff's statement are not sound. We must eliminate, at the start, any consideration of the question whether the rates charged are reasonable for the services performed. The question of rates is not for the courts. Texas &

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Pacific Railroad Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075, and Loomis v. Lehigh Valley Railroad Co., 240 U. S. 43, 36 Sup. Ct. 228, 60 L. Ed. 517, are two of very many cases sustaining this point.

[2] If a transportation service be performed by the carrier, the rate applicable to such service as specified in tariffs relating thereto, which are duly filed and published, must be paid by the person for whom such service was rendered. In the present state of the records it clearly appears that the service for which the charges were made should be paid by the shipper, unless the defendant's contention that the railway company could not charge anything for such of the materials as it might have used itself, be correct. The purpose of the transportation was "for wasting for the plant," and not wasting for the railroad, or for any other individual, or for any other entity.

[3-5] When considering the materials which were transported, and for the transportation of which the charges are made, we believe that the best definition of the verb "to waste," as used in this case, is "to throw away." See Stormonth's Dictionary. We know that "slag" is a refuse from metallic ores after being smelted. We note that slag and ashes are classed with "other refuse material" in the various tariffs. "Refuse" has been defined to be "that which is refused or rejected as useless or worthless." We note that brickbats and dirt are classed with "other refuse material" in the tariffs.

It is an irresistible conclusion that the object of the defendant in shipping these various kinds of refuse materials was to be rid of them. The service for which the plaintiff was entitled to recover the rates charged was the transportation of the materials away from the several plants of the defendant, so that they would be rid of them. What use the plaintiff would make of the materials after it had rid the plants of the defendant of them is, under the tariff, wholly immaterial. That there might be a difference in the use of the materials transported is suggested by the fact that there is one rate for clean ashes and another rate for ashes mixed with other refuse—a difference of 15 cents per net ton to the shipper in favor of clean ashes. If a householder agrees to pay a man for the removal of garbage, rubbish, or other things that he desires to be rid of, such householder ought not to be permitted to set off as against the other any amount that the latter might make by the disposition or even use of such refuse. Even if there should be a disposition on the part of the court to hold that the plaintiff is not entitled to the full rate per car for refuse used by it for ballast or fill along its line, the court could not do so, because it would then be assuming a control over the rates which, as we have seen from the cases above cited, is not within our jurisdiction.

Briefly, we find that reason (a) urged by the defendant has no foundation, because there is in the statement of claim positive averments of transportation to destinations of the various cars of material embraced in the tariffs, and that the destination of each car was at such a point that the material transported therein was wasted for the plant from which it was shipped, and that by the very transportation it was so wasted by the plaintiff. Reason (b) is without substance, because the

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material transported was wasted for the plant from which it was shipped.

Therefore this court decides the question of law against the defendant, which may file a supplemental affidavit of defense to the averments of fact within 15 days.

Supplement to Foregoing Opinion.

Inasmuch as there are a number of cases pending in this court involving the same question determined in this case, it is well perhaps to broaden the opinion, so as to include all of such cases. In some of the cases all the destinations of the several cars enumerated in the schedules attached to the statements are set forth. In some of them, however, some of the destinations of the cars which appear in the schedules are omitted. It is immaterial to the decision of the cases whether or not the destinations of the cars are expressed in the schedules. In accordance with the construction of the tariffs set forth in the foregoing opinion, the defendants in the various cases have no interest in knowing what the carriers may have done with the material after it was removed from their several plants at their instance.

A. H. MARSHALL CO., Inc., v. BUICK MOTOR CO.

(District Court, N. D. New York. June 29, 1918.)

COURTS ⇐329—FEDERAL COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.

Where plaintiff demanded recovery of a sum less than $3,000, with interest from the date of accrual, the federal court is without jurisdiction, though claim, with interest from the time of accrual, would exceed $3,000, for the demand for interest is a demand for interest as such, and not an interest calculation as a means of arriving at the amount of damages to be awarded on the principal demand.

At Law. Action by the A. H. Marshall Company, Incorporated, against the Buick Motor Company, begun in the state court and removed to the federal court. On motion to remand. Motion granted.

Motion to remand case from the United States District Court, Northern District of New York, to the Supreme Court of the state of New York, Clinton county, from which court it was removed to this court. The claim of the plaintiff is that the matter in controversy, exclusive of interest and costs, does not exceed the sum or value of $3,000, but amounts to the sum of $2,936.10 only. Diversity of citizenship is conceded.

Weeds, Conway & Cotter, of Plattsburg, N. Y., for plaintiff.
John Thomas Smith, of New York City, for defendant.

RAY, District Judge. The plaintiff's complaint sets out two causes of action. The first cause of action sets out a contract with the defendant by which defendant was to sell and deliver to the plaintiff certain cars of its make at certain prices, and plaintiff agreed to establish an agency for the sale of such cars and engage in selling

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same, and was to receive from defendant a graduated increasing compensation, depending on the number of cars sold. The plaintiff ordered the cars, fully complied with the contract on its part in all respects, and actually sold cars which the defendant refused to deliver or furnish to plaintiff, as it had agreed to do. The complaint alleges that defendant refused to deliver cars for the purpose of keeping plaintiff's sales within certain limits, and thereby depriving the plaintiff of the additional commissions or compensation to which it would have been entitled from defendant if such cars had been actually received from defendant and sold and delivered by plaintiff to third persons. The amount of such compensation to which plaintiff was entitled, if the defendant had performed on its part, is stated. This cause of action then alleges:

"Twelfth. That because of defendant's refusal and failure to deliver and ship to the plaintiff the 3 four-cylinder cars and the 43 six-cylinder cars, sold to it, as above alleged, and its failure and refusal to pay the plaintiff the additional discount, credit, and compensation earned and to which it is justly entitled under said contracts, and because of the sale of said cars, the plaintiff has been damaged and has suffered a loss of $1,769.10, which amount is justly due and owing to the plaintiff from the defendant.

"Thirteenth. Before the commencement of this action, the plaintiff duly demanded of the defendant the amount so due and unpaid of $1,769.10, but the defendant has failed and refused to pay the same, or any part thereof."

This cause of action in substance states that such commissions or compensation would have been and was due July 1, 1917.

The second cause of action alleges that for three years it had the exclusive agency for the sale of the Buick cars in counties named under yearly contracts expiring June 30 each year; that about July 1, 1917, the defendant, to induce plaintiff to continue its efforts to sell defendant's cars in said territory and to continue its subagent salesmen, etc., all of which entailed large expense, agreed with plaintiff that it would renew its sales agency contracts in the same territory for another year on the same basis as before, giving 20 per cent. off the list price for four-cylinder cars if more than 95 were sold, and 25 per cent. off on six-cylinder cars if more than 150 were sold, in such territory during the year; that, relying on such agreement, plaintiff did continue his efforts while awaiting the delivery of the contracts and sold 6 four-cylinder cars; that defendant delivered and shipped to plaintiff 3 of the four-cylinder cars and 4 of the six-cylinder cars, and refused to ship the others; that those shipped were billed at too high a price, with a sight draft attached, which plaintiff was compelled to pay and did pay in order to obtain the cars; that in August, 1917, plaintiff was notified by defendant that it repudiated its agreement to renew, and also refused to ship more cars; that plaintiff was at all times ready and willing and able to perform on its part. This cause of action then alleges:

"Tenth. By reason of the facts above set forth in this cause of action, the plaintiff became entitled to receive from the defendant, and the defendant obligated to deliver and ship to the plaintiff, the three model E–4–35, one model E–6–45, and one model E–6–49, so sold to the plaintiff and duly ordered by it, and the defendant became indebted to the plaintiff for the full discount commission and compensation earned by the sale of said cars, which

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was 20 per cent. of the list or sale price of the four-cylinder cars and 25 per cent. of the list or sale price of the six-cylinder cars, and which together amounts to $1,167, no part of which has been paid, although payment thereof has been duly demanded before the commencement of this action."

The complaint demands judgment as follows:

"Wherefore the plaintiff demands judgment against the defendant for $1,769.10, the amount claimed in the first cause of action, and $1,167, the amount claimed in the second cause of action, together with interest thereon from July 1, 1917, besides the costs of this action."

This last cause of action alleges mutual agreement to enter into a written contract for the performance of work and labor involving the expenditure of time and money in selling automobiles, the compensation to be paid by way of a discount commission, and a part performance by each party, whereby plaintiff earned and has due him from defendant commissions on the cars sold by him amounting to $1,167, for which judgment is demanded, as we have seen, with interest from July 1, 1917. The compensation agreed on for the work and labor done and sales commissions earned prior to July 1, 1917, when same became due and payable, is alleged to be $1,769.10.

If the allegations of the first cause of action are true defendant became indebted to plaintiff July 1, 1917, in the sum of $1,769.10, and, as this indebtedness was not paid, plaintiff is entitled to interest thereon from that date, in addition to the amount of the debt, and by way of damages for retention of money due the plaintiff. Under the facts stated in the second cause of action the plaintiff, on the same theory, will be entitled to interest from the time the $1,167 became due. There was no contract or agreement to pay interest in either case, except such as is implied from a retention of money due for services performed under the terms of a valid contract, and which some of the cases say is recoverable by way of damages for retention of money due.

The principal sum sued for is $1,769.10 under the first cause of action, and $1,167 under the second cause of action, and judgment for these sums of money, amounting to $2,936.10, "together with interest thereon from July 1, 1917," is demanded. The action was commenced February 27, 1918, and the interest demanded then amounted to over $102.76 making the amount demanded, and actually in controversy as fixed by the demand, over $3,038.86; but, excluding the interest, the amount or sum in controversy is less than $3,000. There is no general allegation of damage in a certain sense. The first cause of action (paragraph twelfth) says:

"That because * * * the plaintiff has been damaged and has suffered a loss of $1,769.10, which amount is justly due and owing to the plaintiff from defendant."

It seems to me this is the sum or amount in controversy under the first cause of action. This is the damage there alleged. The second cause of action is equally specific as to the amount due and owing and sued for, viz.:

"And which together amounts to $1,167, and no part of which has been paid, although payment thereof has been duly demanded before the commencement of this action."

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In Brown v. Webster, 156 U. S. 328, 15 Sup. Ct. 377, 39 L. Ed. 440 (in effect approved in Springstead v. Crowfordsville State Bank, 231 U. S. 541, 34 Sup. Ct. 195, 58 L. Ed. 354, although there the question of interest was not involved), it is held:

"The measure of damages for the purpose of jurisdiction, in an action against the grantor of real estate on the warranty of title in his deed of conveyance, is the purchase money paid with interest."

In that case defendant sold the land to plaintiff with covenant and warranty of title. One Hugh claimed superior and paramount title, and brought and successfully maintained ejectment, and plaintiff thereupon sued his grantor for damages. Under the law of the state of Nebraska, where the cause of action arose, damages and recovery against the grantor in such case are limited to recovery of the price paid, with interest; that is, the damages are made up of two items, the price paid for the land and interest thereon. The Supreme Court, by Mr. Justice White, said:

"The argument is that the matter in dispute did not exceed $2,000, exclusive of interest and costs, and hence the alleged want of jurisdiction. The demand of the plaintiff was for damages in the sum of $6,000. This was the principal controversy. It is insisted, however, that as, under the law of Nebraska, damages in case of eviction involved responsibility only for the return of the price, with interest thereon, and the price here was only $1,200, the sum in controversy could not exceed $2,000, exclusive of interest; that is to say, as the measure of the damage was price and interest, the price being below $2,000, the jurisdictional amount could not be arrived at by adding the interest to the price. This contention overlooks the elementary distinction between interest as such and the use of an interest calculation as an instrumentality in arriving at the amount of damages to be awarded on the principal demand. As we have said, the recovery sought was not the price and interest thereon, but the sum of the damage resulting from eviction. All such damage was, therefore, the principal demand in controversy, although interest and price and other things may have constituted some of the elements entering into the legal unit, the damage which the party was entitled to recover. Whether, therefore, the court below considered the interest as an instrument or means for ascertaining the amount of the principal demand, is wholly immaterial, provided the principal demand, as made and ascertained, was within the jurisdiction of the court. Indeed, the confusion of thought which the assertion of want of jurisdiction involves is a failure to distinguish between a principal and an accessory demand. The sum of the principal demand determines the question of jurisdiction; the accessory or the interest demand cannot be computed for jurisdictional purposes. Here the entire damage claimed was the principal demand, without reference to the constituent elements entering therein. This demand was predicated on a distinct cause of action—eviction from the property bought. Thus considered, the attack on the jurisdiction is manifestly unsound, since its premise is that a sum, which was an essential ingredient in the one principal claim, should be segregated therefrom, and be considered as a mere accessory thereto."

It will be noted that the court expressly says:

"The sum of the principal demand determines the question of jurisdiction; the accessory or the interest demand [when it is accessory, of course] cannot be computed for jurisdictional purposes."

The court held, however, in that case that interest was a constituent element entering into the entire damage sustained by reason of the eviction.

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In Continental Casualty Co. v. Spradlin, 170 Fed. 322, 95 C. C. A. 112 (C. C. A. 4th Circuit), the defendant refused to pay the amount due on an accident policy of insurance of $2,000. The plaintiff sued in assumpsit for breach of contract on the policy, and laid her damages in the sum of $3,000, and demanded judgment for that sum. The policy of insurance was silent on the question of interest. The court said:

"The exception of the plaintiff in error is upon the ground that the declaration discloses $2,000 as the principal demand, and that this should oust the jurisdiction; the further proposition being that amount alleged and recovered above $2,000 was interest. We do not agree to this proposition. There was no contract for interest in this policy. The action is in assumpsit for damages for failure to perform. The interest, therefore, was not a mere incident or accessory to the amount demanded, but constituted, together with the amount set out in the policy, aggregate damages for the breach. We think Brown v. Webster, 156 U. S. 328, 15 Sup. Ct. 377, 39 L. Ed. 440, settles this point."

The case would seem to have been decided on the proposition that interest was a mere item of damages, and not provided for in the contract of insurance, and therefore not a mere incident or accessory of the amount demanded.

In the instant case two specific and specified sums are alleged to be due the plaintiff, and are sued for and judgment therefor specifically demanded, "together with interest thereon from July 1, 1917," the date when claimed to have become due the plaintiff. I think this demand for interest on the sums specifically named is a demand for "interest as such," and not "an interest calculation as an instrumentality in arriving at the amount of damages to be awarded on the principal demand." It seems to me the sum of the principal demand in this case is $1,769.10 plus $1,167, or $2,936.10, and, as said by Mr. Justice White, that:

"The sum of the principal demand determines the question of jurisdiction; the accessory or the interest demand cannot be computed for jurisdictional purposes."

If the sums named are the principal demands, then the interest on such sums demanded in the prayer for judgment is a mere accessory demand, and cannot be computed and added thereto for jurisdictional purposes.

The motion to remand must be granted.

UNITED STATES v. STOBO.

(District Court, D. Delaware. May 18, 1918.)

No. 2.

1. HOMICIDE ⇐92—THREATS TO TAKE LIFE OF PRESIDENT.
An oral threat to take the life of the President violates Act Feb. 14, 1917.

2. HOMICIDE ⇐92—THREATS TO TAKE LIFE.
Under Act Feb. 14, 1917, making it a crime to threaten the life of the President, it is not necessary that the threat be communicated, or be

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intended to be communicated, to the President; nor does it need to have a tendency to cause action or nonaction on his part.

3. HOMICIDE ⟸92—THREATS TO TAKE LIFE.
An oral threat to take the life of the President need not be addressed or spoken to any person, to be punishable under Act Feb. 14, 1917.

4. HOMICIDE ⟸92—THREATS TO TAKE LIFE.
Under Act Feb. 14, 1917, providing punishment for threats against the life of the President, whether the words constituting the threat are used lightly, or with a set purpose to kill, is immaterial.

5. HOMICIDE ⟸268—THREATS TO TAKE LIFE—JURY QUESTION.
Whether the words, "The President ought to be shot and I would like to be the one to do it," constituted a threat to take the life of the President, under Act Feb. 14, 1917, depends on the circumstances, as a threat may be either conditional or absolute and the question should be submitted to the jury under proper instructions.

6. INDICTMENT AND INFORMATION ⟸121(5)—BILL OF PARTICULARS—USURPATION OF FUNCTIONS OF GRAND JURY.
Where an indictment sets forth all the essential elements of an offense, the filing of a bill of particulars under the order of the court would not involve any usurpation upon the functions of the grand jury.

7. HOMICIDE ⟸92—THREATS TO TAKE LIFE.
An oral threat against the President, unheard by any one except the accused, cannot constitute the threat denounced by Act Feb. 14, 1917.

8. HOMICIDE ⟸141(2)—THREATS TO TAKE LIFE—INDICTMENT.
An averment, in an indictment under Act Feb. 14, 1917, that an oral threat was made against the President, does not necessarily imply that it was made in the hearing of any person other than the accused, and in absence of such allegation the indictment is demurrable.

John Stobo was indicted for violation of Act Feb. 14, 1917, and he demurs to the indictment. Demurrer sustained.

Charles F. Curley, U. S. Atty., of Wilmington, Del.
Herbert H. Ward, of Wilmington, Del., for defendant.

BRADFORD, District Judge. An indictment has been found against John Stobo charging him with violation of the act of Congress of February 14, 1917 (39 Stat. 919, c. 64). The act is as follows:

"Any person who knowingly and wilfully deposits or causes to be deposited for conveyance in the mail or for delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of or to inflict bodily harm upon the President of the United States, or who knowingly and wilfully otherwise makes any such threat against the President, shall upon conviction be fined not exceeding $1,000 or imprisoned not exceeding five years, or both."

The indictment contains three counts. The first count sets forth:

"That heretofore, that is to say, on the first day of September, A. D. 1917, at Wilmington, in the State and District of Delaware and within the jurisdiction of this court, that John Stobo, late of the District aforesaid, did then and there, knowingly, wilfully, unlawfully and feloniously make a threat to take the life of and to inflict bodily harm upon the President of the United States, that is to say, at Wilmington, in the State and District aforesaid, on the said date did make said threat by uttering the language following, namely, 'The President ought to be shot and I would like to be the one to do it,' or words substantially to that effect, meaning thereby to refer to the President of the United States, contrary to the form," etc.

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The second count is in all respects similar to the first save that the date on which the defendant is alleged to have uttered the language attributed to him is "a day within the period of three weeks prior to the sixteenth day of September, A. D. 1917." The third count is in all respects similar to the second save that the place where it is alleged the defendant made use of the language attributed to him is stated as "the premises known as No. 1811 Washington Street, in the said City of Wilmington, State and District of Delaware." It will be perceived that the language attributed to the defendant is precisely the same in each count. The defendant has demurred to the indictment and has assigned fifteen causes of demurrer.

[1] In discussing these causes I find it convenient to depart from the order in which they are numerically arranged and also for the sake of brevity to group them. The 10th, 11th and 15th causes of demurrer are based upon the omission from the indictment of any averment that the supposed threat was made "in writing" or "by means of or was contained in any letter, paper, writing, print, missive or document"; the demurrant alleging that the statute does not denounce "spoken words as a crime punishable thereunder." It is contended that the words "otherwise makes any such threat" in the latter part of the act refer to a written or printed threat, and not to an oral one. This position I regard as cleary untenable. The word "such" has no reference to print or writing, but to "any threat to take the life of or to inflict bodily harm upon the President of the United States." The context leaves no reasonable doubt on this point. The word "otherwise" as used in the latter part of the section is broad enough to include not only a written or printed threat other than one deposited or caused to be deposited for conveyance in the mail or for delivery from a post office or by letter carrier, but also an oral threat. I perceive no ground on which the meaning of "otherwise" can legitimately be so restricted as to exclude an oral threat against the President of the United States. To so limit the term would not only violate the language of the act but largely defeat its broad policy. Causes of demurrer Nos. 10, 11 and 15 must, therefore, be disregarded as insufficient.

[2] The 3d, 4th, 5th, 6th, 12th and 14th causes of demurrer all rest upon the assumption that a threat to kill or do bodily harm to the President in order to be punishable under the act must be communicated or intended to be communicated to him. I can find nothing in the act or in any well-considered case to justify this contention. It is argued that a threat, punishable under the act, must be a menace of such a character as to be calculated to "unsettle the mind of the person on whom it operates, and to take away from his acts that free, voluntary action which alone constitutes consent"; and that the language imputed to the defendant could not have "any of the effects or influences upon the mind of the person threatened which are necessary ingredients of a threat." The counsel for the defendant fails to distinguish between threats made for the purpose of inducing action or non-action on the part of the person against whom they are directed, and threats not made for that purpose, but calculated to breed disloyalty or hostility in the community to the constituted authorities and in-

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cite a spirit of unrest and sedition. A large number of authorities have been cited to show that in the case of threats of the former class it is necessary that they should be communicated or intended to be communicated to the person against whom they are directed. But these authorities are wholly inapplicable to the case of threats denounced by the act in question. Whatever prior to the passage of the act may have been the essential nature of a criminally punishable threat or its technical significance or description, that act recognizes as punishable an oral as well as a written threat, though not communicated or intended to be communicated to the President. The question whether the threat has a tendency to cause action or non-action on his part is wholly foreign to any proper consideration of a given case. The vital inquiry under the act is whether the threat is of such a nature as to create or tend to create sedition or disloyalty, or to stir up violence toward or resistance to the lawful authority of the President, as commander-in-chief of the army and navy, or as chief executive of the nation. It is true that in United States v. French, 243 Fed. 785, the district court for the southern district of Florida held that under the act in question a threat is a "menace of such a nature and extent as to unsettle the mind of the person on whom it operates, and to take away from his acts that free and voluntary action which alone constitutes consent," and that "no particular words are necessary to constitute a threat, but these words must be intended for the person threatened." This holding does not commend itself to the judgment of this court, and is in direct opposition to the doctrine declared in United States v. Stickrath, 242 Fed. 151, decided by the district court for the southern district of Ohio a month earlier than the decision in United States v. French. In United States v. Stickrath the sufficiency of an indictment under the act in question was challenged upon the ground, among others, that "the threat was not communicated to the President." It was held that it was not necessary to a conviction that the threat should be made to the President or in his presence nor communicated to him, nor that the threat, even if communicated to the President, "should have been of such a nature and extent as to disturb or unsettle his mind to any degree, or to take away from his acts in any measure that free, voluntary action which alone constitutes consent." The court in the course of its opinion said:

"In this country sovereignty resides in the people, not in the President, who is merely their chosen representative. To threaten to kill him or to inflict upon him bodily harm stimulates opposition to national policies, however wise, even in the most critical times, incites the hostile and evil-minded to take the President's life, adds to the expense of his safe-guarding, is an affront to all loyal and right-thinking persons, inflames their minds, provokes resentment, disorder, and violence, is akin to treason, and is rightly denounced as a crime against the people as the sovereign power. The statute in question was enacted not only for the protection of the President as the representative and chosen chief executive of the nation, but also to preserve the tranquillity of the people and their peace of mind. Its passage came at a time when this country was about to be driven into and to engage in an epoch-making and substantially worldwide war, participation in which it had earnestly sought to avoid. It was then known that there were some who, on account of erratic tendencies, or mistaken views, or want of sympathy with or even loyalty to our country, were unfriendly to its aims and might, by direction or indirec-

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tion, or both, endeavor to embarrass and cripple it in the great struggle upon which it was about to be forced to enter, and might by threats assail the President, and thereby inspire others to attempt his life, if they themselves should not undertake the commission of that crime. The enactment was opportune, not only on account of our past record of three presidential assassinations and the peculiar stress to which the country was about to be subjected, but that there might hereafter be a deterrent to restrain the disloyal, erratic, misguided, or wickedly disposed."

The 3d, 4th, 5th, 6th, 12th and 14th causes of demurrer must be held insufficient.

[3] The 7th and 8th causes of demurrer are to the effect that the language imputed to the defendant is not averred to have been addressed or spoken "to any particular person or persons named or described in said indictment," nor "to any person whatsoever." Both of these grounds are insufficient. It is unnecessary that the oral threat should be addressed or spoken to any person. If spoken in the hearing of any person or persons it is denounced by the act. It is not solely the effect which the spoken threat may have upon the mind of the person to whom the threat is uttered, but the effect which it may have upon the mind of any one who hears it. The purpose and policy of the act are to guard and shield from improper and dangerous influences not only the minds of those to whom the threat is uttered but equally the minds of all who may hear the words as and when uttered. There is no room for any distinction between the two cases. The 7th and 8th grounds of demurrer must, therefore, be held insufficient.

[4] The 13th cause of demurrer is that the indictment does not contain "any averment of any facts or circumstances showing or indicating any intention or attempt on the part of the defendant by the supposed use of the words therein ascribed or imputed to the defendant to menace the President of the United States." I have some difficulty in understanding the meaning of this cause of demurrer. If it means that the making of a threat to take the life of or inflict bodily harm upon the President is not punishable unless the person making the threat intends to execute it by killing or inflicting bodily harm upon the President, I cannot recognize the soundness of the proposition. If one wilfully in the hearing of others makes a threat against the life or bodily welfare of the President he is punishable under the act whether he uses the words lightly or with a set purpose to kill or maim. The effect upon the minds of the hearers, who cannot read his inward thoughts, is precisely the same and equally within the scope and obnoxious to the provisions of the act in either case. In view of the policy and broad scope of the act no one who wilfully utters in the hearing of others a threat against the life or limb of the President and thereby inflames or seeks to inflame other minds against constituted authority can shield himself by the plea that the words were uttered lightly or without intent to do bodily harm. If he wilfully utters a threat in the hearing of others he must be held to intend its necessary or probable effect upon other minds.

[5] The 2d cause of demurrer is that the words imputed to the defendant "do not import, express or contain a threat." The words are "The President ought to be shot and I would like to be the one to do

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it." It is strongly urged on the part of the defendant that these words do not constitute a threat, but are only the expression of opinion and desire. The contention on the part of the government is that these words are in substance equivalent to the words, "The President ought to be shot, give me the opportunity," or "if I have the opportunity, I will shoot him." A close question is here presented. In United States v. Stickrath, supra, the words were:

"President Wilson ought to be killed. It is a wonder some one has not done it already. If I had an opportunity, I would do it myself."

These words were held to constitute a threat within the meaning of the act. In point of significance I am unable to distinguish in substance the words there used from those set forth in the indictment in hand. The act denounces a threat, and does not distinguish between an absolute threat and one which is conditional. A threat is a threat whether conditional or absolute, and may have an equally sinister effect upon the minds of those hearing it. Further, the circumstances under which the words were uttered, the manner and tone of the utterance, what else was said on the occasion, and, in short, the res gestæ, may or may not be determinative of the question whether they were intended to operate or operated as a threat. In the absence of any other and sufficient ground of demurrer the words should be submitted to a jury with proper instructions from the court. I am not prepared and think it would be improper at this time to hold the uttered words did not constitute a threat against the life or limb of the President. The 2d cause of demurrer must, therefore, be held insufficient.

[6-8] The 9th cause of demurrer is as follows:

"9. Because the charge and accusation against said defendant of making an alleged threat to take the life of and to inflict bodily harm upon the President of the United States is made and averred in said indictment and in each count thereof, without legal or legally sufficient certainty, to enable said defendant subsequently to plead, enter a previous acquittal or previous conviction upon such charge in that no occasion upon which, and no manner or circumstances by or under which, and no definite place at which, and no means by which, and no person to whom, such alleged threat was made, are with certainty or otherwise averred in said indictment or any count thereof."

If under the act the bare utterance of an oral threat to take the life of or to inflict bodily harm upon the President were a punishable offense per se, whether heard by others or not, all possible prejudice to the defendant arising from the uncertainty pointed out in the 9th cause of demurrer could readily be obviated by means of a bill of particulars furnished by the government. On the above hypothesis each count of the indictment having set forth all of the essential elements of the offense under the act, the filing of a bill of particulars under the order of the court would not involve any usurpation of or encroachment upon the functions of the grand jury. For, while operating to obviate embarrassment in the production of evidence and to render certain the identity of the charge upon which an acquittal or conviction should be had, the bill of particulars would in no sense constitute part of the indictment or in any respect change or affect

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the nature of the offense therein set forth. If the sufficiency of an unheard oral threat be assumed, a case would be presented in which the filing of a bill of particulars setting forth the names of the person or persons in whose presence or hearing the threat was made and the circumstances of time and place would not only be permissible but desirable. The disposition of the 9th ground of demurrer is, therefore, dependent upon the question whether the indictment in any of its counts sets forth the essential elements of an oral threat punishable under the act. That point is raised by the 1st ground of demurrer, which is that "neither the indictment nor any count thereof states any offense against the statute." This ground of demurrer, I think, is well taken. An oral threat against the President, unheard by any one, cannot constitute the threat denounced by the statute. In an oral threat contemplated by the statute there are two essential elements: First, the utterance of the words, and, secondly, the hearing of the words by some person or persons other than the utterer. The use of the threatening words in an unheard soliloquy, whatever may be the intent or purpose with which they are uttered, is not an offense punishable under the act. Its manifest purpose was to punish the use by one of threatening words calculated to inflame or have a sinister influence upon the minds of others, and in the case of an oral threat the offense is not complete unless the words are uttered in the hearing of some other person or persons. The latter of the two elements essential to the offense, namely, the hearing of the oral threat as and when uttered, is not contained in the indictment, either expressly or by necessary implication. An averment that an oral threat was made does not necessarily imply that it was made in the hearing of any person other than the utterer. If an indictment should be found solely upon the strength of an admission by the defendant, testified to by witnesses, that he had made such threat but not in the hearing of any other person, and not upon any evidence that the threat as and when made was heard by any other person, there could be no conviction. And such supposed case is not inconsistent with the indictment as it stands. In view of the fact that the indictment does not in any of its counts aver expressly or by necessary implication that the oral threat was made in the hearing of any other person or persons it fails to state an essential element of the offense denounced by the act so far as it applies to oral threats. This omission cannot be supplied by the court without usurpation of the functions of the grand jury.

The demurrer must, therefore, be sustained.

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BELTZ v. GREAT WESTERN LEAD MFG. CO. et al.

(District Court, D. Delaware. May 8, 1918.)

No. 339.

1. ACTION ⇐53(3)—SPLITTING DEMANDS—SEPARABILITY OF CLAIMS.
Claim against individual defendants for recovery of $36,000 expended by complainant in developing mining property, and claim against corporation for stock and dividends, both claims being under single contract between parties for exploitation of mining property, *held* separable, in sense that, while they could both be enforced in one action, they could also be separately enforced; the action against corporation for stock and dividends being brought in federal court, as involving internal management of foreign corporation after state court had refused to pass on claim against company.

2. ACTION ⇐53(1)—SPLITTING DEMANDS.
There is no inflexible rule in equity against the splitting of demands, which may be done under special circumstances to avoid injustice.

3. JUDGMENT ⇐828(3)—RES JUDICATA—JUDGMENT OF STATE COURT.
Defendants, in suit in a federal court, are concluded by a decision, in complainant's prior suit in a state court to which they all were parties, as to a question there decided.

4. TRIAL ⇐388(1)—FINDING BEYOND JURISDICTION OF COURT.
Where state court ruled in stockholder's suit against his company and individual stockholders, that ownership of stock in foreign corporation was matter of internal administration, over which it had no jurisdiction, its finding that complainant paid nothing on his stock subscription, in addition to amount already paid, was erroneous.

5. CORPORATIONS ⇐189(12)—STOCKHOLDER AS SUPERINTENDENT—SALARY—EVIDENCE.
Evidence *held* to show that complainant stockholder was to receive from company, as superintendent, a salary of $125 a month, and was also to be credited for any outlay incurred by him in that capacity.

6. TRUSTS ⇐103(1)—TRANSACTIONS BETWEEN STOCKHOLDERS.
Where corporate stockholders agreed for development of mining property of company and division of stock in certain proportions, complainant stockholder's portion of capital stock was impressed with trust in his favor, in accordance with contract, and was not liable, either at law or in equity, without his consent to be taken and sold to other persons, save by due process of law.

7. CORPORATIONS ⇐189(12)—RIGHTS OF STOCKHOLDER—AGREEMENT—VIOLATION—SUFFICIENCY OF EVIDENCE.
Evidence *held* to show that complainant, stockholder in a lead and zinc mining company, was wronged and victimized by other stockholders, for whose acts the company was responsible, whom he benefited by taking them into the company under an agreement to divide the corporate stock, and who practically threw him out.

8. DEPOSITS IN COURT ⇐11—DISPOSITION BY JUDGMENT.
In stockholder's suit against company and other stockholders, company having become bankrupt, and other stockholders having paid into court amount of money to abide its order, with view to satisfaction, in whole or in part, of any demand determined to exist in favor of complainant, it being shown that by wrongful acts of his fellow stockholders complainant suffered loss of more than amount, he is entitled to receive entire amount, after deduction of costs.

In Equity. Suit by John Beltz against the Great Western Lead Manufacturing Company and others. Decree in accordance with the opinion.

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Edward G. Bradford, Jr., of Wilmington, Del., and Thomas Watson, of Pittsburgh, Pa., for complainant.

Daniel O. Hastings, of Wilmington, Del., and James Balph, of Pittsburgh, Pa., for defendants.

BRADFORD, District Judge. This suit was instituted by John Beltz against the Great Western Lead Manufacturing Company, a corporation of Delaware, hereinafter referred to as the company, to obtain, among other things, certain relief touching capital stock of the company claimed by him together with dividends declared thereon. In 1905 the complainant and some associates acquired a lease of a tract of land containing 104 acres in Jo Daviess County, Illinois, and began prospecting on it for lead and zinc ore. In October, 1908, the lead company was incorporated, with a capital of $500,000, divided into 10,000 shares of the par value of $50 each, and in November, 1908, by action of its board of directors and its stockholders the company purchased the above lease by issuing to the complainant and his associates its entire capital stock, full paid and non-assessable. Prior to April 10, 1912, the complainant acquired title to all the shares of the other stockholders, and $36,000 had been spent upon the leased tract, partly in the drilling of test wells to learn whether lead and zinc ore existed on the property, resulting in the discovery that such ore did exist there, but the limits of the ore deposit had not been definitely ascertained. The complainant had interested George H. Fritch and Samuel Garrison, two of the defendants, in the property, and an independent investigation had been made by or in behalf of those two defendants which disclosed the existence of a valuable deposit of ore. Finally, April 10, 1912, the complainant, F. E. McGillick, Fritch and Garrison, entered into an agreement, under seal, bearing that date, as follows:

"Memorandum of Agreement, made this 10th day of April, A. D. 1912, between John Beltz, F. E. McGillick, George H. Fritch and Samuel Garrison, all of the city of Pittsburgh, Pennsylvania.

"Whereas, said Beltz is the owner of all the capital stock of the Great Western Lead Manufacturing Company, a corporation organized under the laws of the State of Delaware, having its principal office in the town of Dover, in said state, which said corporation holds a lease on certain partially developed ore lands in Jo Daviess County in the State of Illinois—and whereas, the parties hereto have agreed to further develop said ore lands and, if ore is found in paying quantities, to operate the same, upon terms and conditions hereinafter set forth:

"Now this agreement witnesseth—First. That said Beltz shall and will deliver to the treasurer of the corporation all of the capital stock. Second. That of said capital stock, 2,000 shares shall remain in the treasury and be known as treasury stock, to be hereafter sold when and as ordered by the board of directors. Third. Three shares of stock shall be forthwith issued to each of the parties hereto, and three shares to M. J. Dain and J. McF. Carpenter, as required by the laws of Delaware—the shares issued to M. J. Dain and J. McF. Carpenter to be surrendered on request to the other parties hereto. Fourth. That when the development work has been completed, and if ore is found sufficient in quantity and quality to justify the erection of a mill, the remaining stock shall be issued in equal amounts to each of the parties hereto. Fifth. That upon signing this agreement each of the parties hereto shall pay to the treasurer of the corporation the sum of two hundred and fifty ($250.00) dollars, and a like sum, if necessary—to complete said develop-

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ment work and pay incidental expenses, said payment to be made within 30 days after notice that said sum, or any less sum is necessary to complete said work; it being distinctly understood that failure to make said payment as herein provided be deemed and taken as a surrender and cancellation of all right, title and interest of said defaulting party arising out of this agreement.

"It is further agreed, that if ore is found in paying quantities a mill for the reduction of said ore shall be erected, and that if sufficient stock has not been sold or cannot then be marketed, to pay the cost of constructing said mill, an assessment may be levied upon the stock issued, none of the parties hereto shall sell or pledge his stock or any part thereof, until he shall have offered same to the other parties hereto at such price as the proposed purchaser has offered in good faith to pay.

"The net profits derived from the operations contemplated shall be applied and distributed as follows: First, to the repayment to said parties of the sums severally advanced by them herein provided. Second after said sums have been repaid fifty per cent. (50%) of the net profits shall then be applied to the repayment of the sum of thirty six thousand ($36,000.00) dollars, which the said Beltz has already expended upon the leased premises above mentioned, and fifty per cent. (50%) shall be applied as dividends upon the stock of the corporation, until said Beltz has been paid in full. It is also agreed, that the parties hereto shall pay, if required, the sum of six hundred ($600.00) dollars in settlement of present debts against said corporation—said Beltz agreeing to pay any additional amount necessary to fully pay said outstanding claims. Said Beltz also agrees to protect his associates against any demands or claims of persons heretofore associated or interested with him in said lease.

"Witness our hands and seals the day and year aforesaid.

"John Beltz. [Seal.]
"F. E. McGillick. [Seal.]
"Geo. H. Fritch. [Seal.]
"S. Garrison. [Seal.]

"Witness: John H. McCloskey."

The complainant claims that he performed all things necessary to be performed on his part and that all necessary conditions had been complied with to entitle him to the relief he seeks in this suit. He charges that the company has appropriated to itself and refuses to deliver to him one equal fifth part of its capital stock, which fifth part he contends was held for his benefit or in trust for him by it under the terms of the agreement of April 10, 1912; and prays that the company be compelled to deliver to him the said one-fifth part of capital stock under and in accordance with the provisions of that agreement, and also to account to him for any and all dividends which have become payable thereon.

It appears that the complainant in November, 1914, brought a suit in equity in the court of common pleas of Allegheny County, Pennsylvania, against Garrison, McGillick, Fritch and the company, and also H. L. Williams, J. E. McGinnis and William I. N. Lofland. In that suit the complainant, to use the language employed by the counsel for the defendant, sought to do two things, namely:

"(1) To compel the defendant corporation to pay to the complainant 50% of the net earnings of the company declared in dividends until he had received $36,000, as provided in the contract of April 10, 1912, known as Exhibit B.

"(2) To compel an accounting by the individual defendants with respect to stock and to compel them to deliver to complainant the stock they unjustly withheld from him."

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A decree was made in September, 1915, in favor of the complainant so far as payment of the debt or sum of $36,000 out of net profits of the company was concerned, but the court made no decree touching his asserted right to an accounting for stock wrongfully withheld from him. The decree of the court of common pleas was affirmed by the supreme court of Pennsylvania May 23, 1916 (Beltz v. Garrison, 254 Pa. 145, 154, 98 Atl. 956, 958) which declared:

"After due consideration of all the assignments of error filed by the appellant, and the argument of learned counsel in support of them, we have not been convinced that any of them ought to be sustained, and the decree is, therefore, affirmed at appellant's costs on the facts found and the legal conclusions reached by the learned trial judge."

[1, 2] The defendants contend that the complainant is not entitled to any relief in this case for various reasons, one of them being that the cause of action under the contract of April 10, 1912, was single and entire and could not be divided, and that the affirmance on appeal of the decision of the lower court worked a final adjudication of the complainant's rights under that contract. Both the supreme court and court of common pleas recognized that the judicial tribunals there could not decide the question of the right asserted by the complainant to receive stock under the agreement of April 10, 1912, as involving the consideration of a matter of internal administration of the affairs of a foreign corporation "over which we have no jurisdiction." And for the same reason they could not go into the question whether the complainant had paid to the lead company an amount of money, or rendered to it services as superintendent, sufficient to entitle him to the receipt of stock. On this latter point the court of common pleas in its opinion on exceptions said:

"We made no finding relative to Beltz's right to stock, arising out of the agreement testified to by him that he was to receive a salary as superintendent so that we might not make any finding with reference to holdings of stock, which is a question of internal management."

It is insisted on behalf of the defendants that the proceedings in Pennsylvania preclude the granting to the complainant in this suit of relief touching any part of the subject-matter covered by the agreement of April 10, 1912. It is not asserted that the claim now made by him with respect to stock and dividends was passed upon by the Pennsylvania courts, by way either of allowance or disallowance. But it is contended that the two matters touching which relief was there prayed, namely, his right to recover the $36,000, and his right to receive stock and dividends, were practically, for the purposes of suit, one and indivisible, and that those courts, while establishing his right as to the $36,000, having failed to act upon his claim to stock and dividends, it is impossible to sustain in this suit any claim in that behalf. But neither the court of common pleas nor the supreme court of Pennsylvania regarded the two claims strictly as indivisible or inseparable; for, though both were disclosed in the pleadings, favorable action was taken upon one of them, while the other was simply ignored as involving a question of internal administration of a foreign corporation as to which there was lack of jurisdiction. On the part of the defendants attention is drawn to the fact that in the Pennsylvania suit the

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claim for the recovery of stock was made against the individual defendants, and not against the company, while here the claim is against the latter; and it is suggested that, had such claim been made in Pennsylvania against the company rather than the individuals, the court having a clear right to pass upon the claim for $36,000 could and would have passed upon the claim to stock and dividends. This is a violent assumption, in view of the judicial holding that there was no jurisdictional authority to pass upon matters involving the internal administration of foreign corporations. But, further, it is beyond all reasonable question that the two claims, although arising from the same contract, were separable in the sense that while they could both be enforced in one action they could also be separately enforced in two. Stark v. Starr, 94 U. S. 477, 24 L. Ed. 276; The Haytian Republic, 154 U. S. 118, 125, 14 Sup. Ct. 992, 38 L. Ed. 930; Land v. Ferro-Concrete Const. Co. (D. C.) 221 Fed. 433, 439; Boyd v. Atlantic Coast Line R. Co. (D. C.) 218 Fed. 653, 658; Union Cent. Life Ins. Co. v. Drake, 214 Fed. 536, 547, 131 C. C. A. 82; Johnson v. Herold (C. C.) 161 Fed. 593, 598. The same evidence could not establish both claims. Evidence supporting the claim for the $36,000 could not support the claim for stock and dividends, and, conversely, evidence supporting the latter claim could not support the former. The proofs respectively required were essentially different. The complainant sought in the Pennsylvania suit to establish both claims. There was no omission or laches on his part in the matter. The objection came from the defendants who demurred to the whole bill on the ground that the suit involved an adjudication as to the internal management of a foreign corporation which could not be done. The demurrer was overruled, as the portion of the bill relating to the claim for the $36,000 was on its face unobjectionable. The complainant, however, in view of the objection taken by the defendants and the Pennsylvania doctrine of judicial abstention from passing upon the internal administration of foreign corporations, withdrew or abandoned that portion of the bill claiming stock and dividends, and adduced no evidence with respect to payments made or credits given to entitle him to capital stock claimed by him and dividends thereon. And the court of common pleas said with reference to this matter:

"The plaintiff withdrew that part of his case, and we have not considered or adjudicated it."

Consequently the complainant brought the present suit. Under these circumstances a decision by this court sitting in equity that the complainant is by reason of the proceedings in Pennsylvania barred or precluded from enforcing here whatever claim he has to stock of the company and dividends thereon under and by virtue of the agreement of April 10, 1912, would fall little short of a travesty upon the administration of justice. Further, there is no inflexible, cast iron rule in equity against the splitting of demands. It may be done under special circumstances to avoid injustice; and this case presents such circumstances.

The question is now presented whether the complainant did not become entitled under and by virtue of the agreement of April 10, 1912,

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and action had thereunder, to receive from the company a portion of its capital stock together with dividends declared and payable thereon. The defendants claim that the agreement of April 10, 1912, was not binding upon the company for the reason that it never executed, adopted or ratified it. But in the Pennsylvania suit it was specifically found that the company was bound by that agreement. In the opinion of the court of common pleas it is stated:

"The important question is whether the corporation is bound by the terms of the contract. At the moment when it was signed the four individuals could not bind the corporation but, having settled the terms upon which the property was to be operated they immediately took their places in the corporation, through which the contract was to be performed, and being all of the directors (except one nominal director) and all of the stockholders, the contract was carried out so far as it could be done, that is, the corporation purchased Beltz's stock and the four individuals paid into the treasury the agreed price. It was one transaction. It was for the benefit of the corporation. It was without funds and had no assets, except the property, and could not raise any money. The stock which Beltz delivered was ultimately sold for $23,525. The fact that the capital was later decreased and then increased does not affect this conclusion. * * * The promise to pay was not renewed after Garrison and Fritch became directors and did not appear upon the minutes, but the transfers of stock were upon the records of the company. The adoption of a contract may be inferred from acts done, although no resolution is passed. Bagaley v. Iron Co., 146 Pa. 478 [23 Atl. 837]. The company received the benefits and cannot be relieved of the burden. The principle upon which a corporation is held liable for the acts of its promoters is, that it cannot receive benefits without assuming the burdens: Bell's Gap R. R. Co. v. Christy, 79 Pa. 54 [21 Am. Rep. 39]; Girard v. Case Co., 225 Pa. 327 [74 Atl. 201]. There is more reason for applying this to a contract by individuals about to become the directors and the holders of all of the stock of a corporation in existence than there is for applying it to a case of promoters."

[3] The bill in this case was originally brought only against the company, but, March 14, 1917, before final hearing, by leave of the court, Garrison, Williams, McGinness and Fritch intervened as co-defendants with the company, the four intervenors together with the company being parties defendant in the suit brought by the complainant in the Pennsylvania court of common pleas. The defendants in this suit are concluded by the decision in Pennsylvania on the question of the binding force of the contract upon the company.

The agreement of April 10, 1912, provides that:

"Said Beltz shall and will deliver to the Treasurer of the corporation all of the capital stock."

The defendants claim that he never owned and never delivered to the company all of the shares of its capital stock. The court of common pleas found as a fact that:

"Soon after April 23, 1913, Beltz assigned and delivered to the treasurer of the corporation for cancellation all of the stock called for by the contract."

The agreement did not limit the time within which the stock should be delivered. The court of common pleas in its opinion on exceptions said:

"Beltz was to deliver to the treasurer all of the stock, and he did so."

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And in this case it has been admitted that Beltz had delivered to the company the entire amount of its capital stock,—10,000 shares. The fact that when Beltz delivered all of the stock to the treasurer of the company it was so delivered for cancellation is immaterial so far as the complainant's rights are concerned. It having been decided to reduce the capital stock of the company from $500,000 to $10,000 it was necessary that the stock which Beltz held subject to delivery should be cancelled in order that stock might be issued in accordance with the new arrangement. And unless such new arrangement was inconsistent with the rights of the stockholders it could not abrogate or terminate the agreement of April 10, 1912. It appears that the stock was reduced from the larger to the smaller sum in order to avoid the payment of an undue amount of tax, but not for the purpose of altering the proportionate interests of McGillick, Garrison, Fritch and Beltz in the capital stock of the company. The court of common pleas refused to find that:

"The agreement of April 10th, 1912, was abandoned and abrogated, and the agreement as to starting anew on the basis of a capital of $10,000 and getting in new men, and more money, was substituted."

The court in its opinion on exceptions said:

"Beltz was to deliver to the treasurer all of the stock, and he did so. 2,000 shares, or one-fifth, were to be treasury stock to be sold. The capital was reduced to $10,000, and there was sold to Williams and McGinness $2,000, or one-fifth. If ore is found sufficient to justify a mill, the remaining four-fifths of the stock were to be divided. If sufficient stock has not been sold to erect a mill, an assessment may be levied. An assessment, as such, was not made, but each of the four subscribed for $1,000 of stock. This was a substantial compliance with the plan outlined in the contract. The reduction in the capital was not a departure, as the proportionate interests remained the same. The contract made no provision for raising additional capital except by assessment. The sale of stock and the increase in capital found in the eighth finding, are not a departure from the spirit of the contract and do not indicate an abandonment. The agreement made, when the parties subscribed to $1,000 stock (seventh finding) that they were to receive credit for the amount paid in under Exhibit B is more consistent with its continued existence than with an abandonment."

The defendants further claim that the agreement of April 10, 1912, was abandoned January 2, 1913, and a new agreement entered into by the parties. In the answer it is alleged that on the latter date a new agreement essentially different from the original was entered into by Garrison, Fritch, McGillick and Beltz, consisting of the earlier agreement subject to a marginal modification, as follows:

"Pittsburgh, Jany. 2nd, 1913.

"We and each of us hereby agree that we will return to the treasury of the Great Western Lead Mfg. Co. out of the two thousand (2,000) shares of stock in said Co. allotted under this agreement to each of us the amount of twelve hundred (1,200) shares, to be sold so as to bring the treasury the sum of six thousand ($6,000) dollars. We also agree that each of us will pay in addition to the six hundred and fifty dollars already paid in by us the sum of three hundred and fifty ($350) dollars."

With respect to this marginal modification the court of common pleas in its findings of fact said:

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"On January 2, 1913, they executed an amendment to the contract, Exhibit B, that they would return to the treasurer of the corporation out of the 2,000 shares of the stock allotted to each of them 1200 shares to be sold so as to bring the treasury stock to the amount of $6,000 and agreed that they would pay in addition to the $650 already paid in by them the sum of $350. This agreement was not performed and was abandoned."

In the answer it is alleged:

"A new agreement was entered into by said Garrison, Fritch, McGillick and Beltz, the complainant, sometime in February or the first part of March, 1913, by which it was provided that the agreement as made January 2, 1913, * * * was abrogated and rescinded."

The specific findings in the Pennsylvania suit that "the corporation is bound by the contract, Exhibit B," and that "the subsequent modifications in the distribution and sale of stock is not an abandonment" are a sufficient answer to the claim of abandonment, abrogation or rescission now made by the defendants.

[4, 5] The defendants contend that the complainant paid only $475 under the provisions of the agreement of April 10, 1912, and is entitled to no other or further credits upon his stock subscription. This position I deem untenable. It is true that in the Pennsylvania suit the court of common pleas found that the complainant "paid nothing in addition to the $475 already paid under the contract, Exhibit B." But this finding was made under circumstances which deprive it of any binding effect upon the complainant, and further, was clearly erroneous. As before stated, it was expressly ruled in that suit that the ownership of stock in a foreign corporation was "a matter of internal administration over which we have no jurisdiction," and entertaining that view the court of common pleas used the language already quoted, namely:

"We made no finding relative to Beltz's right to stock, arising out of the agreement, testified to by him, and that he was to receive a salary as superintendent, so that we might not make any finding with reference to holdings of stock, which is a question of internal management."

In the agreement of April 10, 1912, it was provided that upon signing it each of the parties thereto should pay to the treasurer of the company $250, and also a further like sum "if necessary to complete said development work and pay incidental expenses, said payment to be made within 30 days after notice that said sum, or any less sum, is necessary to complete said work." And it was further provided, that failure to make such payment should be "deemed and taken as a surrender and cancellation of all right, title and interest of said defaulting party arising out of this agreement." It was further provided "that if ore is found in paying quantities a mill for the reduction of said ore shall be erected, and that if sufficient stock has not been sold or cannot then be marketed, to pay the cost of constructing said mill, an assessment may be levied upon the stock issued;" and further, that "none of the parties hereto shall sell or pledge his stock or any part thereof, until he shall have offered same to the other parties hereto at such price as the proposed purchaser has offered in good faith to pay." It was also further provided that "when the develop-

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ment work has been completed, and if ore is found sufficient in quantity and quality to justify the erection of a mill the remaining stock [four-fifths of the whole] shall be issued in equal amounts to each of the parties hereto." The complainant testified that shortly after the execution of the agreement of April 10, 1912, he had an arrangement with the directors under which the salary of $125 a month was to be allowed him as superintendent of the company's operations in Illinois; that the salary "was to be applied as against whatever expenses were being incurred in putting the money into the treasury of the company; I was not to pay any money into the treasury of the company, but my salary was to be applied as against that." Garrison, the president of the company, denies that any such arrangement was made with the complainant. And the minutes of the company do not disclose the appointment of the complainant as superintendent at a salary or any understanding that he was to be allowed a credit for outlays by him while acting in such capacity. But the performance of an act or the existence of a fact does not depend upon the record which may be made of it, and the silence of the minutes does not afford conclusive evidence that it has not transpired. It appears that there was much looseness or carelessness in the making or omission to make entries in the minutes of the proceedings of the directors. The complainant's statement on this subject is natural and inherently probable and he is corroborated by McGillick, one of the directors. The latter testified that the complainant "was to receive one hundred and twenty-five dollars per month," and "was to generally superintend the proposition, run the work and look after the buying of materials, and the general interest of the company." Confirmatory evidence of the truth of the complainant's statement in this connection is furnished in a letter from Garrison to the complainant under date of February 11, 1913, in which the former said:

"We are willing to do anything we can to help and we are not asking you to contribute to the money that we have to raise here," etc.

Both the weight of the evidence and the probabilities of the case support the conclusion that the complainant was to receive from the company as superintendent a salary of $125 a month, and was also to be credited for any outlays or expenses made or incurred by him in that capacity. His duties as superintendent clearly were not embraced among those he owed as director. I shall not undertake to enter by way of discussion into the labyrinth of details involved in the ascertainment of the amount to which the complainant became entitled as a credit upon the part or proportion of stock he might have a right to claim under the agreement of April 10, 1912, by reason of his services as superintendent and his outlay of moneys while acting in that capacity. I am satisfied by the evidence, oral and documentary, direct and circumstantial, that such amount is, as claimed by the complainant, $3,195.92, of which $1,375 consisted of his salary for eleven months.

The defendants further contend that pursuant to various resolutions of the directors and stockholders of the company its shares of stock

were so distributed that there remain no shares for the complainant other than nine and one-half shares on which he has received dividends. But the fact that no additional shares were left for him affords no justification or excuse for a wrongful disposition of stock which the complainant was entitled to receive, nor can it bar him from receiving appropriate redress under the prayer for other and further relief.

[6] The agreement of April 10, 1912, provided that the parties should pay, if required, the sum of $600 in settlement of the debts then existing against the company, the complainant agreeing to pay "any additional amount necessary to fully pay said outstanding claims," and further, that the complainant would "protect his associates against any demands or claims of persons heretofore associated or interested with him in said lease." But there is no proof of claims against the company then outstanding exceeding $600 nor that the company has ever been disturbed in its enjoyment of the leased property or that either the company or his associates therein had been compelled to settle any demands or claims made upon them by any person or persons theretofore interested or associated with him in the lease. The agreement of April 10, 1912, provided, as has appeared, that when the development work had been completed and if ore should be found in quantity and quality to justify the erection of a mill 8,000 shares of the capital stock, being the entire stock after deducting 2,000 shares which were to remain as treasury stock, to be thereafter sold when and as ordered by the board of directors, should be issued in equal amounts to Beltz, McGillick, Fritch and Garrison. It has been established that the development work was completed and that ore was found sufficient in quantity and quality to justify the erection of a mill, and that a mill was accordingly erected. It is admitted in the defendants' brief that "ore was found on said land about September 1, 1913, in sufficient quantity and quality to justify the erection of a mill." The complainant thereby presumptively became entitled to receive one equal fifth part of the total capital stock, namely, 2,000 shares, amounting to $100,000 on a capitalization of $500,000, or 40 shares amounting to $2,000 on a capitalization of $10,000, or 100 shares amounting to $5,000 on a capitalization of $25,000. Yet with the exception of 9½ shares, representing $475 at par, and dividends thereon during a certain period, the defendants have refused to recognize any right, title or claim on the part of the complainant to either stock or dividends. The agreement of April 10, 1912, while contemplating and providing for the issuance and sale of the treasury stock, being one-fifth of the total capital, so far as necessary "to pay the cost of constructing said mill," provided for the payment of the balance, if any, of such cost of construction through an assessment, and only through an assessment, to be levied upon the four-fifths of the stock to be issued respectively to the four parties to the agreement. It is proved and admitted that no such assessment was ever made and that stock, other than treasury stock, was sold for the purpose of defraying the cost of developing and operating the property. Such sale so far as it encroached upon the part or proportion of the capital stock coming

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to the plaintiff under the provisions of the agreement of April 10, 1912, was made against his consent and protest and in violation of his right to have such part or proportion remain unimpaired and undiminished save in so far as necessary to enforce the payment of an assessment duly levied. Under the operation of the agreement the complainant's share or proportion of the capital stock was impressed with a trust in his favor and was not liable either at law or in equity without his consent to be taken and sold to other persons save by due process of law, which was not resorted to. I am not aware of any provision in the laws of Delaware or of any principle of law or equity which can be successfully invoked to justify or excuse the action of the defendant or its directors in their attempt to strike down the rights of the complainant through an unauthorized, arbitrary and illegal disposal of the stock to which he was entitled.

The prime cause of difficulty in this case was the wrongful departure by the defendant and its directors from an observance of the plain and unmistakable provisions of the contract of April 10, 1912. This action on their part necessarily introduced into the case confusion and complication and has resulted in an adoption by them of an arbitrary and oppressive course toward the complainant.

[7] It is admitted in the answer that out of the total issue of 500 shares constituting the capital stock of the company as raised to $25,000, 29½ shares remain in the treasury of the company; 9½ shares have been issued to the complainant; 147 shares are held by the other parties to the contract of April 10, 1912, namely, McGillick, Fritch and Garrison; and 314 shares are in the names of other persons. The whole 500 shares are thus accounted for. 147 shares issued to McGillick, Fritch and Garrison, if divided equally between them, would be 49 shares for each. Having been issued at par each of them has received dividends amounting to 200%, beginning May 29, 1914, up to November, 1915, and since the latter date 165% additional, aggregating 365%. Thus McGillick, Fritch and Garrison have each received in dividends $8,942.50. The complainant received on 9½ shares, the par value of which was $475, 200% in dividends, from May 29, 1914, until November, 1915, aggregating $950, but has received no additional dividends. Thus he has received by way of dividends only $950 as against $8,942.50, received by each of the other parties to the agreement of April 10, 1912. And this is the net result so far as dividends are concerned of his association and dealings with the defendants in this case. The complainant is a man of but little education, and undoubtedly inconsistencies and discrepancies on minor points are disclosed in his testimony. But it is against the dictates of self-interest and the known rules of human conduct that after acquiring the mining lease and turning it over to the company in consideration of which its total capital stock was issued, he should in surrendering the stock to the company under the agreement of April 10, 1912, have intended or contemplated that it would be so manipulated as to produce the grotesque result the defendants seek to justify. On the evidence I am satisfied that the complainant was wronged and victimized by persons, for whose acts the company was responsible, whom he benefitted by

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taking them into the company under the agreement of April 10, 1912, and who have practically thrown him out.

[8] After the filing of answer in this case the company went into bankruptcy, and it is not possible for the complainant to receive adequate redress as against it. But the four individual defendants and J. B. Laubach, against whom proceedings in civil contempt had been instituted for alleged violation of the restraining order theretofore awarded in this suit, each paid into the registry of this court the sum of $1,500, aggregating $7,500, to abide the further order of the court, with a view to the saitsfaction in whole or in part of any demand which should be determined to exist in favor of the complainant by reason of the matters involved in this suit. I am satisfied that under the prayer for other or further relief the complainant is entitled to redress at least in part for the wrong he has suffered at the hands of the defendants. The sum of $3,195.92 for which the complainant is entitled to claim credit on account of his part or proportion of stock under the agreement of April 10, 1912, is largely in excess of the par value of the stock issued at par to each of the other parties to that agreement on which each has received dividends aggregating $8,942.50. If dividends amounting to 365% should be allowed to the complainant upon only a similar amount, namely, $2,450, and further, if the amount received by him by way of dividends on the 9½ shares from May 29, 1914, to November, 1915, namely, $950, be deducted from the amount of dividends received by each of the other parties to that agreement, the amount which he is in equity entitled to receive would be $7,992.50, which is $492.50 in excess of the sum paid into court. The claim of the complainant being in excess of the amount so paid into court, he is entitled to receive the money so paid in after the deduction therefrom of the costs of this cause.

A decree in accordance with this opinion may be prepared and submitted.

UPSON NUT CO. v. AMERICAN SHIPBUILDING CO.

(District Court, N. D. Ohio, E. D. July 12, 1918.)

No. 9327.

1. COURTS ⇐342—EQUITABLE DEFENSE IN ACTION AT LAW—REFORMATION.
Where plaintiff sued at law for breach of contract, it was admissible for defendant by cross-petition to seek reformation of the contract, under Judicial Code, § 274b, as added by Act March 3, 1915.

2. REFORMATION OF INSTRUMENTS ⇐45(1)—EVIDENCE REQUIRED.
To warrant reformation of written instrument for mistake provable only by oral testimony, the evidential force of the written contract must be clearly and adequately overcome; but if the contract written was highly improbable, and one for which there was no motive, necessity, or consideration, a relatively small amount of clear and credible evidence will establish the mistake.

3. REFORMATION OF INSTRUMENTS ⇐45(2)—EVIDENCE REQUIRED.
If a written contract was the reduction of preliminary written negotiations, only a mutual mistake in the reduction of the agreement to writing need be established to warrant reformation.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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4. SALES ⟸36—MISTAKE OF LAW.

Where plaintiff purchased defendant's accumulation of steel scrap, approximating 8,200 tons, and mailed an order in usual form, which called for the exact amount of 8,200 tons, plaintiff's mistake in assuming that the agreement called for an exact tonnage was one of law, and, not being disclosed to defendant, did not modify the written terms of the original contract.

5. REFORMATION OF INSTRUMENTS ⟸45(2)—CONTRACTS—EVIDENCE—SUFFICIENCY.

Evidence *held* to warrant reformation of written contract for sale of 8,200 tons of steel scrap, to conform to the original contract embodied in letter by which defendant offered to sell and plaintiff agreed to buy defendant's accumulation of steel scrap, approximating 8,200 tons.

6. REFORMATION OF INSTRUMENTS ⟸25—RIGHT TO REMEDY.

Defendant, having agreed to sell its accumulation of steel scrap, honestly but mistakenly estimated at 8,200 tons, could not be denied relief of reformation of the contract, so as to call for its accumulation, approximating 8,200 tons, when the contract as finally reduced to writing called for the exact amount of 8,200 tons.

7. REFORMATION OF INSTRUMENTS ⟸32—RIGHT TO REMEDY—EFFECT OF LACHES.

Where contract expressed by letters called for sale of defendant's accumulation of steel scrap, approximating 8,200 tons, and plaintiff's order blank called for the exact amount of 8,200 tons, laches could not be imputed to defendant, after receiving the order, in failing to notify plaintiff that it would deliver only its accumulation, since defendant could not be held to anticipate that plaintiff would make a claim other than that embodied in the contract as originally written.

At Law. Action by the Upson Nut Company against the American Shipbuilding Company, wherein defendant filed cross-petition. Decree for defendant upon its cross-petition.

Cook, McGowan, Foote, Bushnell & Lamb, of Cleveland, Ohio, for plaintiff.

Hoyt, Dustin, Kelley, McKeehan & Andrews, of Cleveland, Ohio, for defendant.

WESTENHAVER, District Judge. This action was begun in the state court and removed here because of diversity of citizenship. Plaintiff's petition herein alleges in a first cause of action that on or about October 12, 1915, it entered into a contract in writing with defendant whereby it agreed to buy and the defendant agreed to sell 4,200 gross tons steel scrap, to be shipped at a rate not exceeding four cars a day, from the accumulation defendant then had on hand at its Cleveland yard; and in a second cause of action it alleges a similar contract of the same date for 4,000 gross tons steel scrap, to be shipped at a rate not exceeding four cars a day from the accumulation then had on hand at its Lorain yard. It is further alleged that plaintiff received only 2,685.50 tons from the Cleveland yards, leaving 1,514.50 tons undelivered, and that it received only 3,706.47 tons from the Lorain yards, leaving 293.53 tons undelivered, and that defendant has refused to make further deliveries on either contract.

[1] Defendant has added to its answer what is therein called a

second defense and cross-petition, seeking reformation of these two written contracts on the ground of a mutual mistake of the scrivener in reducing to writing the true and actual agreement of the parties as made. This method of pleading an equitable cause of action by answer in the nature of a cross-petition, rather than by an independent suit in equity, is now permissible under section 274b, an amendment to the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1164) approved March 3, 1915 (Act March 3, 1915, c. 90, 38 Stat. 956 [Comp. St. 1916, § 1251b]). The issues arising upon this cross-petition have been tried to the court in advance of the trial of the issues in the law action.

Defendant's contention, in brief, is that the actual agreement made with the plaintiff was one for a sale of its then present accumulation of steel scrap at its Cleveland yards, approximating 4,200 gross tons, and a like sale of its present accumulation of similar material at its Lorain yards, approximating 4,000 gross tons, and that, after this agreement had been made by the parties, plaintiff's bookkeeper, acting as a scrivener, in preparing the two written contracts sued on, through inadvertence or mistake, failed to embody correctly therein the terms of the actual contract, but, instead, through mistake or inadvertence, framed the contracts so as to make them a sale of 4,200 gross tons of steel scrap from the accumulation on hand at the Cleveland yards, and 4,000 gross tons from the accumulation on hand at the Lorain yards.

The materiality of the mistake, if one such was made, is quite apparent. If the contract should be reformed as defendant contends, it has performed it by delivering its accumulation of steel scrap, both at its Cleveland yards and at its Lorain yards; but, if not reformed, it probably remains liable for plaintiff's damage due to nondelivery. Brawley v. United States, 96 U. S. 168, 24 L. Ed. 622; Inman Bros. v. Dudley & Daniels Lumber Co. (6 C. C. A.) 146 Fed. 449, 76 C. C. A. 659.

[2] The principles and conditions under which equity will reform a written contract for mutual mistake are well settled, and counsel do not really differ as to what they are. All will agree that written contracts can only be reformed when the mistake is proved by clear and satisfactory evidence of such cogency as will satisfy the court. A sufficient statement of these principles and of certain rules for weighing and appraising evidence in such a suit will be found in Biser v. Bauer (6 C. C. A.) 205 Fed. 229, 123 C. C. A. 417. Thus it appears if the evidence of the mistake depends upon oral testimony and the recollection of witnesses, or if the written contract is itself the result of adversary negotiations and the only embodiment of the terms in writing, then the evidence will not be regarded as clear and satisfactory, unless the evidential force of the written contract itself is clearly and adequately overcome. On the other hand, if the environment and the motive of the parties, the consideration and the necessities to be met, make the contract as it is written a highly improbable one, one for which there was no motive, or necessity, or consideration, then the writing has little self-supporting force, and a

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relatively small amount of clear and credible evidence will establish the mistake.

[3] So, likewise, if a contract was actually made, and this is evidenced by preliminary documents, and the charge is that the mistake was in embodying these preliminary terms in the more formal written document subsequently signed, the written document has little self-supporting force, and will be much more easily overcome than when the mistake is to be established by oral evidence, especially when the mistake inheres in the contract itself and not in the embodiment thereof in the final written form. In the last analysis the mistake must be mutual, but in the class of cases last referred to it is necessary only to allege and prove a mistake in the reduction of the agreement to writing, and not a mistake in the making of the contract itself.

In the instant case nearly all the testimony is embodied in five letters exchanged between the plaintiff and defendant; indeed, it may be said that all the controlling, if not all material, evidence is contained therein. This evidence, briefly summmarized, shows the following facts:

Prior to September 29, 1915, and during the preceding five years, defendant had accumulated at six different shipbuilding yards on the Great Lakes, among them its yards at Cleveland and Lorain, Ohio, certain quantities of what is known as steel scrap. This scrap consisted of plate and shape shearings, punchings, and scrap rivets and bolts. It had carefully estimated the quantity of such scrap for inventory purposes at 4,146 gross tons in its Cleveland yards, and 4,016 gross tons in its Lorain yards. Prior to this date there had been no market or demand for scrap. On September 29, 1915, defendant sent to the plaintiff and others a letter in which it said:

"We estimate that we have on hand at the present time approximately the following amount of steel scrap at the points mehtioned."

Among the points thus mentioned were the Cleveland and Lorain yards. This letter further stated:

"A proposition is requested on all or any portion of this scrap you could use."

Opportunity is offered to examine the scrap, and a desire is expressed to close up the matter within the next week or ten days. The plaintiff, by Mr. Bingham, its representative, acknowledges receipt of this letter under date of September 30, 1915, and expresses an intention to submit a proposition, and a hope that it might be able to secure at least a portion of the scrap.

Some testimony was offered as to whether or not Mr. Bingham, before submitting the proposition as requested, examined this scrap in person. There is some conflict in the testimony on this point; but whether he did so or not is, it seems to me, immaterial. Both sides agree that he did not see the scrap at the Lorain yards, and he himself admits that he saw a part of that in the Cleveland yards by looking through a fence, and that he visited the yards and saw it in this manner before plaintiff's proposition was submitted. The remaining three letters are of such vital importance that I quote them in

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full, omitting only the printed letter heads. The first from plaintiff to defendant reads as follows:

"Cleveland, Ohio, October 8, 1915.

"American Shipbuilding Co., Mr. N. S. Thrasher, Pur. Ag't, Cleveland—Gentlemen: confirming phone conversation of to-day, we are pleased to offer you, for your present accumulation of steel scrap at your Cleveland plant, which you say approximates 4,200 gross tons, $14 per gross ton f. o. b. cars your works. As advised, we would prefer to handle only this quantity of scrap, but are glad to offer you $13.75 f. o. b. cars your plant, Lorain, Ohio, for your accumulation of similar material, approximating 4,000 tons. These prices are made with your assurances that, in the event of our obtaining one or both lots, you will ship the material no faster than at the rate of four cars per day, and we hope you will be able to slightly decrease this rate. This proposition, we understand, will be decided within the next few days. Trusting that we shall be able to secure the material, we remain,

"Yours very truly, The Upson Nut Company,
"H. P. Bingham, Ass't Treasurer."

This is stamped by defendant:

"Received Oct. 9, 1915, Purchasing Dept. Answered 10/12/15."

The answer referred to is as follows:

"Cleveland, Ohio, October 12, 1915.

"The Upson Nut Company, Mr. H. P. Bingham, Asst. Treasurer, City—Dear Sir: Referring to your letter of the 8th instant, and confirming telephone conversation with you, this p. m., we hereby accept your proposition to take from us our present shipyard steel scrap accumulation, consisting of plate and shape shearings and punchings and scrap rivets and bolts, at our Cleveland and Lorain plants, estimated at about 8,150 tons, at the following prices, terms, and conditions: For the Cleveland portion—$14.00 per gross ton f. o. b. cars our Cleveland shipyard; for the Lorain portion—$13.75 per gross ton f. o. b. cars our Lorain shipyard. Terms: Net cash thirty days. Scrap to be shipped at the rate of not to exceed four cars per day, all told, starting at once, and continuing until completed. Scrap to be billed to you as shipped.

"Please give us immediately a written confirmation of this order, and also give us definite shipping instructions for the material from each plant.

"Very truly yours, N. S. Thrasher, Purchasing Agent."

The request for a written confirmation contained in the last paragraph thereof brought from plaintiff the following:

"Cleveland, Ohio, October 13, 1915.

"The American Shipbuilding Co., Mr. N. S. Thrasher, Pur. Ag't, Cleveland—Gentlemen: This acknowledges your letter of October 12th confirming sale to us of your Lorain and Cleveland accumulation of steel scrap. Our formal order, per your request, has already gone forward.

"Confirming phone advices of this morning, charging box size, as designated on our formal order, simply means material under 6 feet in length and no plate or other piece wider than 18 inches.

"Again thanking you, we remain, yours very truly,

"The Upson Nut Company,
"H. P. Bingham, Ass't Treasurer."

This was stamped by defendant, "Received Oct. 14, 1915, Purchasing Dept.," but not answered.

Defendant earnestly insists that these letters show an express agreement in writing such as it contends was made; i. e., a sale only of its present accumulation of steel scrap at its Cleveland and Lorain yards, estimated to contain a certain number of tons, and not a sale

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of a fixed tonnage. The oral testimony to be considered in deciding whether or not this contention is sustained consists at most of three telephone conversations between Mr. Thrasher and Mr. Bingham. One of these, between the letter of September 29th and that of October 8th, relates to the modification of the price from $13.62 to $13.75 for the scrap at the Lorain yards. This is the purport of Mr. Bingham's testimony, and is plainly inferable from the October 8th letter. The second telephone conversation was evidently on October 12th, and is referred to in the letter of that date. Neither Mr. Bingham nor Mr. Thrasher gives the details of this conversation. The testimony of Mr. Bingham, presently to be referred to, may, however, relate to this conversation, or to the other referred to in the letter of October 13th, at which time another conversation was had.

Mr. Bingham says the figures, 4,200 tons for the Cleveland yards, and 4,000 tons for the Lorain yards, were fixed for the written contracts signed by the parties as the result of a telephone conversation between him and Mr. Thrasher. Mr. Thrasher gives no specific testimony to the contrary. This is probable, for it will be noted the letter of October 12th places the total tonnage at 8,150 tons, which is 50 tons less than the figures in the letter of October 8th, and also is not divided between the different yards. It is therefore probable that the apportionment was mentioned in a telephone conversation, either the conversation referred to in the letter of October 8th or that of October 12th. The third conversation refers to another telephone conversation, the terms of which no witness gives, but the purport of which is shown in the last paragraph of this last letter.

In my opinion, this oral testimony neither adds to nor takes from the probative effect of these three letters. The telephone conversations appear in each instance to have been immediately confirmed by a letter. The parties did not rely on the telephone conversations as embodying a part of their contract, but reduced the same forthwith to writing by embodying them in these letters. Mr. Bingham's statement that he got the figures, 4,200 tons for the Cleveland yards, and 4,000 tons for the Lorain yards, from Mr. Thrasher in one of these conversations, is consistent with the letters themselves, and does not call for a weighing of conflicting oral testimony.

Let us, therefore, examine these letters. The first letter of September 29th may, in one aspect, be regarded as an offer to sell a fixed tonnage out of the accumulation of steel scrap estimated to be on hand. This aspect ceases to be of importance because it wholly disappears from the proposals actually made and accepted, as embodied in the letters of October 8th, 12th, and 13th. The October 8th letter was evidently carefully prepared, and bears internal evidence that it was designed to express in final form a detailed proposition to be accepted by the defendant. It was prepared after the telephone conversation, and was written for the purpose of confirming that conversation. The offer is "for your present accumulation of steel scrap at your Cleveland plant, which you say approximates 4,200 gross tons" and "for your accumulation of similar material, approximating 4,000

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tons, at your Lorain yards." The acceptance thereof in the letter of October 12th is equally definite and certain. The language is:

"We hereby accept your proposition to take from us our present shipyard steel scrap accumulation, * * * estimated at about 8,150 tons."

The last paragraph requests a written confirmation and definite shipping instructions. The October 13th letter acknowledges the October 12th letter, "confirming sale to us of your Lorain and Cleveland accumulation of steel scrap." A more certain and definite agreement could not well be made. No term or condition is left open to be settled. No request or suggestion appears therein that the parties did not expect a final contract to result from the exchange of these letters, or that either party was to embody the contract thus made in a different form and submit it to the other for signature.

Taking these writings, and considering in connection therewith all the oral testimony, no other conclusion is warranted than that a definite agreement was made, and that this agreement was a sale merely of defendant's present accumulation of steel scrap at its Cleveland yards, approximating 4,200 gross tons, and at its Lorain yards approximating 4,000 gross tons. The evidence to sustain this finding is in writing, and does not depend on the slippery memory of interested witnesses, or on conflicting testimony. It is clear and convincing; it is of sufficient cogency to satisfy the mind of the court.

At this juncture Mr. Elliott, plaintiff's bookkeeper, intervenes in the transactions. Mr. Bingham, upon receipt of the October 12th letter, intrusted to this bookkeeper the preparation of the confirmation requested. Mr. Bingham testifies, and no doubt correctly, that he gave to this bookkeeper all the information which was used to fill out this confirmation order, and that he gave him the items of 4,200 tons for the Cleveland yards and 4,000 tons for the Lorain yards. The bookkeeper, in preparing the confirmation, made use of a purchase contract form or order blank used by plaintiff in purchasing material. This form has marginal headings as follows: "Quantity," "Material," "Shipment," "Price, F. O. B.," "Terms," "Remarks." The bookkeeper, in making distribution of the information contained in the letters or received from Mr. Bingham, placed opposite the heading "Quantity" 4,200 gross tons in one form or order, and 4,000 gross tons in the other form or order. He also placed opposite the heading "Shipment" in both forms, "Not to exceed 4 cars per day until completion of contract, from accumulation you have on hand," etc. The bookkeeper does not testify. Mr. Bingham, however, testifies that there was no intention of changing or modifying the terms as made in the letters of October 8th and 12th. His letter of October 13th confirms his testimony in this respect. He insists, however, that the purchase contract forms or orders are the same as those two letters; that they embody the same terms and correctly represent his then understanding of what were the terms and conditions agreed upon.

[4] Obviously this statement of Mr. Bingham is in itself a mistake; his intention or understanding must be for practical purposes infer-

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red from the language used by him; he could not have entertained such an understanding, in view of the language used by him in his letter of October 8th, except on the assumption that he did not understand the meaning or the legal effect of the words used. Furthermore, these purchase contract forms, thus filled out, bound the plaintiff to accept shipment at the rate of four cars per day from each yard; whereas, it was expressly agreed that shipment should be made not to exceed a total of four cars per day all told. No one contends that the purchase contract forms in this respect embody the understanding of any one. Mr. Bingham's entire good faith is not questioned; he may have honestly been under the impression that he was to get 8,200 tons, and that the language used by him conveyed that understanding; but such an understanding on his part, in the light of the language used, is not a permissible inference. It is on his part a mistake of law, and, not having been disclosed to the other party, will not be accepted as modifying or qualifying the written terms.

Plaintiff's bookkeeper forwarded the purchase contract forms, thus filled out, duly signed by the plaintiff, on October 12th, prior to the mailing of the letter of October 13th. Mr. Thrasher testifies that he thereupon signed and returned these purchase contract forms, believing that they embodied in substance the true agreement of the parties. He did note the mistake therein that eight cars might be shipped per day, and noted on the copy kept by him, after the words, "Not to exceed four cars per day," the following: "From Cleveland and Lorain together." He also noted, he says, the use of 4,200 tons in one and 4,000 tons in the other, but, observing that shipment was to be made from defendant's accumulation at its different yards, did not discover that the terms of the agreement, as made, were not correctly recorded therein.

[5] I am of opinion that the two purchase form contracts sued on do not correctly embody the contract actually made by the parties. Previous to the bookkeeper's labor of preparing these forms, a definite written agreement had been made. These forms were not prepared for any purpose other than to embody the terms of the agreement already reached. They were prepared and signed only to embody that agreement. Any departure from the terms previously agreed upon was unauthorized and unwarranted. That there was a departure is obvious, and, in my opinion, that departure was the result of an honest mistake or inadvertence on the part of the scrivener, aided, it may be, by Mr. Bingham, in recasting the language and fitting it to the purchase form of contract. If the changes were intentional, and not called to the attention of the other contracting party, the good faith of plaintiff's agents participating therein would be seriously impugned. I am therefore of opinion that all the conditions necessary to warrant a court of equity in reforming a written contract are here present, and that the two contracts sued on should be reformed, so as to express the actual agreement of the parties.

[6] This conclusion, moreover, agrees with the inherent probabilities. The defendant was not a dealer in steel scrap, and this the

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plaintiff well knew. This scrap had been accumulated in defendant's shipbuilding operations during a period of several years. It was desirous of getting rid of that accumulation. It is not probable that the defendant would agree to sell that which it did not have on hand, for the reason that similar scrap probably could not be obtained in the market or anywhere. It is equally improbable that it would desire to sell 4,200 tons out of a possible 4,250, leaving a small residue of indefinite amount undisposed of. The probability is that defendant at all times intended to sell a specific accumulation of scrap in a specific place, be it a greater or less amount. Nothing appears to impeach its good faith in representing this estimated amount at the figures contained in the correspondence. It is not to be denied relief because of any error in an estimate thus made in good faith and without any fraud or intentional wrongdoing.

[7] Plaintiff further urges that defendant's negligence or laches should bar the relief sought. This negligence is said to consist in not discovering sooner this mistake in the purchase contract forms and calling it to plaintiff's attention. Plaintiff's injury resulting therefrom is said to be that the price of scrap rose rapidly during the period of shipment, and that when defendant, after shipping its entire accumulation, refused to ship more, it was then too late for the plaintiff to protect itself by purchasing other scrap in the market needed in its business, except at a higher price. This contention is not sound. Negligence or laches cannot on these facts be imputed to the defendant. A similar contention was made and is fully discussed in Griswold v. Hazard, 141 U. S. 260, 286, 287, 11 Sup. Ct. 972, 35 L. Ed. 678. Defendant was under no necessity for acting until plaintiff made some effective effort to establish a liability otherwise than in accordance with the actual terms of the contract between the parties. It had fully performed this contract by shipping and delivering all its then present accumulation of scrap at its Cleveland and Lorain yards. It was not obliged to foresee that plaintiff would wrongfully insist upon a mistake such as is found here to exist; but, as soon as plaintiff's attitude was disclosed by the filing of its petition, defendant's response thereto is made with all due diligence.

A decree will be entered, granting the relief prayed for in defendant's cross-petition.

THE LUSITANIA.

Petition of CUNARD S. S. CO., Limited.

(District Court, S. D. New York. August 23, 1918.)

1. SHIPPING ⟸207—LIMITATION OF LIABILITY—NEGLIGENCE.

In a proceeding for limitation of liability on account of the loss of the British steamship Lusitania, which was torpedoed by a German submarine without warning, *held*, that the equipment of the vessel, the navigation, and the launching of the lifeboats showed no negligence, so that passengers had no claim against the owner.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. SHIPPING ⟸82—NAVIGATION—DUTY OF COMMANDING OFFICER.
It is a fundamental principle in navigating a merchantman, whether in peace or war, that the commanding officer be left free to exercise his own judgment.

3. SHIPPING ⟸207—LIMITATION OF LIABILITY—NEGLIGENCE.
In proceeding by the owners of the Lusitania, which was torpedoed by a German submarine, to limit their liability, *held* that, though the commanding officer did not exactly follow the general advices sent out by the British admiralty, he could not be deemed negligent or at fault.

4. NEGLIGENCE ⟸56(1)—RECOVERY—PROXIMATE CAUSE.
It is an elementary principle of law that, even if a person is negligent, recovery cannot be had, unless the negligence is the proximate cause of the loss or damage.

5. NEGLIGENCE ⟸62(3)—PROXIMATE CAUSE—INTERVENING AGENCY.
Even if negligence is shown, it cannot be deemed the proximate cause of loss or damage, if an independent illegal act of a third party intervenes to cause the loss.

6. INTERNATIONAL LAW ⟸1—EFFECT—RECOGNITION IN UNITED STATES.
The United States courts recognize the binding effect of international law as an integral part of the laws of the land.

7. INTERNATIONAL LAW ⟸2—SOURCES.
To ascertain international law, resort may be had to the customs and usages of civilized nations, and, as evidence of these, to the works of commentators and jurists.

8. SHIPPING ⟸207—LIMITATION OF LIABILITY—SINKING OF UNARMED MERCHANTMEN WITHOUT WARNING.
The act of the German submarine commander in sinking the Lusitania, an unarmed British passenger vessel, without warning and without making any provision for the safety of passengers and crew, was illegal, being in violation of the laws of nations recognized by all civilized powers, and recognized even by Germany prior to the sinking of the Lusitania; hence the owners are in no way liable for the death of passengers.

In Admiralty. In the matter of the petition of the Cunard Steamship Company, Limited, as owner of the steamship Lusitania, for limitation of its liability. Petition granted, and claims dismissed, without costs.

Lord, Day & Lord, of New York City (J. Parker Kirlin, Lucius H. Beers, and Allan B. A. Bradley, all of New York City, of counsel), for petitioner.

Hunt, Hill & Betts, of New York City (George Whitefield Betts, Jr., and George C. Sprague, both of New York City, of counsel), for claimants Adams and others.

A. Gordon Murray, William H. Blymyer, Griggs, Baldwin & Baldwin, Joseph F. Collins, Foley & Martin, George V. A. McCloskey, John M. Nolan, and Sol Friedland, all of New York City, R. Emmet Digney, of White Plains, N. Y., Maurice B. Gluck, of New York City, Patrick J. Dolan, of Newark, N. J., Standish Chard, James W. Prendergast, Charles O. Maas, Raymond Ballantine, and Sidney Rossman, all of New York City, Thibodeau & Ellsworth, of Boston, Mass., and Conklin & Reid and Baldwin & Curtis, of New York City (Paul C. Whipp and Frank V. Barns, both of New York City, of counsel), for various claimants.

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MAYER, District Judge. On May 1, 1915, the British passenger carrying merchantman Lusitania sailed from New York, bound for Liverpool, with 1,257 passengers and a crew of 702, making a total of 1,959 souls on board, men, women, and children. At approximately 2:10 on the afternoon of May 7, 1915, weather clear and sea smooth, without warning, the vessel was torpedoed and went down by the head in about 18 minutes, with an ultimate tragic loss of life of 1,195. Numerous suits having been begun against the Cunard Steamship Company, Limited, the owner of the vessel, this proceeding was brought in familiar form, by the steamship company, as petitioner, to obtain an adjudication as to liability, and to limit petitioner's liability to its interest in the vessel and her pending freight, should the court find any liability.

The sinking of the Lusitania was inquired into before the Wreck Commissioner's Court in London, June 15, 1915, to July 1, 1915, and the testimony then adduced, together with certain depositions taken pursuant to commissions issued out of this court and the testimony of a considerable number of passengers, crew, and experts heard before this court, constitute the record of the cause. It is fortunate, for many reasons, that such a comprehensive judicial investigation has been had; for, in addition to a mass of facts which give opportunity for a clear understanding of the case in its various aspects, the evidence presented has disposed, without question and for all time, of any false claims brought forward to justify this inexpressibly cowardly attack upon an unarmed passenger liner.

So far as equipment went, the vessel was seaworthy in the highest sense. Her carrying capacity was 2,198 passengers and a crew of about 850, or about 3,000 persons in all. She had 22 open lifeboats, capable of accommodating 1,322 persons, 26 collapsible boats, with a capacity of 1,283, making a total of 48 boats, with a capacity for 2,605 in all, or substantially in excess of the requirements of her last voyage. Her total of life belts was 3,187, or 1,959 more than the total number of passengers, and, in addition, she carried 20 life buoys. She was classed 100 A1 at Lloyd's, being 787 feet long over all, with a tonnage of 30,395 gross and 12,611 net. She had 4 turbine engines, 25 boilers, 4 boiler rooms, 12 transverse bulkheads, dividing her into 13 compartments, with a longitudinal bulkhead on either side of the ship for 425 feet, covering all vital parts.

The proof is absolute that she was not and never had been armed, nor did she carry any explosives. She did carry some 18 fuse cases and 125 shrapnel cases, consisting merely of empty shells, without any powder charge, 4,200 cases of safety cartridges, and 189 cases of infantry equipment, such as leather fittings, pouches, and the like. All these were for delivery abroad, but none of these munitions could be exploded by setting them on fire in mass or in bulk, nor by subjecting them to impact. She had been duly inspected on March 17, April 15, 16, and 17, all in 1915, and before she left New York the boat gear and boats were examined, overhauled, checked up, and defective articles properly replaced. There is no reason to doubt that this part of her equipment was in excellent order when she left New York.

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The vessel was under the command of a long-service and experienced captain, and officered by competent and experienced men. The difficulties of the war prevented the company from gathering together a crew fully reaching a standard as high as in normal times (many of the younger British sailors having been called to the colors); but, all told, the crew was good, and, in many instances, highly intelligent and capable. Due precaution was taken in respect of boat drills while in port, and the testimony shows that those drills were both sufficient and efficient. Some passengers did not see any boat drills on the voyage, while others characterized the drills, in effect, as formally superficial. Any one familiar with ocean traveling knows that it is not strange that boat drills may take place unobserved by some of the passengers, who, though on deck, may be otherwise occupied, or who may be in another part of the ship, and such negative testimony must give way to the positive testimony that there were daily boat drills, the object of which mainly was to enable the men competently and quickly to lower the boats.

Each man had a badge showing the number of the boat to which he was assigned, and a boat list was posted in three different places in the ship. Each day of the voyage a drill was held with the emergency boat, which was a fixed boat, either No. 13 on the starboard side or No. 14 on the port side, according to the weather; the idea, doubtless, being to accustom the men quickly to reach the station on either side of the ship. The siren was blown and a picked crew from the watch assembled at the boat, put on life belts, jumped into the boat, took their places, and jumped out again.

Throughout this case it must always be remembered that the disaster occurred in May, 1915, and the whole subject must be approached with the knowledge and mental attitude of that time. It may be that more elaborate and effective methods and precautions have been adopted since then, but there is no testimony which shows that these boat drills, as practiced on the voyage, were not fully up to the then existing standards and practices. There can be no criticism of the bulkhead door drills, for there was one each day.

In November, 1914, the directors of the Cunard Company, in view of the falling off of the passenger traffic, decided to withdraw the Lusitania's sister ship, Mauretania, and to run the Lusitania at three-fourths boiler power, which involved a reduction of speed from an average of about 24 knots to an average of about 21 knots. The ship was operated under this reduced boiler power and reduced rate of speed for six round trips, until and including the fatal voyage, although at the reduced rate she was considerably faster than any passenger ship crossing the Atlantic at that time. This reduction was in part for financial reasons and in part "a question of economy of coal and labor in time of war." No profit was expected, and none was made; but the company continued to operate the ship as a public service. The reduction from 24 to 21 knots is, however, quite immaterial to the controversy, as will later appear.

Having thus outlined the personnel, equipment, and cargo of the vessel, reference will now be made to a series of events preceding

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her sailing on May 1, 1915. On February 4, 1915, the Imperial German government issued a proclamation as follows:

"Proclamation.

"1. The waters surrounding Great Britain and Ireland, including the whole English Channel, are hereby declared to be war zone. On and after the 18th of February, 1915, every enemy merchant ship found in the said war zone will be destroyed without its being always possible to avert the dangers threatening the crews and passengers on that account.

"2. Even neutral ships are exposed to danger in the war zone, as in view of the misuse of neutral flags ordered on January 31 by the British government, and of the accidents of naval war, it cannot always be avoided to strike even neutral ships in attacks that are directed at enemy ships.

"3. Northward navigation around the Shetland Islands, in the eastern waters of the North Sea, and in a strip of not less than 30 miles width along the Netherlands coast is in no danger.

"Von Pohl,
"Chief of the Admiral Staff of the Navy.

"Berlin, February 4, 1915."

This was accompanied by a so-called memorial, setting forth the reasons advanced by the German government in support of the issuance of this proclamation, an extract from which is as follows:

"Just as England declared the whole North Sea between Scotland and Norway to be comprised within the seat of war, so does Germany now declare the waters surrounding Great Britain and Ireland, including the whole English Channel, to be comprised within the seat of war, and will prevent by all the military means at its disposal all navigation by the enemy in those waters. To this end it will endeavor to destroy, after February 18 next, any merchant vessels of the enemy which present themselves at the seat of war above indicated, although it may not always be possible to avert the dangers which may menace persons and merchandise. Neutral powers are accordingly forewarned not to continue to intrust their crews, passengers or merchandise to such vessels."

To this proclamation and memorial the government of the United States made due protest under date of February 10, 1915. On the same day protest was made to England by this government regarding the use of the American flag by the Lusitania on its voyage through the war zone on its trip from New York to Liverpool of January 30, 1915, in response to which, on February 19, Sir Edward Grey, Secretary of State for Foreign Affairs, handed a memorandum to Mr. Page, the American ambassador to England, containing the following statement:

"It was understood that the German government had announced their intention of sinking British merchant vessels at sight by torpedoes, without giving any opportunity of making any provisions for saving the lives of noncombatant crews and passengers. It was in consequence of this threat that the Lusitania raised the United States flag on her inward voyage and on her subsequent outward voyage. A request was made by the United States passengers who were embarking on board her that the United States flag should be hoisted, presumably to insure their safety."

The British ambassador, Hon. Cecil Spring Rice, on March 1, 1915, in a communication to the American Secretary of State, regarding an economic blockade of Germany, stated in reference to the German proclamation of February 4th:

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"Germany has declared that the English Channel, the north and west coasts of France, and the waters around the British Isles are a war area, and has officially notified that all enemy ships found in that area will be destroyed and that neutral vessels may be exposed to danger. This is in effect a claim to torpedo at sight, without regard to the safety of the crew or passengers, any merchant vessel under any flag. As it is not in the power of the German Admiralty to maintain any surface craft in these waters, this attack can only be delivered by submarine agency."

Beginning with the 30th of January, 1915, and prior to the sinking of the Lusitania on May 7, 1915, German submarines attacked and seemed to have sunk 20 merchant and passenger ships within about 100 miles of the usual course of the Lusitania, chased 2 other vessels, which escaped, and damaged still another.

It will be noted that nothing is stated in the German memorandum, supra, as to sinking enemy merchant vessels without warning, but, on the contrary, the implication is that settled international law as to visit and search, and an opportunity for the lives of passengers to be safeguarded, will be obeyed, "although it may not always be possible to avert the dangers which may menace persons and merchandise."

As a result of this submarine activity, the Lusitania, on its voyages from New York to Liverpool, beginning with that of January 30, 1915, steered a course further off from the south coast of Ireland than formerly. In addition, after the German proclamation of February 4, 1915, the Lusitania had its boats swung out and provisioned while passing through the danger zone, did not use its wireless for sending messages, and did not stop at the Mersey bar for a pilot, but came directly up to its berth.

The petitioner and the master of the Lusitania received certain advices from the British Admiralty on February 10, 1915, as follows:

"Instructions with Reference to Submarines—10th February, 1915.

"Vessels navigating in submarine areas should have their boats turned out and fully provisioned. The danger is greatest in the vicinity of ports and off prominent headlands on the coast. Important landfalls in this area should be made after dark whenever possible. So far as is consistent with particular trades and state of tides, vessels should make their ports at dawn."

On April 15 and 16, 1915, and after the last voyage from New York, preceding the one on which the Lusitania was torpedoed, the Cunard Company and the master of the Lusitania received at Liverpool the following advices from the British Admiralty:

"Confidential Daily Voyage Notice, 15th April, 1915, Issued under Government War Risks Scheme.

"German submarines appear to be operating chiefly off prominent headlands and landfalls. Ships should give prominent headlands a wide berth."

Confidential memo., issued April 16, 1915:

"War experience has shown that fast steamers can considerably reduce the chance of successful surprise submarine attack by zigzagging—that is to say, altering the course at short and irregular intervals, say in ten minutes to half an hour. This course is almost invariably adopted by warships, when cruising in an area known to be infested by submarines. The underwater speed of a submarine is very low, and it is exceedingly difficult for her to get into position to deliver an attack, unless she can observe and predict the course of the ship attacked."

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Sir Alfred Booth, chairman of the Cunard Line, was a member of the War Risks Committee at Liverpool, consisting of shipowners, representatives of the Board of Trade and the Admiralty, which received these instructions, and passed them on to the owners of vessels, including the Cunard Company, who distributed them to the individual masters.

On Saturday, May 1, 1915, the advertised sailing date of the Lusitania from New York to Liverpool on the voyage on which she was subsequently sunk, there appeared the following advertisement in the New York Times, New York Tribune, New York Sun, New York Herald, and New York World; this advertisement being, in all instances except one, placed directly over, under, or adjacent to the advertisement of the Cunard Line regarding the sailing of the Lusitania:

"Travelers intending to embark on the Atlantic voyage are reminded that a state of war exists between Germany and her allies and Great Britain and her allies. That the zone of war includes the waters adjacent to the British Isles. That in accordance with formal notice given by the Imperial German government vessels flying the flag of Great Britain or of any of her allies are liable to destruction in those waters and that travelers sailing in the war zone on ships of Great Britain or her allies do so at their own risk.

"April 22, 1915. Imperial German Embassy,
"Washington, D. C."

This was the first insertion of this advertisement, although it was dated more than a week prior to its publication. Capt. Turner, the master of the vessel, saw the advertisement or "something of the kind" before sailing and realized that the Lusitania was included in the warning. The Liverpool office of the Cunard Company was advised of the sailing and the number of passengers by cable from the New York office, but no mention was made of the above quoted advertisement. Sir Alfred Booth was informed through the press of this advertisement on either Saturday evening, May 1st, or Sunday morning, May 2d.

The significance and construction to be given to this advertisement will be discussed infra, but it is perfectly plain that the master was fully justified in sailing on the appointed day from a neutral port with many neutral and noncombatant passengers, unless he and his company were willing to yield to the attempt of the German government to terrify British shipping. No one familiar with the British character would expect that such a threat would accomplish more than to emphasize the necessity of taking every precaution, to protect life and property, which the exercise of judgment would invite. And so, as scheduled, the Lusitania sailed, undisguised, with her four funnels and a figure so familiar as to be readily discernible, not only by naval officers and mariners, but by the ocean-going public generally.

The voyage was uneventful until May 6th. On approaching the Irish coast, on May 6th, the captain ordered all the boats hanging on the davits to be swung out and lowered to the promenade deck rail, and this order was carried out under the supervision of Staff Capt. Anderson, who later went down with the ship. All bulkhead doors which were not necessary for the working of the ship were closed, and it was reported to Capt. Turner that this had been done. Lookouts were

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doubled, and two extra were put forward and one on either side of the bridge; that is, there were two lookouts in the crow's nest, two in the eyes of the ship, two officers on the bridge, and a quartermaster on either side of the bridge.

Directions were given to the engine room to keep the highest steam they could possibly get on the boilers and in case the bridge rang for full speed to give as much as they possibly could. Orders were also given that ports should be kept closed. At 7:50 p. m. on May 6th the Lusitania received the following wireless message from the Admiralty at Queenstown:

"Submarines active off south coast of Ireland."

And at 7:56 the vessel asked for and received a repetition of this message. The ship was then going at a rate of 21 knots per hour. At 8:30 p. m. of the same day the following message was received from the British Admiralty:

"To All British Ships 0005:

"Take Liverpool pilot at bar and avoid headlands. Pass harbors at full speed; steer mid-channel course. Submarines off Fastnet."

At 8:32 the Admiralty received a communication to show that this message had been received by the Lusitania, and the same message was offered to the vessel seven times between midnight of May 6th and 10 a. m. of May 7th. At about 8 a. m. on the morning of May 7th, on approaching the Irish coast, the vessel encountered an intermittent fog or Scotch mist, called "banks" in seafaring language and the speed was reduced to 15 knots. Previously, the speed, according to Capt. Turner's recollection, had been reduced to 18 knots. This adjustment of speed was due to the fact that Capt. Turner wished to run the last 150 miles of the voyage in the dark, so as to make Liverpool early on the morning of May 8th, at the earliest time when he could cross the bar without a pilot.

Judging from the location of previous submarine attacks, the most dangerous waters in the Lusitania's course were from the entrance to St. George's Channel to Liverpool bar. There is no dispute as to the proposition that a vessel darkened is much safer from submarine attack at night than in the daytime, and Capt. Turner exercised proper and good judgment in planning accordingly as he approached dangerous waters. It is futile to conjecture as to what would or would not have happened had the speed been higher prior to the approach to the Irish coast, because, obviously, until then, the captain could not figure out his situation, not knowing how he might be impeded by fog or other unfavorable weather conditions.

On the morning of May 7, 1915, the ship passed about 25 or 26, and, in any event, at least 18½ miles south of Fastnet, which was not in sight. The course was then held up slightly to bring the ship closer to land, and a little before noon land was sighted, and what was thought to be Brow Head was made out. Meanwhile, between 11 a. m. and noon, the fog disappeared, the weather became clear, and the speed was increased to 18 knots. The course of the vessel was S. 87° E. mag. At 11:25 a. m. Capt. Turner received the following message:

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"Submarines active in southern part of Irish Channel last heard of 20 miles south of Coningbeg Light vessel make certain Lusitania gets this."

At 12:40 p. m. the following additional wireless message from the Admiralty was received:

"Submarines 5 miles south of Cape Clear proceeding west when sighted at 10 a. m."

After picking up Brow Head, and at about 12:40 p. m., the course was altered in shore by about 30 degrees to about N. 63° or 67° E. mag., Capt. Turner did not recall which. Land was sighted which the captain thought was Galley Head, but he was not sure, and therefore held in shore. This last course was continued for an hour at a speed of 18 knots until 1:40 p. m., when the Old Head of Kinsale was sighted, and the course was then changed back to the original course of S. 87° E. mag. At 1:50 p. m. the captain started to take a four point bearing on the Old Head of Kinsale, and while thus engaged, and at about 2:10 p. m., as heretofore stated, the ship was torpedoed on the starboard side. Whether one, two, or three torpedoes were fired at the vessel cannot be determined with certainty. Two of the ship's crew were confident that a third torpedo was fired and missed the ship. While not doubting the good faith of these witnesses, the evidence is not sufficiently satisfactory to be convincing.

There was, however, an interesting and remarkable conflict of testimony as to whether the ship was struck by one or two torpedoes, and witnesses, both passengers and crew, differed on this point, conscientiously and emphatically; some witnesses for claimants and some for petitioner holding one view, and others, called by each side, holding the opposite view. The witnesses were all highly intelligent, and there is no doubt that all testified to the best of their recollection, knowledge, or impression, and in accordance with their honest conviction. The weight of the testimony (too voluminous to analyze) is in favor of the "two torpedo" contention, not only because of some convincing direct testimony (as, for instance, Adams, Lehman, Morton), but also because of the unquestioned surrounding circumstances. The deliberate character of the attack upon a vessel whose identity could not be mistaken, made easy on a bright day, and the fact that the vessel had no means of defending herself, would lead to the inference that the submarine commander would make sure of her destruction. Further, the evidence is overwhelming that there was a second explosion. The witnesses differ as to the impression which the sound of this explosion made upon them—a natural difference, due to the fact, known by common experience, that persons who hear the same explosion, even at the same time, will not only describe the sound differently, but will not agree as to the number of detonations. As there were no explosives on board, it is difficult to account for the second explosion, except on the theory that it was caused by a second torpedo. Whether the number of torpedoes was one or two is relevant, in this case, only upon the question of what effect, if any, open ports had in accelerating the sinking of the ship.

While there was much testimony and some variance as to the places where the torpedoes struck, judged by the sound or shock of the ex-

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plosions, certain physical effects, especially as to smoke and blown-up débris, tend to locate the areas of impact with some approach to accuracy. From all the testimony it may be reasonably concluded that one torpedo struck on the starboard side, somewhere abreast of No. 2 boiler room, and the other, on the same side, either abreast of No. 3 boiler room, or between No. 3 and No. 4. From knowledge of the torpedoes then used by the German submarines, it is thought that they would effect a rupture of the outer hull 30 to 40 feet long and 10 to 15 feet vertically.

Cockburn, senior second engineer, was of opinion that the explosion had done a great deal of internal damage. Although the lights were out, Cockburn could hear the water coming into the engine room. Water at once entered No. 1 and No. 2 boiler rooms, a result necessarily attributable to the fact that one or both of the coal bunkers were also blown open. Thus, one torpedo flooded some or all of the coal bunkers on the starboard side of Nos. 1 and 2 boiler rooms and apparently flooded both boiler roms. The effect of the other torpedo is not entirely clear. If it struck midway between two bulkheads, it is quite likely to have done serious bulkhead injury. The Lusitania was built so as to float with two compartments open to the sea, and with more compartments open she could not stay afloat. As the side coal bunkers are regarded as compartments, the ship could not float with two boiler rooms flooded and also any adjacent bunker, and therefore the damage done by one torpedo was enough to sink the ship. To add to the difficulties, all the steam had gone as the result of the explosions, and the ship could not be controlled by her engines.

Little, senior third engineer, testified that in a few seconds after the explosion the steam pressure fell from 190 to 50 pounds; his explanation being that the main steam pipes or boilers had been carried away. The loss of control of and by the engines resulted in disability to stop the engines, with the result that the ship kept her headway until she sank. That the ship commenced to list to starboard immediately is abundantly established by many witnesses.

Some of the witnesses (Lauriat and Adams, passengers; Duncan, Bestic, and Johnson, officers) testified that the ship stopped listing to starboard and started to recover, and then listed again to starboard until she went over. This action, which is quite likely, must have resulted from the inrush of water on the port side. There can be no other adequate explanation consistent with elementary scientific knowledge; for, if the ship temporarily righted herself, it must have been because the weight of water on the two sides was equal, or nearly so. The entry of water into the port side must, of course, have been due to some rupture on that side. Such a result was entirely possible, and, indeed, probable.

The explosive force was sufficiently powerful to blow débris far above the radio wires—i. e., more than 160 feet above the water. The boiler rooms were not over 60 feet wide, and so strong a force could readily have weakened the longitudinal bulkheads on the port side, in addition to such injury as flying metal may have done. It is easy to understand, therefore, how the whole pressure of the water rushing

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in from the starboard side against the weakened longitudinal bulkheads on the port side would cause them to give way, and thus open up some apertures on the port side for the entry of water. Later, when the water continued to rush in on the starboard side, the list to starboard naturally again occurred, increased, and continued to the end. As might be expected, the degree of list to starboard is variously described, but there is no doubt that it was steep and substantial.

A considerable amount of testimony was taken upon the contention of claimants that many of the ship's ports were open, thus reducing her buoyancy and substantially hastening her sinking. There is no doubt that on May 6th adequate orders were given to close all ports. The testimony is conclusive that the ports on deck F (the majority of which were dummy ports) were closed. Very few, if any, ports on E deck were open, and, if so, they were starboard ports in a small section of the first class, in the vicinity where one of the torpedoes did its damage. A very limited number of passengers testified that the portholes in their staterooms were open, and, if their impressions are correct, these portholes, concerning which they testified, were all, or nearly all, so far above the water that they could not have influenced the situation.

There was conflicting testimony as to the ports in the dining room on D deck. The weight of the testimony justifies the conclusion that some of these ports were open—how many it is impossible to determine. These ports, however, were from 23 to 30 feet above water, and when the gap made by the explosion and the consequent severe and sudden list are considered, it is plain that these open ports were not a contributing cause of the sinking and had a very trifling influence, if any, in accelerating the time within which the ship sank.

From the foregoing, the situation can be visualized. Two sudden and extraordinary explosions; the ship badly listed, so that the port side was well up in the air; the passengers scattered about on the decks and in the staterooms, saloons, and companion ways; the ship under headway, and, as it turned out, only 18 minutes afloat—such was the situation which confronted the officers, crew, and passengers in the endeavor to save the lives of those on board. The conduct of the passengers constitutes an enduring record of calm heroism, with many individual instances of sacrifice, and, in general, a marked consideration for women and children. There was no panic; but, naturally, there was a considerable amount of excitement and rush, and much confusion and, as the increasing list rendered ineffective the lowering of the boats on the port side, the passengers, as is readily understandable, crowded over on the starboard side.

[1] The problem presented to the officers of the ship was one of exceeding difficulty, occasioned largely because of the serious list and the impossibility of stopping the ship or reducing her headway. The precaution of extra lookouts resulted in a prompt report to the captain, via the bridge, of the sighting of the torpedo. Second Officer Heppert, who was on the bridge, immediately closed all water-tight doors worked from the bridge, and the testimony satisfactorily shows that all water-tight doors worked by hand were promptly closed. Immediately after Capt. Turner saw the wake of the torpedo, there was an explo-

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sion, and then Turner went to the navigation bridge and took the obvious course; i. e., had the ship's head turned to the land. He signaled the engine room for full speed astern, hoping, thereby, to take the way off the ship, and then ordered the boats lowered down to the rail, and directed that women and children should be first provided for in the boats. As the engine room failed to respond to the order to go full speed astern, and as the ship was continuing under way, Turner ordered that the boats should not be lowered until the vessel should lose her headway, and he told Anderson, the staff captain, who was in charge of the port boats, to lower the boats when he thought the way was sufficiently off to allow that operation. Anderson's fidelity to duty is sufficiently exemplified by the fact that he went down with the ship.

Jones, first officer, and Lewis, acting third officer, were in charge of the boats on the starboard side, and personally superintended their handling and launching. Too much cannot be said both for their courage and skill; but, difficult as was their task, they were not confronted with some of the problems which the port side presented. There, in addition to Anderson, were Bestic, junior third officer, and another officer, presumably the second officer. These men were apparently doing the best they could and standing valiantly to their duty. Anderson's fate has already been mentioned, and Bestic, although surviving, stuck to his post until the ship went down under him. The situation can readily be pictured, even by a novice.

With the ship listed to starboard, the port boats, of course, swung inboard. If enough man power were applied, the boats could be put over the rail; but then a real danger would follow. Robertson, the ship's carpenter, aptly described that danger in answer to a question as to whether it was possible to lower the open boats on the port side. He said:

"No; to lower the port boats would just be like drawing a crate of unpacked china along a dock road. What I mean is that, if you started to lower the boats, you would be dragging them down the rough side of the ship on rivets which are what we call 'snap-headed rivets'; they stand up about an inch from the shell of the ship, so you would be dragging the whole side of the boat away if you tried to lower the boats with a 15° list."

That some boats were and others would have been seriously damaged is evidenced by the fact that two port boats were lowered to the water and got away (though one afterward filled), and not one boat reached Queenstown. Each boat has its own history (except possibly boats 2 and 4), although it is naturally difficult, in each case, to allocate all the testimony to a particular boat.

There is some testimony, given in undoubted good faith, that painted or rusted davits stuck out; but the weight of the testimony is to the contrary. There were some lamentable occurrences on the port side, which resulted in spilling passengers, some of whom, thus thrown out or injured, went to their death. These unfortunate accidents, however, were due either to lack of strength of the seaman who was lowering, or possibly, at worst, to an occasional instance of incompetency, due to the personal equation so often illustrated where one man of many may not be equal to the emergency. But the problem was of the

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most vexatious character. In addition to the crowding of passengers in some instances, was this extremely hazardous feat of lowering boats swung inboard from a tilted height, heavily weighted by human beings, with the ship still under way. It cannot be said that it was negligent to attempt this, because, obviously, all the passengers could not be accommodated in the starboard boats.

On the starboard side, the problem in some respects was not so difficult, while in others troublesome conditions existed, quite different from those occurring on the port side. Here the boats swung so far out as to add to the difficulty of passengers getting in them, a difficulty intensified by the fact that many more passengers went to the starboard side than to the port side, and also that the ship maintained her way. Six boats successfully got away. In the case of the remaining boats, some were successfully lowered, but later met with some unavoidable accident, and some were not successfully launched (such as Nos. 1, 5, and 17) for entirely explainable reasons, which should not be charged to inefficiency on the part of the officers or crew.

The collapsible boats were on the deck under the open lifeboats, and were intended to be lifted and lowered by the same davits which lowered the open boats after the open boats had gotten clear of the ship. It was the duty of the officers to get the open boats away before giving attention to the collapsible boats, and that was a question of time. These boats are designed and arranged to float free if the ship should sink before they can be hoisted over. They were cut loose, and some people were saved on these boats.

It is to be expected that those passengers who lost members of their family or friends, and who saw some of the unfortunate accidents, should feel strongly and entertain the impression that inefficiency or individual negligence was widespread among the crew. Such an impression, however, does an inadvertent injustice to the great majority of the crew, who acted with that matter-of-fact courage and fidelity to duty which are traditional with men of the sea. Such of these men, presumably fairly typical of all, as testified in this court, were impressive, not only because of inherent bravery, but because of intelligence and clear-headedness, and they possessed that remarkable gift of simplicity so characteristic of truly fearless men, who cannot quite understand why an ado is made of acts which seem to them merely as, of course, in the day's work.

Mr. Grab, one of the claimants, and an experienced transatlantic traveler, concisely summed up the situation when he said:

"They were doing the best they could; they were very brave and working as hard as they could without any fear; they didn't care about themselves. It was very admirably done. While there was great confusion, they did the best they could."

It will unduly prolong a necessarily extended opinion to sift the voluminous testimony relating to this subject of the boats and the conduct of the crew, and something is sought to be made of comments of Capt. Turner, construed by some to be unfavorable, but afterwards satisfactorily supplemented and explained; but, if there were some instances of incompetency, they were very few, and the charge

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of negligence in this regard cannot be successfully maintained. In arriving at this conclusion, I have not overlooked the argument, earnestly pressed, that the men were not sufficiently instructed and drilled; for I think the testimony establishes the contrary, in the light of conditions in May, 1915.

[2, 3] I now come to what seems to me the only debatable question of fact in the case; i. e., whether Capt. Turner was negligent in not literally following the Admiralty advices, and also in not taking a course different from that which he adopted. The fundamental principle in navigating a merchantman, whether in times of peace or of war, is that the commanding officer must be left free to exercise his own judgment. Safe navigation denies the proposition that the judgment and sound discretion of the captain of a vessel must be confined in a mental strait-jacket. Of course, when movements are under military control, orders must be strictly obeyed, come what may. No such situation, however, was presented either to petitioner or Capt. Turner. The vessel was not engaged in military service, nor under naval convoy. True, she was, as between the German and British governments, an enemy ship as to Germany; but she was unarmed, and a carrier of not merely noncombatants, but, among others, of many citizens of the United States, then a neutral country, at peace with all the world.

In such circumstances, the captain could not shield himself automatically against error behind a literal compliance with the general advices or instructions of the Admiralty; nor can it be supposed that the Admiralty, any more than the petitioner, expected him so to do. What was required of him was that he should seriously consider, and as far as practicable, follow the Admiralty advices, and use his best judgment as events and exigencies occurred; and if a situation arose where he believed that a course should be pursued to meet emergencies which required departure from some of the Admiralty advices as to general rules of action, then it was his duty to take such course, if in accordance with his carefully formed deliberate judgment. After a disaster has occurred, it is not difficult for the expert to show how it might have been avoided, and there is always opportunity for academic discussion as to what ought or ought not to have been done; but the true approach is to endeavor, for the moment, to possess the mind of him upon whom rested the responsibility.

Let us now see what that responsibility was and how it was dealt with. The rules of naval warfare allowed the capture, and, in some circumstances, the destruction, of an enemy merchant ship; but, at the same time, it was the accepted doctrine of all civilized nations (as will be more fully considered infra), that, as Lord Mersey put it:

"There is always an obligation first to secure the safety of the lives of those on board."

The responsibility, therefore, of Capt. Turner, in his task of bringing the ship safely to port, was to give heed, not only to general advices advanced as the outcome of experience in the then developing knowledge as to submarine warfare, but particularly to any special information which might come to him in the course of the voyage.

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Realizing that, if there was a due warning, in accordance with international law, and an opportunity, within a limited time, for the passengers to leave the ship, nevertheless that the operation must be quickly done, Capt. Turner, on May 6, had taken the full precautions, such as swinging out the boats, properly provisioned, which have been heretofore described. The principal features of the Admiralty advices were (1) to give the headlands a wide berth; (2) to steer a mid-channel course; (3) to maintain as high a speed as practicable; (4) to zigzag; and (5) to make ports, if possible, at dawn, thus running the last part of the voyage at night.

The reason for the advice as to keeping off headlands was that the submarines lurked near those prominent headlands and landfalls to and from which ships were likely to go. This instruction Capt. Turner entirely followed in respect of Fastnet, which was the first point on the Irish coast which a vessel bound from New York to Liverpool would ordinarily approach closely, and, in normal times, the passing would be very near, or even inside of, Fastnet. The Lusitania passed Fastnet so far out that Capt. Turner could not see it. Whether the distance was about 25 miles, as petitioner contends, or about 18½ miles, as claimant calculates, the result is that either distance must be regarded as a wide berth in comparison with the customary navigation at that point, and, besides, nothing happened there. At 8:30 p. m. on May 6 the message had been received from the British Admiralty that submarines were off Fastnet, so that Capt. Turner, in this regard, not only followed the general advices, but the specific information, from the Admiralty.

At 11:25 a. m. on May 7 Capt. Turner received the wireless from the Admiralty plainly intended for the Lusitania, informing him that submarines (plural) were active in the southern part of the Irish Channel, and when last heard of were 20 miles south of Coningbeg Lightship. This wireless message presented acutely to the captain the problem as to the best course to pursue, always bearing in mind his determination and the desirability of getting to the Liverpool bar when it could be crossed, while the tide served and without a pilot. Further, as was stated by Sir Alfred Booth:

"The one definite instruction we did give him with regard to that was to authorize him to come up without a pilot."

The reasons for this instruction were cogent, and were concisely summed up by Sir Alfred Booth during his examination as a witness as follows:

"It was one of the points that we felt it necessary to make the captain of the Lusitania understand the importance of. The Lusitania can only cross the Liverpool bar at certain states of the tide, and we therefore warned the captain, or whoever might be captain, that we did not think it would be safe for him to arrive off the bar at such a time that he would have to wait there, because that area had been infested with submarines, and we thought, therefore, it would be wiser for him to arrange his arrival in such a way, leaving him an absolutely free hand as to how he would do it, that he could come straight up without stopping at all. The one definite instruction we did give him with regard to that was to authorize him to come up without a pilot."

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The tide would be high at Liverpool bar at 6:53 on Saturday morning, May 8. Capt. Turner planned to cross the bar as much earlier than that as he could get over without stopping, while at the same time figuring on passing during the darkness the dangerous waters from the entrance of St. George's Channel to the Liverpool bar.

Having thus in mind his objective, and the time approximately when he intended to reach it, the message received at 11:25 a. m. required that he should determine whether to keep off land approximately the same distance as he was when he passed Fastnet, or to work in shore and go close to Coningbeg Lightship. He determined that the latter was the better plan, to avoid the submarines reported in mid-channel ahead of him.

When Galley Head was sighted, the course was changed so as to haul closer to the land, and this course was pursued until 1:40 p. m. at which time Capt. Turner concluded that it was necessary for him to get his bearings accurately. This he decided should be done by taking a four-point bearing, during which procedure the ship was torpedoed. It is urged that he should have taken a two-point bearing or a cross-bearing, which would have occupied less time; but if, under all the conditions which appealed to his judgment as a mariner, he had taken a different method of ascertaining his exact distance, and the result would have been inaccurate, or while engaged in taking a two-point bearing, the ship had been torpedoed, then somebody would have said he should have taken a four-point bearing. The point of the matter is that an experienced captain took the bearing he thought proper for his purposes, and to predicate negligence upon such a course is to assert that a captain is bound to guess the exact location of a hidden and puzzling danger.

Much emphasis has been placed upon the fact that the speed of the ship was 18 knots at the time of the attack, instead of 24, or, in any event, 21, knots, and upon the further fact (for such it is) that the ship was not zigzagging as frequently as the Admiralty advised, or in the sense of that advice. Upon this branch of the case much testimony was taken (some in camera, as in the Wreck Commissioners' Court), and, for reasons of public interest, the methods of successfully evading submarines will not be discussed. If it be assumed that the Admiralty advices as of May, 1915, were sound and should have been followed, then the answer to the charge of negligence is twofold: (1) That Capt. Turner, in taking a four-point bearing off the Old Head of Kinsale, was conscientiously exercising his judgment for the welfare of the ship; and (2) that it is impossible to determine whether, by zigzagging off the Old Head of Kinsale or elsewhere, the Lusitania would have escaped the German submarine or submarines.

As to the first answer, I cannot better express my conclusion than in the language of Lord Mersey:

"Capt. Turner was fully advised as to the means which, in the view of the Admiralty, were best calculated to avert the perils he was likely to encounter, and in considering the question whether he is to blame for the catastrophe in which his voyage ended I have to bear this circumstance in mind. It is certain that in some respects Capt. Turner did not follow the

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advice given to him. It may be (though I seriously doubt it) that, had he done so, his ship would have reached Liverpool in safety. But the question remains: Was his conduct the conduct of a negligent or of an incompetent man? On this question I have sought the guidance of my assessors, who have rendered me invaluable assistance, and the conclusion at which I have arrived is that blame ought not to be imputed to the captain. The advice given to him, although meant for his most serious and careful consideration, was not intended to deprive him of the right to exercise his skilled judgment in the difficult questions that might arise from time to time in the navigation of his ship. His omission to follow the advice in all respects cannot fairly be attributed either to negligence or incompetence. He exercised his judgment for the best. It was the judgment of a skilled and experienced man, and although others might have acted differently, and perhaps more successfully, he ought not, in my opinion, to be blamed."

As to the second answer, it is only necessary to outline the situation in order to realize how speculative is the assertion of fault. It is plain from the radio messages of the Admiralty (May 6, 7:50 p. m., "Submarines active off south coast of Ireland;" May 6, 8:30 p. m., "Submarines off Fastnet;" the 11:25 message of May 7, supra; May 7, 11:40 a. m., "Submarines 5 miles south of Cape Clear, proceeding west when sighted at 10 a. m.")—that more than one submarine was lying in wait for the Lusitania.

A scientific education is not necessary to appreciate that it is much more difficult for a submarine successfully to hit a naval vessel than an unarmed merchant ship. The destination of a naval vessel is usually not known; that of the Lusitania was. A submarine commander, when attacking an armed vessel, knows that he, as the attacker, may and likely will also be attacked by his armed opponent. The Lusitania was as helpless in that regard as a peaceful citizen suddenly set upon by murderous assailants. There are other advantages of the naval vessel over the merchant ship, which need not be referred to.

It must be assumed that the German submarine commanders realized the obvious disadvantages which necessarily attached to the Lusitania, and, if she had evaded one submarine, who can say what might have happened five minutes later? If there was, in fact, a third torpedo fired from the Lusitania's port side, then that incident would strongly suggest that, in the immediate vicinity of the ship, there were at least two submarines. It must be remembered, also, that the Lusitania was still in the open sea, considerably distant from the places of theretofore submarine activity and comfortably well off the Old Head of Kinsale, from which point it was about 140 miles to the Scilly Islands, and that she was nearly 100 miles from the entrance to St. George's Channel, the first channel she would enter on her way to Liverpool.

No transatlantic passenger liner, and certainly none carrying American citizens, had been torpedoed up to that time. The submarines, therefore, could lay their plans with facility to destroy the vessel somewhere on the way from Fastnet to Liverpool, knowing full well the easy prey which would be afforded by an unarmed, unconvoyed, well-known merchantman, which, from every standpoint of international law, had the right to expect a warning before its peaceful pas-

sengers were sent to their death. That the attack was deliberate, and long contemplated, and intended ruthlessly to destroy human life, as well as property, can no longer be open to doubt. And when a foe employs such tactics it is idle and purely speculative to say that the action of the captain of a merchant ship, in doing or not doing something, or in taking one course and not another, was a contributing cause of disaster, or that, had the captain not done what he did, or had he done something else, then that the ship and her passengers would have evaded their assassins.

I find, therefore, as a fact, that the captain, and, hence, the petitioner, were not negligent. The importance of the cause, however, justifies the statement of another ground which effectually disposes of any question of liability.

[4] It is an elementary principle of law that, even if a person is negligent, recovery cannot be had, unless the negligence is the proximate cause of the loss or damage.

[5] There is another rule, settled by ample authority, viz. that, even if negligence is shown, it cannot be the proximate cause of the loss or damage, if an independent illegal act of a third party intervenes to cause the loss. Jarnagin v. Travelers' Protective Ass'n, 133 Fed. 892, 66 C. C. A. 622, 68 L. R. A. 499; Cole v. German Savings & Loan Soc., 124 Fed. 113, 59 C. C. A. 593, 63 L. R. A. 416. See, also, Insurance Co. v. Tweed, 7 Wall. 44, 19 L. Ed. 65; Railroad Co. v. Reeves, 10 Wall. 176, 19 L. Ed. 909; Insurance Co. v. Boon, 95 U. S. 117, 24 L. Ed. 395; The Young America (C. C.) 31 Fed. 749; Goodlander Mill Co. v. Standard Oil Co., 63 Fed. 400, 11 C. C. A. 253, 27 L. R. A. 583.

[6-8] Claimants contend strongly that the case at bar comes within Holladay v. Kennard, 12 Wall. 254, 20 L. Ed. 390, where Mr. Justice Miller, who wrote the opinion, carefully stated that that case was not to be construed as laying down a rule different from that of Railroad Co. v. Reeves, supra. An elaborate analysis of the Holladay and other cases will not be profitable. Suffice it to say, neither that nor any other case has changed the rule of law, above stated, as to the legal import of an intervening illegal act of a third party. The question, then, is whether the act of the German submarine commander was an illegal act.

The United States courts recognize the binding force of international law. As was said by Mr. Justice Gray in The Paquete Habana, 175 U. S. 677, 700, 20 Sup. Ct. 290, 299 (44 L. Ed. 320):

> "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."

At least, since as early as June 5, 1793, in the letter of Mr. Jefferson, Secretary of State, to the French minister, our government has recognized the law of nations as an "integral part" of the laws of the land. Moore's International Law Digest, I, p. 10; The Scotia, 14 Wall. 170, 187, 20 L. Ed. 822; The New York, 175 U. S. 187, 197, 20 Sup. Ct. 67, 44 L. Ed. 126; Kansas v. Colorado, 185 U. S. 125,

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146, 22 Sup. Ct. 552, 46 L. Ed. 838; Kansas v. Colorado, 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956. To ascertain international law:

"Resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of commentators and jurists. * * * Such works are resorted to by judicial tribunals * * * for trustworthy evidence of what the law really is." The Paquete Habana, 175 U. S. 677, 20 Sup. Ct. 290, 44 L. Ed. 320 (and authorities cited).

Let us first see the position of our government, and then ascertain whether that position has authoritative support. Mr. Lansing, in his official communication to the German government, dated June 9, 1915, stated:

"But the sinking of passenger ships involves principles of humanity which throw into the background any special circumstances of detail that may be thought to affect the cases—principles which lift it, as the Imperial German government will no doubt be quick to recognize and acknowledge, out of the class of ordinary subjects of diplomatic discussion or of international controversy. Whatever be the other facts regarding the Lusitania, the principal fact is that a great steamer, primarily and chiefly a conveyance for passengers, and carrying more than a thousand souls, who had no part or lot in the conduct of the war, was torpedoed and sunk without so much as a challenge or a warning, and that men, women, and children were sent to their death in circumstances unparalleled in modern warfare. The fact that more than one hundred American citizens were among those who perished made it the duty of the government of the United States to speak of these things, and once more, with solemn emphasis, to call the attention of the Imperial German government to the grave responsibility which the government of the United States conceives that it has incurred in this tragic occurrence, and to the indisputable principle upon which that responsibility rests. The government of the United States is contending for something much greater than mere rights of property or privileges of commerce. It is contending for nothing less high and sacred than the rights of humanity, which every government honors itself in respecting, and which no government is justified in resigning on behalf of those under its care and authority. Only her actual resistance to capture, or refusel to stop when ordered to do so for the purpose of visit, could have afforded the commander of the submarine any justification for so much as putting the lives of those on board the ship in jeopardy. This principle the government of the United States understands the explicit instructions issued on August 3, 1914, by the Imperial German Admiralty to its commanders at sea, to have recognized and embodied, as do the naval codes of all other nations, and upon it every traveler and seaman had a right to depend. It is upon this principle of humanity, as well as upon the law founded upon this principle, that the United States must stand. * * * The government of the United States cannot admit that the proclamation of a war zone from which neutral ships have been warned to keep away may be made to operate as in any degree an abbreviation of the rights either of American shipmasters or of American citizens bound on lawful errands as passengers on merchant ships of belligerent nationality. It does not understand the Imperial German government to question those rights. It understands it, also, to accept as established beyond question the principle that the lives of noncombatants cannot lawfully or rightfully be put in jeopardy by the capture or destruction of an unresisting merchantman, and to recognize the obligation to take sufficient precaution to ascertain whether a suspected merchantman is in fact of belligerent nationality, or is in fact carrying contraband of war under a neutral flag. The government of the United States, therefore, deems it reasonable to expect that the Imperial German government will adopt the measures necessary to put these principles into practice in respect of the safeguarding of American lives and American ships, and asks for assurances that this will be done." White Book of Department of State, entitled "Diplomatic Correspondence with Belligerent Governments Relating

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to Neutral Rights and Duties, European War No. 2," at page 172. Printed and distributed October 21, 1915.

The German government found itself compelled ultimately to recognize the principle insisted upon by the government of the United States, for, after considerable correspondence, and on May 4, 1916 (after the Sussex had been sunk), the German government stated:

"The German submarine forces have had, in fact, orders to conduct submarine warfare in accordance with the general principles of visit and search and destruction of merchant vessels as recognized by international law; the sole exception being the conduct of warfare against the enemy trade carried on enemy freight ships that are encountered in the war zone surrounding Great Britain. * * * The German government, guided by this idea, notifies the government of the United States that the German naval forces have received the following orders: In accordance with the general principles of visit and search and destruction of merchant vessels recognized by international law, such vessels, both within and without the area declared as naval war zone, shall not be sunk without warning and without saving human lives, unless these ships attempt to escape or offer resistance."

See Official Communication by German Foreign Office to Ambassador Gerard, May 4, 1916 (White Book No. 3 of Department of State, pp. 302, 305).

There is, of course, no doubt as to the right to make prize of an enemy ship on the high seas, and, under certain conditions, to destroy her, and equally no doubt of the obligation to safeguard the lives of all persons aboard, whether passengers or crew. Phillemore on International Law (3d Ed.) vol. 3, p. 584; Sir Sherston Baker on First Steps in International Law, p. 236; G. B. Davis on Elements of International Law, pp. 358, 359; A. Pearce Higgins on War and the Private Citizen, pp. 33, 78, referring to proceedings of Institute of International Law at Turin in 1882; Creasy on International Law, p. 562, quoting Chief Justice Cockburn in his judgment in the Geneva Arbitration; L. A. Atherby-Jones on Commerce in War, p. 529; Professor Holland's article, Naval War College, 1907, p. 82; Oppenheim on International Law (2d Ed.) vol. 2, pp. 244, 311; Taylor on International Law, p. 572; Westlake on International Law (2d Ed.) p. 309, part II; Halleck on International Law, vol. 2, pp. 15, 16; Vattel's Law of Nations (Chitty's Ed.) 362.

Two quotations from this long list may be given for convenience; one stating the rule and the other the attitude which obtains among civilized governments. Oppenheim sets forth as among violations of the rules of war:

"(12) Attack on enemy merchantmen without previous request to submit to visit."

The observation in Vattel's Law of Nations is peculiarly applicable to the case of the Lusitania:

"Let us never forget that our enemies are men. Though reduced to the disagreeable necessity of prosecuting our right by force of arms, let us not divest ourselves of that charity which connects us with all mankind. Thus shall we courageously defend our country's rights without violating those of human nature. Let our valor preserve itself from every stain of cruelty and the luster of victory will not be tarnished by inhuman and brutal actions."

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In addition to the authorities supra are the regulations and practices of various governments. In 1512, Henry VIII issued instructions to the Admiral of the Fleet which accord with our understanding of modern international law. Hosack's Law of Nations, p. 168. Such has been England's course since. 22 Geo. II, c. 33, § 2, subsec. 9 (1749); British Admiralty Manual of Prize Law 188, §§ 303, 304.

Substantially the same rules were followed in the Russian and Japanese regulations, and probably in the codes or rules of many other nations. Russian Prize Regulations, March 27, 1895 (cited in Moore's Digest, vol. 7, p. 518); Japanese Prize Law of 1894, art. 22 (cited in Moore, supra, vol. 7, p. 525); Japanese Regulations, March 7, 1904 (see Takahashi's Cases on International Law during Chino-Japanese War).

The rules recognized and practiced by the United States, among other things, provide:

"(10) In the case of an enemy merchantman it may be sunk, but only if it is impossible to take it into port, and provided always that the persons on board are put in a place of safety." U. S. White Book, European War, No. 3, p. 192.

These humane principles were practiced, both in the War of 1812 and during our own war of 1861–1865. Even with all the bitterness (now happily ended and forgotten) and all the difficulties of having no port to which to send a prize, Capt. Semmes, of the Alabama, strictly observed the rule as to human life, even going so far as to release ships because he could not care for the passengers. But we are not confined to American and English precedents and practices.

While acting contrary to its official statements, yet the Imperial German government recognized the same rule as the United States, and, prior to the sinking of the Lusitania, had not announced any other rule. The war zone proclamation of February 4, 1915, contained no warning that the accepted rule of civilized naval warfare would be discarded by the German government. Indeed, after the Lusitania was sunk, the German government did not make any such claim, but, in answer to the first American note in reference to the Lusitania, the German Foreign Office, per Von Jagow, addressed to Ambassador Gerard a note, dated May 18, 1915, in which, inter alia, it is stated in connection with the sinking of the British steamer Falaba:

"In the case of the sinking of the English steamer Falaba, the commander of the German submarine had the intention of allowing passengers and crew ample opportunity to save themselves. It was not until the captain disregarded the order to lay to and took to flight, sending up rocket signals for help, that the German commander ordered the crew and passengers by signals and megaphone to leave the ship within 10 minutes. As a matter of fact he allowed them 23 minutes, and did not fire the torpedo until suspicious steamers were hurrying to the aid of the Falaba." White Book No. 2, U. S. Department of State, p. 169.

Indeed, as late as May 4, 1916, Germany did not dispute the applicability of the rule, as is evidenced by the note written to our government by Von Jagow, of the German Foreign Office, an extract from which has been quoted supra.

Further, section 116 of the German Prize Code (Huberich & Kind translation, p. 68), in force at the date of the Lusitania's destruction, conformed with the American rule. It provided:

"Before proceeding to a destruction of the vessel, the safety of all persons on board, and, so far as possible, their effects, is to be provided for, and all ship's papers and other evidentiary material, which, according to the views of the persons at interest, is of value for the formulation of the judgment of the prize court, are to be taken over by the commander."

Thus, when the Lusitania sailed from New York, her owner and master were justified in believing that, whatever else had theretofore happened, this simple, humane, and universally accepted principle would not be violated. Few, at that time, would be likely to construe the warning advertisement as calling attention to more than the perils to be expected from quick disembarkation and the possible rigors of the sea, after the proper safeguarding of the lives of passengers by at least full opportunity to take to the boats.

It is, of course, easy now, in the light of many later events, added to preceding acts, to look back and say that the Cunard Line and its captain should have known that the German government would authorize or permit so shocking a breach of international law and so foul an offense, not only against an enemy, but as well against peaceful citizens of a then friendly nation. But the unexpected character of the act was best evidenced by the horror which it excited in the minds and hearts of the American people.

The fault, therefore, must be laid upon those who are responsible for the sinking of the vessel, in the legal as well as moral sense. It is therefore not the Cunard Line, petitioner, which must be held liable for the loss of life and property. The cause of the sinking of the Lusitania was the illegal act of the Imperial German government, acting through its instrument, the submarine commander, and violating a cherished and humane rule observed, until this war, by even the bitterest antagonists. As Lord Mersey said:

"The whole blame for the cruel destruction of life in this catastrophe must rest solely with those who plotted and with those who committed the crime."

But while, in this lawsuit, there may be no recovery, it is not to be doubted that the United States of America and her Allies will well remember the rights of those affected by the sinking of the Lusitania, and, when the time shall come, will see to it that reparation shall be made for one of the most indefensible acts of modern times.

The petition is granted, and the claims dismissed, without costs.

Addendum.

The grounds upon which the decision is put render unnecessary the discussion of some other interesting questions suggested. As to the exception to interrogatory 20, brushing aside all technical points, I am satisfied that the withheld answer relates to matters irrelevant to the issues here. It certainly cannot be expected, in wartime, that an American court will ask for the disclosure of information deemed confidential by the British Admiralty, nor can I see any good reason for delaying a decree until some future date, when the information

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may be forthcoming; for it seems to me that, no matter what other general advices of the Admiralty may have been given prior to May 7, 1915, the result of this case must be the same.

UNITED STATES v. DODGE.

(District Court, S. D. Florida. July 16, 1918.)

No. 567.

1. EMBEZZLEMENT ⇐34—CLERKS OF FEDERAL COURTS—FEES.
An indictment against a clerk of a federal court for converting unearned fees *held* to charge embezzlement, under Penal Code, § 97 (Comp. St. 1916, § 10265).

2. EMBEZZLEMENT ⇐21—CLERK OF FEDERAL COURT—CONVERSION OF UNEARNED FEES.
The clerk himself of a United States District Court, in converting unearned fees, may be guilty of embezzlement, under Penal Code, § 97, notwithstanding section 99.

Eugene D. Dodge was indicted for embezzlement of court funds, and he demurs to the indictment. Overruled.

See, also, 251 Fed. 740, 742.

Herbert S. Phillips, U. S. Atty., of Tampa, Fla.

John W. Dodge and W. M. Toomer, both of Jacksonville, Fla., for defendant.

NEWMAN, District Judge. This is an indictment against the defendant, who is alleged to have been clerk of the United States District Court for the Southern District of Florida at the time the offense was committed. The first count in the indictment is as follows:

"The grand jurors of the United States of America, duly impaneled, sworn, and charged to inquire within and for the Southern district of Florida, upon their oaths present:

"That Eugene D. Dodge, during all the year 1914 and until the 29th day of May, A. D. 1915, was clerk of the District Court of the United States of America for the Southern District of Florida; that on the 23d day of June, A. D. 1914, in a certain cause in admiralty, to wit, Dunham Albury et al. v. S. S. Lugano, wherein the United States was intervener for duties, the court awarded to the said United States the sum of eight thousand one hundred twenty-two and 80/100 dollars as duties; that on the 20th day of May, A. D. 1915, a large part of the said sum of eight thousand one hundred twenty-two and 80/100 dollars awarded to the United States as duties aforesaid, the exact amount being to the jurors unknown, was on deposit with the First National Bank of Key West, Florida, in the name and to the credit of said court, said bank being then and there a designated depository of the United States; that on the said 20th day of May, A. D. 1915, the said Eugene D. Dodge, under and by virtue of his office aforesaid, and under authority and claim of authority, as such clerk induced the Honorable William B. Sheppard, the then presiding judge of said court, to affix his signature to a certain check in the words and figures following, to wit:

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"'District Court of the United States for the Southern District of Florida.
"'No. 26. $2,500.00
"'The First National Bank of Key West, Florida, U. S. Depositary:
"'May 20, 1915.

"'Pay to E. D. Dodge, clerk, or order, two thousand five hundred dollars, for account of decree in re Albury v. Lugano.
"'By the Court:
"'E. D. Dodge, Clerk. Wm. B. Sheppard, Judge.'

"That the said Eugene D. Dodge, under and by virtue of his office aforesaid, and under authority and claim of authority as such clerk, and by means of said check, draft, or order above set forth, drew out of the said First National Bank of Key West, Florida, and thereby, by means of said check or order above set forth procured and had in his possession, custody, and under his control the said sum of twenty-five hundred ($2,500.00) dollars in said check mentioned, said twenty-five hundred ($2,500.00) dollars being then and there the property of the United States and a part of the said sum of $8,122.80 awarded to the United States by decree of the court as aforesaid; that the said Eugene D. Dodge then and there on the 22d day of May, A. D. 1915, at and within the district aforesaid, and within the jurisdiction of this court, having in the manner and form aforesaid secured possession and control of said sum of twenty-five hundred ($2,500.00) dollars, and then and there having in his custody and under his control as such clerk aforesaid the said sum of twenty-five hundred ($2,500.00) dollars, the same being then and there money belonging in the registry of said court, it then and there became and was the duty of the said Eugene D. Dodge as such clerk to forthwith deposit the said sum of twenty-five hundred ($2,500.00) dollars with the Treasurer or Assistant Treasurer of the United States, or with a designated depositary of the United States, in the name and to the credit of said court; that the said Eugene D. Dodge having the said sum of twenty-five hundred ($2,500.00) dollars in his possession and under his control by virtue of his office aforesaid, as such clerk aforesaid, he, the said Eugene D. Dodge, on the said 22d day of May, A. D. 1915, at and in the district aforesaid and within the jurisdiction of this court the said sum of twenty-five hundred ($2,500.00) dollars, registry funds as aforesaid, a further description thereof being to the jurors unknown, did knowingly, unlawfully, and feloniously fail forthwith to deposit with the Treasurer or Assistant Treasurer of the United States, or with a designated depositary of the United States, in the name and to the credit of said court—contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America."

The second count in the indictment is the same as the first, except that it charges that:

"The said sum of twenty-five hundred dollars, registry funds aforesaid, a further description thereof being to the jurors unknown, did knowingly, unlawfully, and feloniously retain, embezzle, and convert to his own use, contrary to the form of the statute," etc.

The third count in the indictment sets out the decree of the court in the case of Dunham Albury et al. v. S. S. Lugano, in which decree $8,122.80 is awarded to the United States for duties decreed, and it then charges the procuring of Judge Sheppard to sign the check, the procuring of the money from the First National Bank of Key West, Fla., and the failure to deposit the same—

"with the Treasurer or Assistant Treasurer of the United States, or with a designated depositary of the United States in the name and to the credit of said court, contrary to the form of the statute in such case made and provided," etc.

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The fourth count in the indictment is the same as the third, except that it charges the embezzlement of the twenty-five hundred dollars by the defendant.

This indictment, on its back, is supposed to be drawn under section 99 of the federal Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1106 [Comp. St. 1916, § 10267]). There is a demurrer to this indictment, and as to each count in the indictment, upon the ground that the charges therein are not sufficient in law to compel the defendant to answer the same.

[1] As stated, the indictment purports, by the indorsements on the back and probably by the language therein, to have been drawn under section 99 of the Penal Code, and seems to me to be sufficient under that section, which is as follows:

"Whoever, being a clerk or other officer of a court of the United States, shall fail forthwith to deposit any money belonging in the registry of the court, or hereafter paid into court or received by the officers thereof, with the Treasurer, Assistant Treasurer, or a designated depositary of the United States, in the name and to the credit of such court, or shall retain or convert to his own use or to the use of another any such money, is guilty of embezzlement, and shall be fined not more than the amount embezzled, or imprisoned not more than ten years or both: but nothing herein shall be held to prevent the delivery of any such money upon security, according to agreement of parties, under the direction of the court."

But, whatever the duty of the clerk with reference to this fund was, it clearly was not the property of the clerk, under the charges in the indictment, and whatever his duty was with reference to depositing it, it clearly was a violation of law for him to convert the same to his own use, whether it was "public money" or "public funds" or not. Under the charges in the indictment, it clearly was not the money of the clerk, and if he unlawfully converted it to his own use, and thereby embezzled it, he was guilty of the offense set forth in the indictment.

If, as to the manner in which the money should have been deposited, he did not violate section 99 of the federal Penal Code, very clearly it was a violation of that part of section 97 (Comp. St. 1916, § 10265) which reads as follows:

"Any officer of the United States, or any assistant of such officer, who shall embezzle or wrongfully convert to his own use any money or property which may have come into his possession or under his control in the execution of such office or employment, or under color or claim of authority as such officer or assistant, whether the same shall be the money or property of the United States or of some other person or party, shall, where the offense is not otherwise punishable by some statute of the United States, be" punished as prescribed in the statute.

The Supreme Court of the United States dealt with this question in United States v. Davis, 243 U. S. 570, 37 Sup. Ct. 442, 61 L. Ed. 906, and made a decision which I think is important here. In that case a deputy clerk of the United States District Court for Hawaii was indicted, and the decision reverses the ruling of the District Court sustaining a demurrer to the indictment. It cites the case of United States v. Mason, 218 U. S. 517, 31 Sup. Ct. 28, 54 L. Ed. 1133, and treats that, evidently, as inapplicable in the Davis Case. The court then holds that, while the indictment appears to have been drawn under

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section 99 of the federal Penal Code, it, by its language, brought the case within section 97 of the Penal Code.

[2] This decision is valuable, because it holds section 97 of the Penal Code as applicable in cases of this character, notwithstanding the decision in the Mason Case. True, in the Davis Case the defendant was a deputy clerk; but, as I take the decision, it would have been equally applicable to the case of a clerk, if the charges in the indictment were such as to come within that section. Under this decision I think the charge in the fourth count in the indictment in the present case comes clearly within section 97, if it is not properly brought under section 99, about which I express no opinion.

The demurrer to the fourth charge in the indictment is overruled, and action of the court on the other counts in the indictment will be held in abeyance until the trial of the case and the facts appear more clearly.

UNITED STATES v. DODGE.

(District Court, S. D. Florida. July 16, 1918.)

No. 647.

1. EMBEZZLEMENT ⇐34—CLERKS OF FEDERAL COURTS.
An indictment *held* to state an offense, under Penal Code, § 99 (Comp. St. 1916, § 10267), making failure of clerk of federal court to deposit money in certain ways an embezzlement.

2. EMBEZZLEMENT ⇐34—UNITED STATES OFFICERS.
An indictment against the clerk of a United States District Court for embezzlement of unearned fees *held* to state an offense, under Penal Code, § 97 (Comp. St. 1916, § 10265), relating to officers in general.

Eugene D. Dodge was indicted for embezzlement, and he demurs. Overruled.

See, also, 251 Fed. 737, 742.

Herbert S. Phillips, U. S. Atty., of Tampa, Fla.

John W. Dodge, and W. M. Toomer, both of Jacksonville, Fla., for defendant.

NEWMAN, District Judge. An indictment was returned against Eugene D. Dodge, charging him, in the first count, with the embezzlement of $500, which money had been received by him in his official capacity as clerk of the United States District Court for the Southern District of Florida, and had come into his possession and control in the execution of his office and under claim of authority as such clerk of the court, and was then and there held in trust in his official capacity, and that he unlawfully, willfully, and feloniously retained, embezzled, and converted to his own use said moneys; the moneys so converted being the money of persons other than the United States, the names of such persons being to the grand jurors unknown, said moneys having been deposited with Dodge, as clerk, by parties to suits, actions, and proceedings other than proceedings in bankruptcy

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and to secure the payment of costs in such proceedings, including fees authorized to be retained by said clerk if and when such fees should be thereafter actually earned.

[1, 2] I think this count makes a perfect case under section 99 and also under section 97 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1106 [Comp. St. 1916, §§ 10265, 10267]). According to the charge in this count of the indictment, there was deposited with the clerk, as clerk of the court, certain moneys to pay costs in cases other than bankruptcy cases, and for the purpose of securing the payment of costs in the cases in which they were deposited, and before the clerk had earned the costs, he took, and appropriated to his own use, these moneys, and thereby embezzled the same. I do not see how any criticism of this count can destroy its force and effect in the way I have indicated.

The second count in the indictment is the same as the first, except that it charges the embezzlement of $180, and the third count is the same, except that it charges the embezzlement of $95.40 of moneys so deposited.

The fourth count charges the embezzlement of $500, moneys deposited to pay costs in bankruptcy proceedings; such moneys having been deposited by parties other than the United States, whose names were to the grand jurors unknown.

The fifth count in the indictment contains the same charge as the fourth, except that it charges the embezzlement of $180, moneys so deposited by persons other than the United States, to the grand jurors unknown, in proceedings in bankruptcy in said court, to pay and secure the payment of costs in such proceedings, and as in the other counts he is charged with appropriating the same to his own use and thereby embezzling the same before he had earned the costs which the money was intended to secure.

The sixth count charges the embezzlement of $95.40, the same having been deposited by persons other than the United States, and to the grand jurors unknown, to secure the payment of costs in cases in bankruptcy, "the said sum of $95.40 dollars embezzled by the same Eugene D. Dodge as aforesaid, being in excess of any part of said fund which was due and owing, or might become due and owing, to the said clerk for and on account of fees in the said suits, actions, and proceedings."

I think it is clear, from the amounts stated, that the first, second, and third counts are intended to cover the same transactions as the fourth, fifth, and sixth counts; that is, the first three counts to cover the transactions if the moneys were deposited to cover costs in cases other than bankruptcy proceedings, and the last three counts to cover the same transactions if the deposits were made in bankruptcy proceedings. They seem to be charged in the alternative in that way, in order to cover either phase of the case, if the proof should show the moneys referred to have been deposited in the way set out in the respective counts.

The decision in the case of United States v. Mason, 218 U. S. 517, 31 Sup. Ct. 28, 54 L. Ed. 1133, seems to be inapplicable here, in view of the decision of the Supreme Court of the United States in United

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States v. Davis, 243 U. S. 570, 37 Sup. Ct. 442, 61 L. Ed. 906. I have referred to this latter case in disposing of the demurrers to another indictment against this same defendant. 251 Fed. 737. I think the same reasoning will apply here. The money charged to have been converted by the defendant to his own use, in this case, did not belong to him, and, according to the charge in the indictment, he had not earned the money so converted when the conversion took place. Consequently I see no way to avoid the conclusion that the case comes within this last decision of the Supreme Court, which was a case against a deputy clerk of one of the District Courts.

The demurrers to this indictment, and to each count thereof must be overruled.

UNITED STATES v. DODGE.

(District Court, S. D. Florida. July 16, 1918.)

No. 568.

CLERKS OF COURTS ⊜76—MAKING FALSE ENTRIES.

Indictment alleging that accused made false entries in books and records which the Attorney General required to be kept under Act June 30, 1906, § 1 (Comp. St. 1916, § 1399), and that such acts were in violation of Act March 4, 1911 (Comp. St. 1916, § 10270), providing for punishment of any clerk making false entries in accounts with intent to deceive the United States, is not demurrable; the words of the act of 1911, "or whoever being an officer, clerk, agent," etc., embracing clerks of courts.

Eugene D. Dodge was indicted for making false entries of fees collected as court clerk, and he demurs to the indictment. Demurrer overruled.

See, also, 251 Fed. 737, 740.

Herbert S. Phillips, U. S. Atty., of Tampa, Fla.

John W. Dodge and W. M. Toomer, both of Jacksonville, Fla., for defendant.

NEWMAN, District Judge. There is an indictment in this case returned under Act Cong. March 4, 1911, c. 270, 36 Stat. 1355 (Comp. St. 1916, § 10270), which is as follows:

"That whoever, being an officer, clerk, agent, or other person holding any office or employment under the government of the United States and, being charged with the duty of keeping accounts or records of any kind, shall, with intent to deceive, mislead, injure, or defraud the United States or any person, make in any such account or record any false or fictitious entry or record of any matter relating to or connected with his duties, or whoever with like intent shall aid or abet any such officer, clerk, agent, or other person in so doing; or whoever, being an officer, clerk, agent, or other person holding any office or employment under the government of the United States and, being charged with the duty of receiving, holding, or paying over moneys or securities to, for, or on behalf of the United States, or of receiving or holding in trust for any person any moneys or securities, shall, with like intent, make a false report of such moneys or securities, or whoever with like intent shall aid or abet any such officer, clerk, agent, or other person in so doing"—shall be punished as prescribed in the statute.

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The act of Congress requiring the keeping of records and dockets such as are referred to in this indictment is contained in Act Cong. June 30, 1906, 34 Stat. 754, c. 3914, § 1 (Comp. St. 1916, § 1399).

It seems to me that the mere reading of this provision in the act of 1906, in connection with the act of March 4, 1911, under which this indictment was drawn, is sufficient to show that the indictment is properly drawn under this act, and is not subject to demurrer. The act of 1906 authorizes the Attorney General to—

"prescribe such docket or dockets or other books as he may deem proper to be kept and used by such clerks in recording, reporting, and accounting for moneys mentioned above in this paragraph, and in recording all fees and emoluments earned by them, which dockets or other books shall be kept and used by said clerks in accordance with rules and regulations prescribed by the Attorney General."

The clerks referred to in the act of 1906 are clerks of the United States courts, and the charge in the indictment is that the books and records in which the false entries are alleged to have been made are books which the Attorney General of the United States, under this provision of the act of 1906, required the clerks to keep. If the clerks referred to in the first part of the act of 1911 are not court clerks, it is clear that the language of the latter part of the act of 1911, commencing "or whoever, being an officer, clerk, agent," etc., embraces clerks of the courts.

It will be necessary to prove, of course, that the records in which the entries were made were books which the Attorney General required to be kept, and having shown that they were books or dockets which the Attorney General required to be kept, and that false entries were made on them for the purpose of defrauding the persons named in the indictment, a case would certainly be made under the statute referred to.

The demurrer to the indictment will be overruled.

DAVIS et al. v. GARFIELD & PROCTOR COAL CO.

(District Court, D. Massachusetts. January 7, 1918.)

No. 192.

1. SHIPPING ⇐174—CONSIGNEES—ACCEPTANCE OF CARGO.
Consignees, accepting a cargo of coal under a bill of lading making detailed provisions as to demurrage, are bound by its terms.

2. SHIPPING ⇐177—DEMURRAGE—BILL OF LADING.
Under a bill of lading establishing a daily rate of discharge, with demurrage if unloading is not completed within time so limited, and doubling rate in case other vessels be given preference, the consignee may direct discharge at a single wharf, or in a specified berth at a large wharf; and the double rate does not apply, if the vessel be given her turn where directed.

3. SHIPPING ⇐177—DEMURRAGE—PRIORITY IN DISCHARGE.
Where a bill of lading provided for a double rate of demurrage in case later vessels were given preference, a coal-carrying vessel ordered in

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general terms to large docks having several berths, and at which coal for different purposes was unloaded at separate places, takes her place in line for the berth at which coal of the sort which she is carrying is habitually discharged.

4. SHIPPING ⊂⊃172—DEMURRAGE—DOUBLE RATE OF DISCHARGE.
Where a bill of lading to protect a vessel against discrimination provided for a double rate of discharge in case later vessels were given precedence, the provision, being in the nature of a penalty, is enforced with reference to reasonable business conditions and usages prevailing at the wharf where discharge is directed, and comes into effect only when preference is given out of the usual course of business.

5. SHIPPING ⊂⊃184—DEMURRAGE—BURDEN OF PROOF.
Where a bill of lading provided for double rate of discharge in case a later vessel was given preference, the fact that later vessels are given preference throws on the consignee the burden of justifying such action, and it is not sufficient for it to show that no departure was made from the ordinary business practice, but it must also show that the practice was reasonable.

6. SHIPPING ⊂⊃175—DEMURRAGE—PRIORITY.
For a railroad which owned a dock to reserve discharge towers and prefer vessels carrying its own coal is not unreasonable; hence the owner of a coal-carrying schooner, directed to discharge at such dock, cannot recover from the consignee demurrage on the double rate of discharge provided for in the bill of lading in case later vessels were given preference, because vessels carrying coal for the railroad company were given a preference.

In Admiralty. Libel by Cornelius A. Davis and others against the Garfield & Proctor Coal Company. Decree for libelants as indicated.

Benjamin Thompson, of Portland, Me. (Edward S. Dodge, of Boston, Mass., on the brief), for libelants.

Berry & Bucknam, of Boston, Mass., for respondent.

MORTON, District Judge. The schooner Governor Ames was chartered to the Smokeless Fuel Company under a charter party which contained the following provision:

"Discharging per National Association bill of lading, and that for each and every day's detention by default of said party of the second part, or agent, demurrage per N. A. B. lading dollars per day, day by day, shall be paid by said party of the second part or agent to said party of the first part or agent."

A cargo of coal was shipped in her, consigned to the order of the respondent under a bill of lading containing the following provision as to demurrage:

"And twenty-four hours after the arrival at the above-named port and notice thereof to the consignees named, there shall be allowed for receiving said cargo at the rate of one day, Sundays and legal holidays excepted, for every one hundred and fifty tons thereof, after which the cargo consignee or assignee shall pay demurrage at the rate of six cents per ton a day, Sundays and legal holidays not excepted, upon the full amount of cargo as per this bill of lading, for each and every day's detention, and pro rata for parts and portions of a day beyond the day above specified until the cargo is fully discharged, which freight and demurrage shall constitute a lien upon said cargo. After arrival and notice to the consignee as aforesaid, and the expiration of said twenty-four hours, said vessel shall have precedence in discharging over all vessels arriving or giving notice after her arrival, and for any violation of this provision she shall be compensated in demurrage as

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if while delayed by such violation her discharge had proceeded at the rate of three hundred tons per day. This bill of lading is subject to terms and conditions of charter party."

The Governor Ames arrived in Boston on March 9, 1903, and by order of the consignee reported to the Boston & Maine Railroad docks at Mystic Wharf at 9:30 a. m. on that day. She was docked there on March 30 and completed her discharge on April 3, 1903. The present libel is for demurrage and was brought on April 3, 1909.

It is claimed by the libelants that vessels arriving after the Ames were given precedence over her at Mystic Wharf, and that from the date of such preference the time allowed the consignee for discharging should be reckoned on a basis of 300 tons per day in accordance with the second provision of National Association bill of lading above quoted, instead of on a basis of 150 tons per day as allowed under the first provision.

[1] The consignees accepting the cargo under the bill of lading were bound by its terms. I have no doubt that certain steamers arriving later than the Governor Ames were docked and discharged before her at Mystic Wharf. The real question is whether such precedence doubled the rate of discharge.

[2-6] Mystic Wharf is owned by the Boston & Maine Railroad. Four schooners of the size of the Ames, or five steamers, could discharge there at the same time. It was equipped with six discharging towers. These were owned by one Rogan, who, under an arrangement with the Boston & Maine, did all the discharging. The wharf was used by everybody who had coal destined for distribution along the line of the Boston & Maine Railroad. Most or all of this cargo was so destined. Any shipper of such coal could send his vessel to Mystic Wharf; but vessels were not allowed to dock there until directed by the Boston & Maine's agent. The control of the wharf was entirely in its hands; the respondent had nothing to do with it. The Boston & Maine habitually gave precedence to vessels bringing coal for its own supply or use, discharging them as soon as possible after their arrival, and before discharging vessels consigned to other persons which had previously reported.

It was suggested by the libelants that a part of the wharf lying above the bridge might have been used for discharging the Ames, and that she was not placed there. The reason for not doing so does not appear. The libelants' claim is not for unreasonable delay in discharging, but for giving precedence to later vesels; and, as will appear, the point becomes immaterial.

There have been several cases in this circuit on the question presented, the most important of which are Evans v. Blair, 114 Fed. 616, 52 C. C. A. 396, Cargo of 3,408 Tons Pocahontas Coal v. Ross, 175 Fed. 548, 99 C. C. A. 170, and Donnell v. Amoskeag Mfg. Co., 118 Fed. 10, 55 C. C. A. 178. Without undertaking to state or analyze each of these decisions, they establish, in my opinion, the following as the law:

Under bills of lading like the one here in question, delay in discharging is provided against by establishing a daily rate of discharge

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by the consignee, with demurrage if the unloading is not completed within the time so limited. The consignee may direct discharge at a single wharf, or in a specified berth at a large wharf; and the doubled rate does not apply if the vessel be given her turn where directed. If a vessel be ordered in general terms to large docks having several berths, and at which coal for different purposes is unloaded at separate places, she takes her place in line for the berth at which coal of the sort which she is carrying is habitually discharged.

In order to protect a vessel against discrimination, the provision is inserted halving the time for discharge in case later vessels are given precedence. But this provision, which is "in the nature of a penalty" (Putnam, J., Cargo of 3,408 Tons of Pocahontas Coal v. Ross, supra), is enforced with reference to "reasonable business conditions" (Id.), and usages prevailing at the wharf in question. "Its purpose is the preventing of unjust discrimination." Id. It comes into effect when a preference is given "out of the ordinary course of business at either of the discharging places in question here." Id. In Evans v. Blair, supra, it was explicitly held that the owner of several different wharves might appropriate them to different uses, and that a vessel was only entitled to her rightful place at the dock where such cargo as she was carrying was generally discharged. The fact that later vessels are given priority throws upon the respondent the burden of justifying such action; and it is not sufficient for it merely to show that no departure was made from the ordinary business practice of the consignee or its representative, without also showing that the practice was reasonable.

Applying these principles of law to the facts in this case, it cannot, I think, be doubted that, under the conditions prevailing at the time in question, the Boston & Maine acted not unreasonably in reserving two of the towers on its wharf for its own purposes.

While the evidence is meager, it has not been argued, and I see no reason to believe, that the established practice or "the ordinary course of business" at Mystic Wharf was departed from in the case of the Governor Ames, nor that the vessels which were given precedence over her were of any different class from those which had customarily been accorded precedence at the wharf. It follows that she is not entitled to demurrage computed upon the doubled rate of discharge, but only to demurrage computed at the basic rate; i. e., 150 tons per day.

Decree accordingly.

THE VAN DER DUYN.

(District Court, E. D. New York. July 3, 1918.)

1. SEAMEN ⇐11—MEDICAL ATTENTION.
 An action will not lie against the ship for an error of diagnosis on the part of the officers with respect to an injury to one of the crew.
2. SEAMEN ⇐11—INJURIES TO COAL PASSER—MEDICAL ATTENTION.
 Where coal passer broke his arm, and ship's officers gave it merely antiseptic dressing, ship was liable for aggravated condition and additional pain suffered through rough treatment by reason of officers honestly thinking arm was not broken.

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3. SEAMEN ⊂=11—INJURIES TO MEMBER OF CREW.

A ship owes it to an injured seamen to take reasonable precautions to furnish reasonable aid, even to the extent of taking the man to the nearest place for remedy.

4. SEAMEN ⊂=11—MEDICAL ATTENTION.

Mere antiseptic dressing, without knowledge of what is proper treatment, is not sufficient for the assumption of qualification to diagnose an injury consisting of a broken arm, and should not be classed as an error of judgment.

In Admiralty. Libel by Alfred Testut against the steamship Van der Duyn, claimed by the New York & Cuba Mail Steamship Company. Decree for libelant.

Silas B. Axtell, of New York City, for libelant.

Kirlin, Woolsey & Hickox, of New York City (L. De Grove Potter and Harry D. Thirkield, both of New York City, of counsel), for claimant.

CHATFIELD, District Judge. The libelant was a coal passer, who received a fracture of the ulna of his right arm, on the ship Van der Duyn, upon the evening of the 21st of April, 1916, when the vessel was at sea. The libelant's arm was caught between a bucket of ashes and the upper edge of an opening in the side of a ventilator. The bucket had been hoisted up to the level of this doorway, through which it was to be pulled back out on the deck of the vessel. Members of the crew were working a winch which was doing the hoisting, and the evidence indicates that the accident occurred through failure on the part of those operating this winch to use care. There was some intimation that the winch was not so constructed as to work safely unless the operators observed certain precautions in moving a lever, which would not lock itself into rest at a neutral point when the winch was stopped. But no evidence of negligence or unseaworthiness has been shown by the libelant, and he was apparently injured through the carelessness of some other seaman upon the vessel.

The mate of the vessel attempted to dress the injury, and treated it as a sprain or lacerated bruise. When the vessel arrived at Havana, some five days later, the arm was badly swollen, and was examined by a doctor; but the libelant was not sent to a hospital, and the vessel came on to New York, where some two weeks after the accident the libelant himself went to the Long Island College Hospital and had his arm treated in a most skillful and successful manner. An X-ray then taken showed a badly overlapping fracture, necessitating an operation upon the bone itself, and it is impossible, as the operating physician is now out of the country, with the United States Army, to learn more than is shown by the hospital record and the X-ray plate. It appears that a small portion of bone was removed in order to set the arm as well as might be, that the fracture has entirely healed so far as union of the bones is concerned, and that the libelant has recovered motion and muscular strength in his wrist and forearm, except for a slight inability to complete rotation of the humerus upon the ulna, owing to the presence of some bony projection on one of the fractured surfaces,

which could not be entirely restored to normal condition at the time of the operation. The libelant has some slight muscular atrophy, due to this interference with the use of his forearm and to the muscular injuries relating back directly to the fracture and the operation. But his muscular strength is, in general, only slightly interfered with. He endured considerable pain, and testifies to harsh treatment by the mate, who thought that he was shamming, and endeavored to see if the bones were broken by testing their movements, according to the libelant's story, by bending the bones across his knee.

It must be held, upon the testimony, that if the officers of the ship had known that his arm was fractured, or if the doctor at Havana had been certain that the arm was fractured, he might have received at Havana treatment which would have alleviated his suffering, and would have secured him more sympathetic treatment on the voyage to New York. When the vessel arrived at New York he was not taken ashore, and apparently the ship's officers accused him of shamming. He took the matter into his own hands by technically deserting and going to the hospital, a course which has since been proved justified, and which bears out to some extent the libelant's contention in the case.

[1-4] The libelant claims damages against the vessel for unseaworthiness, and for failure of the officers to correctly diagnose his injury, or to give him proper care. An action will not lie against the ship for an error of diagnosis on the part of the officers with respect to an injury to one of the crew. The Sarnia, 147 Fed. 106. Nor does the libelant in this case make out, by a preponderance of testimony, his contention that transfer to a hospital at Havana would have resulted in any better permanent restoration of his arm, after the fracture had been treated by operation, which apparently would have been necessary in any event. The libelant did receive care and maintenance, in so far as transportation to New York and expert hospital treatment, with the payment of expenses during that time, was concerned.

The present condition of the libelant's arm and the testimony as to the operation performed in the Long Island Hospital in Brooklyn, when viewed from the statements of the witnesses as to the appearance of the injury at Havana and during the voyage, indicate that the operation was made necessary by the fracture, and not from lack of treatment, and that the delay may have added little to the permanent injury, which would have resulted in spite of operation at any time. In fact, the testimony indicates that, if a careful examination had been made at Havana, the operation itself would have been postponed until the vessel arrived in New York. But undoubtedly the libelant suffered additional pain and discomfort, and was not given considerate treatment by the officers of the vessel, who concluded that he was shamming, and who looked upon the injury as a mere bruise or laceration of the flesh. The treatment, while useful in preventing infection, was not that which a possibly broken arm should have received, and the evidence supports a finding that the officers were not justified in relying upon their own opinion or in assuming from the examination given by the quarantine doctor at Havana that no other treatment was necessary. Their failure to take such steps as the situation evidently called for, while uninten-

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tional on their part, can nevertheless not be overlooked, and the vessel is certainly liable for that failure, as the vessel owed it to the seaman to take reasonable precautions and to furnish reasonable aid, even to the extent of taking the man to the nearest place for remedy. The Iroquois, 194 U. S. 240, 24 Sup. Ct. 640, 48 L. Ed. 955. In default of this the vessel was liable for the consequences of failure to do so, even if the officers were honest in their opinion that the man was shamming. An error of judgment on the part of the officers means an honest error in choosing the method of treatment. It presupposes that they did the best which they could. But, as is said in the case of The Governor (D. C.) 230 Fed. 857, mere antiseptic dressing, without knowledge of what is proper treatment, is not sufficient for the assumption of qualification to diagnose, and should not be classed as an error of judgment. The vessel should not be absolved from liability, if the ignorance of the officers is merely a basis for their utter failure to appreciate that they should do something to supplement their own lack of knowledge.

In the case at bar the libelant was entitled to different care and treatment of a possible fracture than that which he received. For the increased pain and suffering which he experienced, and for the slight permanent injury, which might have been avoided by careful treatment of the fractured arm, an award of $750 will be granted.

In re ASSOCIATION DAIRY CO.

(District Court, D. Connecticut. June 4, 1918.)

No. 4380.

1. BANKRUPTCY ⊂=228—FINDINGS OF REFEREE.
Findings of fact, made by a referee as special master, are not reviewable on exception.

2. BANKRUPTCY ⊂=11—COURTS OF BANKRUPTCY—RULES OF PROCEDURE.
Courts of bankruptcy act as courts of equity, and are governed by the principles and rules of equity in their procedure.

3. EQUITY ⊂=410(4)—MASTERS—EXCEPTIONS TO REPORT.
Exceptions to the report of a master must specifically point out the matter objected to and the ground of objection, and general exceptions will not be considered.

In Bankruptcy. In the matter of the Association Dairy Company, alleged bankrupt. On exception to master's report. Overruled.

Stewart N. Dunning, of Hartford, Conn., for petitioning creditors.
John J. Toohey, of Hartford, Conn., for alleged bankrupt.

THOMAS, District Judge. [1] Certain controverted questions of fact were referred to the referee as special master, who filed his report, and found certain facts which are detailed in that report. The respondents filed an exception to the report of the special master, which exception is set forth as follows:

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"In the above-entitled cause the respondents except to the finding and report and claim that there was error committed, and therefore take:

"Exception 1. That the Association Dairy Company is insolvent, and has committed the claimed acts of bankruptcy as found, and that the petitioning creditors are entitled to an adjudication, and therefore protest and remonstrate against said finding and report."

Subsequent to the arguments upon this exception, counsel for the petitioning creditors filed a motion to dismiss the exception, on the ground that said exception raises no question of law, is not verified, and is not the proper exception to the report of the special master. The question of the exception raises entirely a question of fact, which the special master has resolved against the respondent, and under the rules and decisions of the federal courts the decision of these questions of fact is final. Were any errors of law committed by the master in his report as set forth in the exception? The exception on this feature of the case is set forth in these words, "and claim that there was error committed." If there was any error of law committed, it is not specifically set forth, as it should have been, but from the exception it appears that the alleged error committed is an error in the finding respecting the facts, which, as above stated, is not reviewable.

[2] In the administration of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544) since its inception, certain well-settled principles have been established by the courts. It is now universally conceded that the District Court, being a court of equity in bankruptcy matters, is a court of equity for all purposes in such matters, and all the principles and rules of equity apply, and the proceedings in bankruptcy are of an equitable nature. It has been further established beyond cavil that valuable privileges are accorded bankrupts under this act, and those who desire to avail themselves of the benefits and privileges thus given must act speedily; at least, they must conform strictly to the rules and regulations governing the administration of the act.

Under these rules and decisions a general review by the court is not intended; otherwise the purpose of the reference is defeated.

In Sheffield, etc., Railway Co. v. Gordon, 151 U. S. 285, page 290, 14 Sup. Ct. 343, 344 (38 L. Ed. 164), Mr. Justice Brown said:

"Proper practice in equity requires that exceptions to the report of a master should point out specifically the errors upon which the party relies, not only that the opposite party may be apprised of what he has to meet, but that the master may know in what particular his report is objectionable, and may have an opportunity of correcting his errors or reconsidering his opinions. The court, too, ought not to be obliged to rehear the whole case upon the evidence, as the main object of a reference to a master is to lighten its labors in this particular."

And (151 U. S. on page 291, 14 Sup. Ct. on page 344 [38 L. Ed. 164]) he further said:

"Cases are referred to a master, not on account of his presumed superior wisdom, but to economize the time and labor of the court, and as exceptions are usually filed to his report, if they are so general as to require a rehearing of the entire case, there is really nothing saved by a reference."

[3] Exceptions are special demurrers to the report (General Fire Extinguisher Co. v. Lamar, 141 Fed. 353, 72 C. C. A. 501) and must

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point out, article by article, the matter objected to and the cause of objection (Fordyce v. Omaha, Kansas City & E. R. R. [C. C.] 145 Fed. 544, 557; Columbus, S. & H. R. Co. Appeals, 109 Fed. 177, 219, 48 C. C. A. 275). Vagueness and generality are good grounds for overruling them. In re Covington (D. C.) 110 Fed. 143; Neal v. Briggs (C. C.) 110 Fed. 477. See, also, Hopkins' Federal Equity Rules, rule 66, and comment under that rule.

As before stated, cases are referred to a master to economize time, and if general exceptions are permitted the court would have to review the whole case, and the effect of the reference thus be lost. Neal v. Briggs, supra; Sheffield, etc., Railway Co. v. Gordon, supra; Jones v. Lamar (C. C.) 39 Fed. 585; Chandler v. Pomeroy (C. C.) 87 Fed. 267; Medsker v. Bonebrake, 108 U. S. 71, 2 Sup. Ct. 351, 27 L. Ed. 654.

Mr. Justice Lurton, speaking for the Circuit Court of Appeals (109 Fed. at page 219, 48 C. C. A. at page 317), said:

"The exceptions are vague, general, and insufficient under the rules of practice, and are insufficient to support the errors assigned thereon. Exceptions to a master's report must point out specifically the errors upon which the party relies. The object of such definiteness is to give the master an opportunity to see wherein his report is subject to objection, and to apprise the opposite party of just what he has to meet."

In Fordyce v. Omaha, Kansas City & E. R. R., supra, at page 557, the court said:

"The law is that the master's report upon matters of fact is deemed to be true where no exceptions are properly taken thereto. And even where an exception is taken, the conclusions of the master on questions of fact, on conflicting evidence, if any, are presumptively correct, and will be adhered to by the court on review, unless it appears to be palpably wrong by the most persuasive weight of evidence. Growing out of these rules in such procedure, exceptions, when taken, must not be to the general result, as such would be but in the nature of a general demurrer. The exceptions must be specific, pointing out the particular errors relied upon, and where they are based upon particular evidence contradicting conclusions of the master they should refer to the evidence in the record where the same may be found, and not leave the court to grope through voluminous records of testimony, as in this case, running into thousands of pages, to find, as best it may, where the evidence * * * may be found. Chief Justice Marshall, in the early case of Harding v. Handy, 11 Wheat. (U. S.) 103–127, 6 L. Ed. 429, said:

"'It may be observed, generally, that it is not the province of a court to investigate items of an account. The report of the master is received as true when no exception is taken and the exceptions are to be regarded so far only as they are supported by the special statements of the master, or by evidence, which ought to be brought before the court by a reference to the particular testimony on which the exceptor relies. Were it otherwise, were the court to look into the immense mass of testimony laid before the commissioner, the reference to him would be of little avail. Such testimony, indeed, need not be reported further than it is relied on to support, explain, or oppose, a particular exception.'

"Mr. Justice Clifford, in Greene v. Bishop, 1 Cliff. 186, Fed. Cas. No. 5,763, after adverting to the above statement of Chief Justice Marshall, said:

"'But the evidence ought to be brought before the court by reference to the particular testimony on which the excepting party relies.'

"Speaking of the exception he said:

"'It merely alleges that the finding of the master is erroneous and unsatisfactory, without attempting or pretending to specify any particulars in which the error consists, * * * and omits altogether to refer to any portion of the testimony to support the allegation.'"

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See, also, Jaffrey v. Brown (C. C.) 29 Fed. 476, 479; Jones v. Lamar (C. C.) 39 Fed. 585–587.

In view of these well-settled principles of law, the exception is overruled, and the report of the master is confirmed. In view of this conclusion, no action is necessary on the motion to dismiss the exception.

Ordered accordingly.

THE NEPONSET.

(District Court, D. Massachusetts. April 23, 1918.)

No. 1496.

TOWAGE ⊜11(5)—LIABILITY OF TUG—NEGLIGENCE.

On a libel by the owner of a scow to recover damages for an injury alleged to have been caused by the negligent manner in which it was towed, *held*, that the tug was at fault in allowing the scow to strand on a well-known and charted shoal, and that there was no fault on the part of those in charge of the scow.

In Admiralty. Libel by the Bath Iron Works, Limited, against the tug Neponset. Decree for libelant.

Harrington, Bigham & Englar, of New York City, for libelant.

Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for claimant.

MORTON, District Judge. This is a libel by the owner of scow 57 to recover damages for an injury alleged to have been caused to the scow by the negligent maner in which it was towed by the respondent tug. The undisputed facts are as follows:

The libelant is the owner of the scow, which was launched new at Bath, Me., on July 30, 1916, and was to be used as a car float in New York Harbor. It was made of steel, about 265 feet long, 37 feet beam, and 3½ feet draft. It had square ends, sloped up from the bottom, which was flat, straight sides, and slightly rounded bilges; it was divided into 13 water-tight compartments. It had no means either of propulsion or of steering. It was towed by a steel bridle, about 90 feet long, attached from corner to corner at the bow, to which was fastened a manilla hawser. Two men, Charles Kingsbury and Albert Kingsbury, went as crew on it; but their duties were merely to attend to lights and ropes, and to give warning in case the scow got into trouble.

The Neponset is a powerful steam tug, drawing about 12 feet of water. She was employed to tow the scow from Bath to New York. She started with it on August 7, 1916, put into Portland that night, and the next day continued the voyage down the coast. At the beginning of the trip the scow was in good condition in every way. When the delivery point at Whitestone, near New York, was reached, it was found that the scow had received serious injuries. She was immediately dry-docked; examination showed that the bottom had been badly scraped, and that there was one hole in it, said to be large enough for a man to go through. The edges of the plates showed signs

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of scraping along rocks, and pieces of rock and stones were found in the breaks. This was the testimony of the surveyor and the repair man, and in the absence of anything tending to show bias or prejudice on their part it is entitled, it seems to me, to the fullest weight. Upon the evidence it cannot be doubted, I think, that the scow stranded heavily during the voyage, and that her injuries were occasioned in that way. The tug's suggestion that they were caused by collision with a floating object is disproved by the clearly established facts in regard to the appearance of the bottom.

The libelant alleges that the stranding occurred on Stratford Middle Ground shoal, in Long Island Sound, through which the tow passed on its westward course. The testimony of the two Kingsburys supports this contention. They say, in substance, that about 9:30 p. m., on the day before the arrival at Whitestone, they felt the scow take bottom and bump and scrape along; that they looked around and saw on the starboard side of the scow, from 500 to 800 feet distant, the lighthouse on the Middle Ground shoal; that the scow was to the south of the lighthouse; and that the tug was ahead of her, at an angle of about 45 degrees on the starboard bow of the scow, about 80 fathoms away, which was the distance of the hawser and bridle. The correctness of this testimony is denied by the respondent; but there is no dispute that when the tug took the scow alongside, farther down the Sound, Charles Kingsbury went into the tug's pilot house and said to her master that the scow had struck bottom on the way. What answer the master made, if he made any, does not appear. He has died pending the litigation and without his testimony having been taken.

It is clear that the scow's injuries were not due to mismanagement by its crew, because it had no capacity to maneuver of itself, and was wholly under the control of the tug. There was no stress of weather at any point. There is no evidence of grounding at any other place than that stated by the scow's crew. The voyage was over familiar, well-charted waters. It has not been contended, and it is altogether unlikely, that in Long Island Sound there is some unknown and uncharted shoal so near the courses ordinarily followed as to have caused the injury. No place where the scow might have stranded is suggested by the tug. If the scow grounded on Middle Ground shoal, it is immaterial whether it grounded to the north, or to the south, of the lighthouse, or before or after dark, except that the testimony of the Kingsburys in regard to those matters may or may not so affect their credibility as witnesses as to occasion doubt whether the scow grounded as they state. No blame has been or could be imputed to them; they would have no motive to falsify, and they impressed me as intending to tell the truth. They were not very familiar with localities and navigating marks in the Sound; but in the broad outlines of their testimony it seems unlikely that they would be in error, viz. that they felt the scow strike, and immediately looked around in the dark, and saw that they were near a lighthouse distant from both shores. There is no place in the western part of the Sound answering that description except the Middle Ground shoal.

On the other hand, no navigating log is produced by the tug; the testimony on her behalf is that none was kept. The libelant suggests that there must have been such a log and that it is not produced, because it would bear heavily against the tug. She carried only one man, Lewis, who was licensed for Long Island Sound; and it is admitted that, for a part of the run through the Sound, she was being navigated by men not licensed for those waters, and was towing on a hawser somewhat longer than permitted by government regulations. These are, perhaps, minor matters; but they indicate a certain laxity of management and discipline, which has been held relevant on the question of negligence. I doubt whether the men on the tug have any independent, accurate recollection of the time at which they passed various points in the voyage which they had no occasion to notice. Their testimony is founded, I think, on the statement in the engineer's log. He was under no duty to make such entries. The book in which they should have been made, the navigating log, either was not kept, or is not produced. There are irreconcilable differences in the testimony offered by the opposing parties; but, upon the whole evidence, I am satisfied that the scow grounded on Middle Ground shoal, as alleged.

During most of the voyage, the tug, as all the witnesses on the point agree, held a position, not in front of the scow, but on her starboard bow. She was in that position, the Kingsburys testify, at the time of the accident. The Middle Ground shoal was briefly described by Capt. Lewis. That the tug could have passed safely 200 feet nearer the lighthouse than the scow which grounded, which is in effect what the Kingsburys testify happened, seems extremely improbable, if Capt. Lewis' description is accurate. On the other hand, if the tow, which was going west, attempted to pass to the north of the Middle Ground and ran too close to it, the tug, being farther off than the scow, might have gone clear, although the scow struck. Such a supposition would adequately account for the accident, and, all things considered, seems to me the most reasonable explanation of it.

As the Middle Ground shoal was well known and charted, the tug's fault in stranding the barge on it is too obvious to require discussion. Cobb v. Tug Coastwise, 233 Fed. 1, 147 C. C. A. 71. It follows that there must be a decree adjudging the tug solely at fault.

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In re GERMANTOWN ALMEGUM MFG. CO.

(District Court, E. D. Pennsylvania. June 7, 1918.)

No. 5702.

BANKRUPTCY ⊂=172—TRUSTEE—RIGHTS OF PLEDGEES.

A second pledge of crude rubber, which the owner had stored with an independent warehouseman, is valid as against the trustee in bankruptcy of the owner, the original pledgee and warehouseman having been notified of the pledge, for the owner had at least a right of redemption and a paper assignment of a chose in action, without other delivery than of itself, and without notice to the one in possession of what is transferred, passes good title against a trustee in bankruptcy.

In Bankruptcy. In the matter of the bankruptcy of the Germantown Almegum Manufacturing Company. Sur certificate of referee upon petition for review of an order allowing the claim of the Pelham Trust Company. Petition dismissed.

Percival H. Granger and Reber & Granger, all of Philadelphia, Pa., for petitioner.

John C. Gilpin, of Philadelphia, Pa., for claimant.

DICKINSON, District Judge. The questions which are or may be involved in this review may be thus formulated: The general question is that of what, if any, rights were secured by the Pelham Trust Company by and under a pledge which the trust company claims to have been given to it of the property of the bankrupt to secure a loan or advances of moneys.

1. One question is the power and authority of the individual who made the claimed pledge as the official representative of the bankrupt to make it. The referee deemed this to be the important question in the cause. He found in favor of the pledgee, and the point is not now pressed.

2. Another question raised was the fact of the pledge having been made. The referee found the fact in favor of the pledgee, and the petitioner does not press for a reversal of this finding.

3. The third, and, as the petitioner regards it, the now controlling, question, is the validity of this pledge as against execution creditors, or, as the petitioner prefers to have the question stated, whether as against execution creditors (or a trustee in bankruptcy) an owner of chattels who has pledged them (delivery of possession accompanying the pledge and the pledgee being in possession) can repledge them to another; the second pledge being accompanied with no delivery other than that of the delivery of the assignment and notice thereof to the person in possession.

To make clear just how this third question arises, and the subquestions which are involved, an outline statement of the general facts may be of help. In making this we ignore all controversies not now urged.

In the regular course of its business the bankrupt had bought crude rubber. This, for the purpose of being used as collateral, was put

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on storage in the Rex Warehouse, an independent depository, and was pledged to the Philadelphia Warehouse Company for advances made. The rights of the Warehouse Company are not in question. The present controversy is over the proceeds of sale in excess of the part which was awarded to this first pledgee. The bankrupt then applied to the Pelham Trust Company for a loan or advances, offering as security whatever value there was in rubber over and above the debt due the Warehouse Company. The trust company agreed to make the advances, and received a paper, which recited the fact of the rubber being on storage with the Rex Company, described its character, quantity, and value, and further set forth, "All of our right, title, and interest to and in this rubber is assigned to Pelham Trust Company as further protection and security," etc., and added authority in the pledgee to have the goods insured for the pledgee's benefit. The assignment was delivered, and knowledge of it conveyed to the storage company and first pledgee. There is no specific finding by the referee of this latter fact. It is stated upon the authority of uncontradicted statements made during the argument.

If we have grasped the thought advanced by counsel for the petitioner, it is that, the bankrupt having by the pledge first made of this rubber put it out of its power to deliver the rubber to the second plegdee, the second pledge is void. This is based upon the familiar proposition that an attempted transfer of property by one afterwards adjudged a bankrupt is void as against his trustee, unless the transfer was accompanied by delivery.

The argument addressed to us does not compel acceptance of the conclusion stated. The only delivery required is that of which the subject-matter of the transfer is in its nature capable. By the first pledge the bankrupt undoubtedly parted with possession. After that, it is further true, the only transfer of possession it could make was a symbolic one, or one which was the practical equivalent of actual physical delivery. It still had, however, a right of property, and incident to that would seem to be the right of transfer. The first transfer passed the legal title and right of possession (together with actual possession) to the pledgee. Thereafter the pledgor had neither possession nor (as matters then stood) the right to possession. It did, however, retain a right of property which involved the right to reclaim the property, reinvest the title in itself, and retake possession upon redemption of the pledge. Whether after the pledge made it was still sub modo owner (subject to the pledge), or whether the character of its property had changed, so that it had only what might be termed a chose in action would seem to be of no importance.

It has been settled in this state that an assignment of choses in action, without other delivery than that involved in the act of transfer, is good as against foreign attachments and attachments in execution. The argument has not been accepted that this is because foreign attachments and attachments in execution are each original and not execution process, their nature and purpose being merely to hold the property until after judgment, so that execution may be effective, and it has been held in this circuit that the mere paper assignment of a

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chose in action without other delivery than of itself, and without notice to the one in possession of what is transferred, passes a good title against a trustee in bankruptcy. It is therefore unimportant whether notice was given to the depositary of the property or not. Phillips Estate (3) 205 Pa. 515, 55 Atl. 213, 66 L. R. A. 760, 97 Am. St. Rep. 746; In re Hawley Co., 238 Fed. 122, 151 C. C. A. 198.

If the proposition, which we understand to be the real one, on which the petitioner stands, were one open to discussion, the argument in support of it would be one of interest. It is the resultant of the subpropositions that (1) a paper assignment is good against the assignor; (2) it is good against the plaintiff in foreign attachment, or an attachment in execution, because neither is execution process, and the plaintiff steps only into the shoes of the defendant, but is not good against execution creditors or a trustee in bankruptcy (who is an execution creditor), unless there was a change of possession or its equivalent in such delivery as that of which the nature of the subject-matter permitted, and that there could be in cases of symbolic delivery notice to the person in possession.

We do not regard the question, however, as longer an open one, and approve the findings made by the referee, confirm the order made, and dismiss the petition for review.

BENSON v. BULGER, Supervising Inspector, et al.

(District Court, W. D. Washington, N. D. April 26, 1918.)

No. 147.

PILOTS ⇐5—REVOCATION OF LICENSES—CHARGES.

A charge by steamboat inspectors against a pilot, alleging inattention to duty and disregard of pilot rule 16, relating to navigation in fogs and mists, falling snow, or rainstorms, does not authorize the inspectors to suspend the pilot's license, merely because it refers incidentally to Rev. St. § 4442 (Comp. St. § 8204), relating to suspension or revocation of licenses, in view of section 4450 (Comp. St. 1916, § 8212), and Comp. St. 1916, § 7907, relating to the regulation of pilots.

In Equity. Suit for injunction by George E. Benson against John L. Bulger, as Supervising Inspector for the First District, Steamboat Inspection Service, Department of Commerce of the United States, and others. On motion to dismiss bill. Denied.

Peterson & Macbride, of Seattle, Wash., for complainant.

Clay Allen, U. S. Atty., and Donald A. McDonald, Asst. U. S. Atty., both of Seattle, Wash., for defendants.

NETERER, District Judge. Complainant prays that the defendants be enjoined from enforcing an order suspending his license as master and pilot of steam vessels, alleging that he is a citizen of the United States, duly licensed under the law; that on the 5th day of October,

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1917, while he was acting as master of the steamer Tolo, operating on Puget Sound in a dense fog, and while operating in accordance with the laws of the United States and pilot rules, without fault on his part, said vessel collided with the tug Magic and was sunk in about 100 fathoms of water; that on October 16th following the local inspectors (defendants) filed charges against the petitioner as follows:

"You, as a licensed officer of steam vessels, are hereby charged with inattention to your duties and violation of section 4442, R. S. U. S., in connection with the navigation of the steamer Tolo, of which you were master and pilot and in charge of the navigation of said vessel when she collided with the steamer Magic on October 5, 1917, disregarding the provisions of article 16 of the Pilot Rules for certain inland waters of the Atlantic and Pacific Coasts and of the coasts of the Gulf of Mexico, as follows:

"'Every vessel shall, in a fog, mist, falling snow, or heavy rainstorm, go at a moderate speed, having careful regard to the existing circumstances and conditions.

"'A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.'

"You are directed to appear at this office, 506 Securities Bldg., Seattle, Wash., October 23d, at 10 a. m. You are advised that you may be represented by counsel.

"Respectfully,

Thomas P. Deering,
"Savine L. Craft,
"Local Inspectors."

It is then alleged that on the 26th of October said inspectors rendered a decision sustaining said charges, and on the 30th of October the Treasury Department, through the collector of customs for the port of Seattle, notified the complainant that a fine of $50 had been imposed. It is further alleged that the local inspectors, by order, suspended the license of the complainant for the period of six months, and directed the surrender of the license to the local inspectors; that an appeal from said decision was taken to the supervising inspector, John K. Bulger, who refused to entertain said appeal; that the defendants have each, at all times since, refused to recognize the petitioner's right to act as a licensed pilot or master, and advised him that his license cannot be extended or renewed; that complainant has been engaged as a navigator and licensed officer of steam vessels for nearly 15 years last past, that being his sole occupation and means of support; that he has no other adequate means of providing a livelihood for his family; and that, unless relief be granted, he will be permanently prevented from obtaining employment as such mariner.

The defendants have moved to dismiss the bill, on the ground that it "does not state any matter of equity entitling plaintiff to the relief prayed for, nor are the facts as stated sufficient to entitle plaintiff to any relief against these defendants."

It is contended by the complainant that the only fault charged against him is the violation of pilot rule No. 16, notwithstanding reference is made to section 4442, Rev. Stat. (U. S. Comp. Stat. 1916, § 8204), and that the only penalty prescribed for the violation of rule 16 is a fine of $50, and that the order of suspension of license was beyond the power of the board to assess.

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Section 4442, supra, provides for the granting of license to a skillful pilot of steam vessels, after ascertaining that he possesses the requisite knowledge and skill and is trustworthy and faithful, and further provides that:

"Such license shall be suspended or revoked upon satisfactory evidence of negligence, unskillfulness, inattention to the duties of his station, or intemperance, or the willful violation of any provision of this title."

Section 4450 of the same act (U. S. Comp. Stat. 1916, § 8212) provides for the investigation of acts of incompetency or misconduct committed by any licensed officer while acting under the authority of his license, and provides that:

"After reasonable notice in writing, given to the alleged delinquent, of the time and place of such investigation, * * * the board shall be satisfied that such licensed officer is incompetent, or has been guilty of misbehavior, negligence, or unskillfulness, they shall immediately suspend or revoke his license."

Section 7907, U. S. Comp. Stat. 1916 (Act June 7, 1897, c. 4, § 3, 30 Stat. 102), provides:

"Every pilot, engineer, mate, or master of any steam-vessel * * * who neglects or refuses to observe the provisions of this Act * * * shall be liable to a penalty of fifty dollars: * * * Provided, that nothing herein shall relieve any vessel, owner or corporation from any liability incurred by reason of such neglect or refusal."

This court, in Fredenberg v. Whitney, 240 Fed. 819, at page 824, said:

"The law in issue is clearly penal, and under all of the authorities, must be strictly construed. Liberal construction, as suggested by the defendants, cannot prevail in such a proceeding. Nor can the penalty be invoked and the provisions enforced unless the penalty is plainly imposed by the statute."

The only reasonable construction, it would appear, that can be made of the charge, is that the specific allegations must control, and the general reference to section 4442 held surplusage. Such interpretation is not without authority. Watson v. State, 2 Wash. 504, 27 Pac. 226.

Again, the statute, being penal, must be strictly construed. The only statement having relation to section 4442 is "inattention to your duty"; whereas, the language of the section is "inattention to the duties of his station." The mere reference to section 4442, supra, by the use of the language employed, can have no operative effect against the specific acts set out under pilot rule 16. Whether the complainant could be proceeded against under section 4442, supra, and pilot rule 16, for the same act, by specific charges under the section and rule, is not before the court; it clearly appearing to my mind that the only charge made, to which the complainant was required to respond, was the violation of pilot rule 16. Nor is the matter of the surrender of the license before the court. The defendants, having exceeded the power conferred by law, acted without jurisdiction in suspending the license, and therefore it has no operative effect. Upon the record, this court has jurisdiction.

The motion to dismiss will be denied.

In re WORCESTER FOOTWEAR CO.

(District Court, D. Massachusetts. July 10, 1918.)

No. 24800.

BANKRUPTCY ⊂=16—CORPORATIONS—"PRINCIPAL PLACE OF BUSINESS."

Where a corporation did all of its business with its customers from Worcester, Mass., where its books of account were kept, *held*, that such was its "principal place of business," under Bankruptcy Act July 1, 1898, § 2(1), being Comp. St. 1916, § 9586, although the treasurer had an office in New York, where he kept the record books and stockbook, and although he notified the clerk of the corporation in Maine, where the corporation was organized, and the internal revenue collector, that the corporation had removed to New York.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Principal Place of Business.]

In Bankruptcy. In the matter of the Worcester Footwear Company, alleged bankrupt. Referee's report confirmed, and adjudication ordered.

Jay Clark, Jr., of Worcester, Mass., and Harry T. Talty, of Boston, Mass., for petitioning creditors.

Robert A. B. Cook and Phipps, Durgin & Cook, all of Boston, Mass., for alleged bankrupt.

MORTON, District Judge. The decisive question, and the only one which has been argued, is that of jurisdiction. It turns on whether the alleged bankrupt had its principal place of business within this district for the greater part of the six months preceding the filing of this involuntary petition against it. Bankruptcy Act July 1, 1898, c. 541, § 2 (1), 30 Stat. 545 (Comp. St. 1916, § 9586). The respondent contends that it did not, and that its principal place of business was in New York. The petition was filed on March 21, 1917, so that the period to be considered begins on September 21, 1916.

The facts are not seriously in controversy; they are fully stated in the referee's report. The alleged bankrupt was organized under the law of Maine in February, 1916, to act as a selling company for the Worcester Felt Shoe Company, a Massachusetts corporation, which manufactured shoes and had its principal place of business in Worcester, Mass. Most of the respondent's business consisted of receiving consignments of shoes from the parent company, reselling them to the retail trade, collecting payments therefor, and turning the payments directly over to the other company. Its books were kept by clerks of the Shoe Company, and its officers and employés were also connected with that company. It had no place of business of its own. Until the autumn of 1916 all its business, except selling its goods, was done in the offices of the Shoe Company in Worcester. One Pevear was treasurer of both companies until October of that year, when he was succeeded as treasurer of the respondent by one Russell. Up to this time there can be no doubt that the respondent's principal place of business was in Worcester.

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Following Mr. Russell's election as treasurer, he removed the record books and stockbook to his own law office in New York; but the books of account remained in Worcester in the office of the Shoe Company, kept, as formerly, by one of its employés, who was also connected with the respondent. At this time Mr. Russell notified the clerk of the corporation in Maine and the internal revenue collector that the corporation had removed to New York.

On December 26, 1916, the Shoe Company finally closed its doors on account of financial difficulties. Somewhat earlier in that month Mr. Russell had opened a bank account in New York in the respondent's name, the first and only bank account which it ever had. Thereafter such payments as it made by check (numbering about 15 in all) were made from that account. The last merchandise sale by the respondent was made in Worcester, in December, 1916, of goods there in storage. Its subsequent activities consisted in sending out bills for its accounts receivable, which was done in Worcester, in receiving payments thereon, which came to its post office box in Worcester and were received by the treasurer on his visits to Worcester, in arrangements to put out a line of sample shoes, which arrangements were also made in Worcester, and in efforts to straighten out its financial affairs and get a new location, which were carried on by its treasurer and officers wherever they might be. Its books of account were sent to New York in January, 1917, and were kept in the offices of Mr. Russell; but the respondent's business activities were pretty well over by that time.

The respondent's letter heads never gave any other address than that in Worcester. It never had any other post office address, and never held itself out to its trade as doing business anywhere else. So far as appears, orders for goods and remittances in payment for them were always sent to the respondent in Worcester. No business of the respondent was ever carried on in New York, except that in connection with its bank account and its stock and corporate record. Its treasurer, who was its controlling official, resided and had his personal office there; but it does not appear that any directors' meetings were ever held there. The keeping of the record and stock books in New York was of little practical importance, because apparently there were few or no transfers of the stock, and no meetings during the period in question.

In his letter of March 10, 1917, Mr. Russell says:

"But from April, 1916, until the middle of January, 1917, I was in Worcester on an average of from two to four days each week."

He went there to look after the respondent's business. This letter confirms a distinct impression created by the testimony that the respondent was essentially a Worcester concern, all of whose major activities, as long as it had any, were carried on at that place, and that the part of its business which was done from New York was only such as would naturally follow the treasurer wherever he might be located.

It is not easy, nor is it required, to lay down any general rule for determining which one of several places at which a corporation does business is its principal place of business. It is not necessarily where

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the manager happens to be located, or the stockbook and recordbook to be kept, although those are significant facts. It is to be gathered from a general survey of the corporation's activities. The decision depends upon a comparison of the activities at each place in respect to their character, importance, and amount. In re Matthews Consol. Slate Co., 144 Fed. 737, 75 C. C. A. 603 (C. C. A. 1st Cir.); Id. (D. C.) 144 Fed. 724; E. & G. Theatre Co. (D. C.) 223 Fed. 657; Collier (11th Ed.) p. 40. In the present case the alternative is Worcester or New York.

From September 21, 1916, to December 26th (when the Shoe Company closed its doors) it seems to me that the respondent's principal place of business was in the office of the Shoe Company in Worcester. This period covers more than half of the six months previous to the filing of the petition. The margin is not large, but it is clear and sufficient.

On the other phases of the case I see no sufficient reason to set aside the findings and conclusions of the learned referee, nor do they call for discussion. His report will be confirmed, and adjudication ordered.

Ex parte ROMANO.

(District Court, D. Massachusetts. January 10, 1918.)

No. 1590.

1. ARMY AND NAVY ⊂=20—SELECTIVE DRAFT ACT—FAIR HEARING.
 Administrative boards, as those authorized by the Selective Draft Act, are bound to deal fairly with the individual, and where a nondeclarant alien, not subject to military service and claiming his exemption, was not given a fair hearing, the courts will grant relief unless he is accorded a fair hearing by the draft boards.
2. ARMY AND NAVY ⊂=20—SELECTIVE DRAFT ACT—FAIR HEARING.
 A nondeclarant alien, who claimed exemption and was not subject to service under the Selective Draft Act, *held* not to have been given a fair hearing by the draft boards which inducted him into military service.
3. ARMY AND NAVY ⊂=20—SELECTIVE DRAFT ACT—INDUCTION INTO MILITARY SERVICE—EFFECT.
 Where a nondeclarant alien, who was not subject to military service, and who claimed his exemption, was inducted into service by the draft boards without a fair hearing, their action is not void, though irregular, and hence, the alien having failed to report, the military authorities have jurisdiction to hold him for desertion.

Habeas Corpus. In the matter of the petition of Pietro Romano. Petition dismissed without prejudice to petitioner's right to file another petition.

Joseph T. Zottoli, of Boston, Mass., for petitioner.

MORTON, District Judge. The petitioner is a laborer, born in Italy, who has resided about 4½ years in this country. He is married, and his wife is living with him in Lynn, Mass. His knowledge of English is very limited, quite insufficient to enable him to under-

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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stand explanations in it of such matters as those involved in the Selective Service Act (Act May 18, 1917, c. 15, 40 Stat. 76). He has never declared an intention to become a citizen of this country, and was not subject to military service under the act.

He duly registered under it, being within the required ages. At that time he explained that he was an alien and was told—by whom does not clearly appear—that, if he did not serve here, he would be sent back to Italy to do so there.

He was called for physical examination, and, after being examined, attempted to explain to Mr. Reeve, chairman of the local board, that he was an alien and had a wife dependent on him for support. The conference was hurried and unsatisfactory, because of the large number of cases with which Mr. Reeve had to deal. He understood Romano to say that he was only 18 years old, and claimed discharge because of that and of his wife. He accordingly filled out an application for discharge on those grounds, and gave Romano proper blanks for the affidavits. He did not understand that Romano claimed exemption because he was an alien. About a week later Romano employed a lawyer, who filled out the blanks which had been given him by Mr. Reeve. Discharge on those grounds was refused.

While the evidence is conflicting, I think it probable that Romano went to Mr. Reeve again and tried to explain through an interpreter that he desired to claim exemption as an alien, and was rather brusquely treated. I do not think that Mrs. Romano would have taken the trouble to go to the Adjutant General's office at the Statehouse and complain about the treatment accorded her husband, if there had not been some interview such as her husband testifies to between him and Mr. Reeve. At the Adjutant General's office, Mrs. Romano, who speaks English well, was given a marked copy of the rules, which she and her husband showed to Mr. Reeve on October 4th, the day when the petitioner was ordered to report for mobilization. Mr. Reeve at that time told them the case was beyond his control, and that Romano must go to Camp Devens the next day, as notified, and press his claim there.

Romano did not report as ordered, nor go to Camp Devens. He was arrested as a deserter, and is now held by the military authorities on that charge.

After his arrest, the Adjutant General's office at the Statehouse suggested to Mr. Reeve that the case be reopened, and transmitted the papers for that purpose. Certain important affidavits, the only substantial evidence on the point of alienage, which had been filed with the district board, ought to have been included, but by mistake were not. The local board knew who the petitioner's counsel were, and could easily have notified them or him that the case was to be reopened, and that further evidence might be submitted, but did not do so. At a closed session of the board, the case was taken up, reopened, and closed again, all within a few minutes; nobody knowing about it except the members of the board.

The result of the whole proceeding is that a man not liable to service under the act, and who has almost from the beginning en-

deavored, though in an unskilled and inaccurate way, on account of his ignorance of our language and law, to obtain the exemption to which he was entitled, finds himself held for military service and charged with desertion for not responding.

[1, 2] The obligation upon administrative boards, which exercise great powers, subject to but slight restrictions as to procedure and to only a limited review, is very great to deal fairly with the individual concerned, as well as with the public. The strict enforcement of this obligation is the only protection which the individual has against an abuse of such powers. The petitioner was plainly not subject to military service; and he was, without his fault, under great difficulties in understanding and obtaining his rights. Upon the case as a whole it does not seem to me that he has been fairly dealt with by the local board. He would, if not under arrest, be entitled either to a hearing in this court on his right to exemption (Chin Yow v. U. S., 208 U. S. 8, 13, 28 Sup. Ct. 201, 52 L. Ed. 369; Antrim's Case, Fed. Cas. No. 495), or to have these proceedings suspended, and to be discharged, unless accorded a fair hearing by the draft tribunals (United States v. Petkos, 214 Fed. 978, 131 C. C. A. 274 [C. C. A. 1st Cir.]).

[3] The ultimate question in the case is, therefore, whether the military authorities have the right to hold him for desertion. He was indisputably within the class of persons reached by the act and within the jurisdiction of the tribunals established thereunder. Their notification to report for service related to a matter also within their jurisdiction. Although based on irregular proceedings, it was not void. Until vacated, it was binding on the petitioner. It brought him under the jurisdiction of the military authorities, and rendered him liable to punishment by them for breach of military duty.

The petition must be dismissed, but without prejudice to the petitioner's right to file another petition.

In re BARNES GEAR CO.

(District Court N. D. New York. July 27, 1918.)

BANKRUPTCY ⇐326—CREDITORS—RIGHT OF SET-OFF.

Where raw materials were delivered to the bankrupt for machine work, and the owner, after bankruptcy, requested a redelivery and agreed to pay for the work already done, the owner cannot, the property having been redelivered under an order made pursuant to such request, retain the amount due, and, on ascertainment of its damages for nonfulfillment of the original contract, offset such damages against the sum due, but is restricted to proof of such damages as an ordinary creditor.

In Bankruptcy. In the matter of the Barnes Gear Company. Application, on order to show cause, for an order directing the New York Air Brake Company to make a payment to the receiver, etc. Application granted.

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Geo. Noyes Burt, of Oswego, N. Y., for receiver.
Fredk. M. Boyer, of Watertown, N. Y., for New York Air Brake Co.

RAY, District Judge. The New York Air Brake Company applied to this court for an order directing the receiver to deliver to it certain raw materials, partially worked, and certain scrap and certain tools, the property of said Air Brake Company, but in the possession of the bankrupt at the time of the bankruptcy, and which came into the possession of the receiver. That application was opposed, as the bankrupt estate had certain rights in such property, and after a hearing on such application this court made an order, dated July 26, 1917, to which reference may be had, and which is hereafter quoted. This order was acceptable to both parties, and the receiver complied with its terms and delivered the property, and under its terms the sum of $4,461.65 is due the receiver, or trustee, unless the New York Air Brake Company can retain the money, and, on ascertainment of its damages for nonfulfillment of the original contract between it and the now bankrupt, offset such damages.

That contract was for the doing of work and labor on such raw materials. In view of all the facts shown on the making of such order, and those now appearing, I do not think this offset can be made, but that the said Air Brake Company should pay over such sum to the receiver or trustee. The New York Air Brake Company can prove up its claim against the bankrupt estate, and have its dividend; but it would be most unjust and inequitable, after the surrender of the property under the order and the acceptance of same by the Air Brake Company, for it to refuse to perform on its part.

The petition of the New York Air Brake Company, presented on the application for the order to turn over the property, and on which the court acted in making the order of July 26, 1917, stated:

"Your petitioner further shows that considerably less than one-fourth in amount of said labor has been performed under said contract, for which labor your petitioner is ready and willing to pay said bankrupt, or its receiver or trustee, at any time upon the order of this court; that it will be impracticable for said Brake Company, your petitioner, to procure this material to be properly inspected and passed upon in accordance with the terms of said contract, but that said inspection can be had immediately upon delivery of said partially completed pieces at its plant at Watertown, N. Y."

The property, aside from tools, had been delivered to the now bankrupt company to be machined, and it had done a large amount of work thereon, and said petition states:

"Your petitioner has received none of its said material under said contract from bankrupt, and roughly estimates that the contract has not been over 20 per cent. performed and that the amount due the bankrupt for work performed to this date would probably not exceed the sum of $5,000, and that your petitioner is ready and willing to pay to bankrupt's estate in accordance with the terms of said contract for all of said labor so performed on said material."

It was on these statements of the petition of the Brake Company that this court made the order directing the receiver to turn over the property. The order provided that:

"If the property referred to in this order is delivered over to and taken possession of by the New York Air Brake Company, it shall have 15 days within which to inspect the same for the purpose of ascertaining the character and quality of the work done thereon by the now bankrupt company, and whether acceptable or not under the terms of the contract existing between said Air Brake Company and the now bankrupt. If any of such work is rejected by the Air Brake Company as not in substantial compliance with the contract, such work or pieces of work shall be segregated, and immediate notice given of such rejection, and the receiver of the now bankrupt shall have 10 days thereafter or 30 days from this date in which to confer with the Air Brake Company or its representatives and adjust any differences or contentions that may exist with reference to the quality, character, and value of such work. Further ordered that all work accepted within the said 20 days is to be paid for within 5 days from the time the amount due for such work has been determined, and all not accepted within said 20 days, but thereafter accepted, in whole or in part, by adjustment or otherwise, shall be paid for within 5 days after the determination of the amount due therefor."

On the argument the question was raised that the first clause of the order in some manner modifies or limits the clauses already quoted. That clause reads:

"It is ordered that said receiver be and he is hereby authorized and directed forthwith to deliver, on demand, to said Air Brake Company, the petitioner, the materials, tools, etc., as shown by the schedules annexed to said petition, and that all other matters arising out of a certain contract, dated April 5, 1917, between the New York Air Brake Company, the petitioner, and said bankrupt, be held and reserved subject to the further order of this court."

Then followed the order and direction as to the property, if delivered and taken, and the payment for the work done thereon by the bankrupt company when the amount was ascertained. Matters arising under said contract, other than the delivery of this property and payment for the work done thereon, were reserved—not the matters disposed of, which included the payment referred to. It seems to me very clear that no question of payment and offsetting damages for nonperformance of the contract was reserved.

I think the fair and the only construction that can be given the order, in view of the petition of the Air Brake Company, is that the compensation for the work done on the raw materials was to be paid over without deduction when the amount was ascertained in the manner provided for in the order. By means of the order the Air Brake Company obtained the property, and it should perform on its part.

There will be an order and direction for such payment, pursuant to the prayer of the petition.

So ordered.

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LEHTO v. SCOTT, Major General.

(District Court, E. D. New York. May 11, 1918.)

ARMY AND NAVY ⟸20—DRAFT OF NONDECLARANT ALIENS.

The courts will not release a nondeclarant alien, who by reason of his lack of understanding of English fails to comply with the draft law; Congress having plainly intimated therein that it will use those who are willing and those who do not comply with the statute in obtaining a discharge.

Application for habeas corpus by Arvo A. Lehto to obtain his discharge from the command of Hugh L. Scott, Major General, Commander of the 77th Division, U. S. A., at Camp Upton, N. Y. Petition dismissed, and relator remanded.

John G. Annala, of Fitchburg, Mass., for petitioner.
Melville J. France, U. S. Atty., of Brooklyn, N. Y., for defendant.

CHATFIELD, District Judge. The applicant was drafted into the army in Massachusetts and has been transferred to Camp Upton, where he has applied for a writ of habeas corpus. It appears that he registered at Prescott, Mass., but left for Maine in order to engage in work in that state, leaving no new address, and therefore failed to receive the notices to appear for examination. Subsequently he returned and endeavored with diligence to submit himself for examination. In order to claim exemption, he sought to prove that he had not intentionally evaded his call under the Selective Draft Law (Act May 18, 1917, c. 15, 40 Stat. 76). He is a nondeclarant alien, and claims that his default in demanding exemption or discharge from the original call should not be enforced against him, even though admitted, inasmuch as he did not intend to default, and inasmuch as his mistake may be attributed to his lack of understanding of English. In other words, the applicant wishes the court to believe that he would not have gone to Maine and failed to leave an address, if he had better understood the English language.

But a person who wished to avoid the draft might thus disappear. He might succeed in obtaining an acquittal, if indicted, unless it could be shown that he had knowledge of the law which he evaded. This would not be the usual case, where ignorance of the law could not be urged as an excuse. But the selective portion of the Draft Law is not worded like a statute defining a crime. The Draft Law in effect gives the military authorities the right to take for service every registered person in the United States who does not claim exemption or secure discharge according to the machinery of the Draft Law itself. It does in fact disavow, in section 2, the general purpose of impressing nondeclarant aliens into service; but in the succeeding sections Congress has plainly intimated that it will use nondeclarant aliens who are willing, and also those who do not comply with the statute in obtaining discharge.

Under these circumstances the courts have nothing to do with the release of a person who has failed to comply with the Draft Law and

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hence is in the army, whether his desire to be released is the result of a change of opinion, or the result of unintentional failure on his part to present his application for release in proper form.

There is nothing shown in the record which would justify a finding that the board did not give the applicant a fair hearing, or that a rehearing was denied him without reason therefor.

Petition dismissed, and relator remanded.

In re O'ROURKE.

(District Court, D. Montana. May 31, 1918.)

No. 641.

ESCAPE ⇐3—TEMPORARY RELEASE OF PRISONER—CHARITABLE MOTIVES.

That sheriff, in charge of jail, from charitable motives, released, for 8 hours a day for 40 days, that he might work and support his family, a prisoner committed to his custody by United States District Court, does not excuse sheriff's contempt in violating order of commitment, or offense of escape, committed both under federal and state law.

Contempt proceedings against John K. O'Rourke. Respondent found guilty, and fined $500.

B. K. Wheeler, U. S. Dist. Atty., of Butte, Mont., for plaintiff.

Peter Breen and H. K. Jones, both of Butte, Mont., for respondent.

BOURQUIN, District Judge. Sheriff and in charge of a jail, respondent, released, for 8 hours per day for 40 days, a prisoner committed by this court. To information herein he returns he acted from charitable motives, and to the end that the prisoner could work in the mines to secure support for his family; that respondent acted thoughtlessly, and without differentiating federal from state prisoners—acted without intent to violate the commitment.

It was respondent's plain duty to continuously imprison the convict for the term. He failed, not only committing contempt of this court (that is, violated its order), but also the offense of escape, whether tested by federal or state law. That charity, which covereth a multitude of sins, excuseth not here. Respondent, free to gratify his charitable disposition from his own purse, erred when he did so at the expense of the administration of justice and of the United States.

He is found guilty, and adjudged to pay a fine of $500 and costs herein.

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BROWN-KING CONST. CO. v. BOWER.

(Circuit Court of Appeals, Third Circuit. July 29, 1918.)

No. 2376.

PARTNERSHIP ⇐53—THE RELATION—EVIDENCE.

Evidence in suit based on existence of partnership between the parties for doing railroad excavation, contract for doing which was obtained by defendant, *held* not to establish the relation, but only on executory agreement for entering into a partnership agreement, the terms of which were in part undefined.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Suit in equity by the Brown-King Construction Company against Charles P. Bower. Bill dismissed, and plaintiff appeals. Affirmed.

Isaac A. Pennypacker and George Wharton Pepper, both of Philadelphia, Pa., for appellant.

Murdoch Kendrick, of Philadelphia, Pa., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

PER CURIAM. The evidence in this case was heard by Judge Thompson, and the facts are fully set out in his clear and satisfactory opinion, which is as follows:

"The Brown-King Construction Company, the plaintiff, filed its bill in equity against Charles P. Bower and Edward C. Nolan, praying for the dissolution of a partnership alleged to have been formed between the plaintiff and Bower for the purpose of contracting with the Philadelphia & Reading Railway Company for the performance of certain grading and construction work in the railway company's yards at South Bethlehem, Pa., and also praying for the appointment of a receiver to carry out the terms of the contract with the railway company, for an accounting, and for an injunction restraining the defendants from disposing of the property of the alleged copartnership, and from collecting or receiving any money from the railway company in connection with the work, and from interfering with its prosecution. It is charged in the bill that Bower, having entered into the contract with the railway company, was persuaded and induced by Nolan, his brother-in-law, to repudiate the partnership agreement, in order that Nolan might receive an interest in the contract in consideration of financial assistance to Bower, and, upon information and belief, that Bower has admitted Nolan to a share in the contract without the plaintiff's consent and in disregard of its right and interest, and that the work is being carried on by the two defendants. The plaintiff and both of the defendants are engaged in the business of general constructing contractors for railroad work. Testimony was offered on behalf of the plaintiff. The defendants offered no evidence. There being no evidence to sustain the allegations of the bill as against Nolan, the bill was dismissed as to him.

"From the testimony it appears that the plaintiff, during June, 1917, had, available for work, equipment consisting of two locomotives, fourteen standard gauge air dump cars, and a spreader car, and, having learned from Bower that the Philadelphia & Reading Railway Company had invited him to bid upon certain grading and construction work at South Bethlehem, through Fred L. Brown, its engineer, agreed with Bower on June 20th that he and Brown would inspect the site of the work the next day for the purpose of having Bower

make a bid upon it. The following day, June 21st, Brown and Bower went to South Bethlehem, looked over the proposed work, and discussed its features and methods by which Bower should bid upon it. The grading work involved 268,000 cubic yards. The railway company's proposal called for the use of its own cars and motive power in moving the material from the cut to the embankment, and it was proposed, if the contract was obtained, to use the plaintiff's equipment in order to save cost in moving material. On the evening of June 21st, at the office of plaintiff, Messrs. Brown and Bower, after figuring together, estimated the probable cost of the excavation, and in consequence it was then arranged that Bower should submit a bid as follows: For excavation without classification, using the cars and locomotives of the railway company, 57 cents per cubic yard, and for excavation without classification of 65,000 cubic yards, requiring an alternative bid using the contractor's cars and motive power, $1.60 per yard. A bid upon the specifications was thereupon signed by Bower and sent to the railway company. It was agreed between the parties to use the language of the witness, 'We will handle this work on a fifty-fifty basis,' or 'We will go into this contract on a fifty-fifty basis.' The agreement between the parties at the time was that Bower, who had been invited to bid, was to endeavor to obtain the contract, and, if successful, the plaintiff's equipment above referred to was to be used upon the work, and that the transaction should be upon a fifty-fifty basis; in other words, that the plaintiff and defendants were to share the profits equally. During the discussion the profits were estimated at $25,000 to each of the parties. The result of Bower's bid was that, during the latter part of June he was notified by the railway company that the contract had been awarded to him.

"After visits to the site by the plaintiff's engineers in company with other contractors, it was agreed between the parties that the contract for the portion of the work involving the 65,000 yards to be removed without the use of the railway company's equipment be sublet to H. C. Ambler at the price of 60 cents per cubic yard. Meanwhile, before any contract had been entered into with the railway company, the plaintiff shipped the two locomotives, fourteen dump cars, and one spreader car from Northumberland, where they had been employed, to South Bethlehem, consigned to itself. There had been discussion between the parties relating to the possibility of obtaining a higher price than 57 cents per cubic yard for the excavation work for which that price had been bid, provided that the railway company's equipment was released and the plaintiff's equipment was substituted for it, but at the time the equipment was sent to South Bethlehem there had been no agreement by Bower with the railway company for its use. Bower had taken up this question with Mr. Dawson, the railway company's engineer, informing the plaintiff's officers from time to time of the progress of his negotiations, and having finally obtained the consent of the railway company's engineers, on July 19th, wrote a letter to the chief engineer of the railway company, offering to furnish all necessary cars and locomotives, with fuel and maintenance, and to transport all excavation at the uniform price of 77 cents per cubic yard, eliminating the bid of $1.60 upon the 65,000 yards. On July 21st, the chief engineer of the railway company in a letter to Bower accepted the modified proposal and notified him that contracts would be drawn accordingly for his execution. During all these negotiations between the plaintiff's engineers and Bower, up to July 30th, no features of the agreement for sharing profits between them had been discussed except those agreed to on June 21st.

"It is stated in the bill and admitted in the answer that the agreement between the parties was to be reduced to writing. About July 28th, Bower sent the plaintiff a written draft embodying his ideas of the terms of an agreement. This form of agreement designating the plaintiff as the 'owner' and Bower as the 'contractor,' recited that the contractor had entered into a contract for the grading and excavation at South Bethlehem and that he would need certain equipment possessed by the owner and also might need working capital: that the owner was willing to provide the equipment and one-half of the necessary working capital and set out the following terms: (1) The owner to furnish the equipment. (2) The owner, if any additional sum for pay rolls or expenses became necessary, to contribute to the working capital one-half of

such sums within 48 hours after request in writing. (3) The contractor to pay the owner one-half the net proceeds upon completion of the work and receipt of all payments due. (4) The net proceeds be ascertained after payment of expenses and deduction of a drawing account of $250 a month for the services of the contractor as supervisor, the owner to be responsible for one-half of any loss on the contract. (5) The contractor to give his personal attention to the supervision and management, to be sole judge of all expenses, and to have sole and absolute authority to perform the work under the contract. (6) The contractor to keep the books of account and furnish a final statement upon completion of the work.

"On July 30th a conference was had at the plaintiff's office, at which Brown, King, and Gimber, representatives of the plaintiff and Bower, were present. Brown and Gimber made various objections to Bower's proposed agreement. They objected to the plaintiff being designated 'owner' and Bower 'contractor,' and contended that the terms of the agreement proposed by Bower implied the rental of their equipment and failed to carry out the terms of the fifty-fifty agreement. They suggested financing the work through a joint note for $5,000 of the Brown-King Company and Bower, to be negotiated with the Franklin Trust Company and to be secured by an assignment from Bower of his contract with the railway company as security. Both Gimber and Brown testified that Bower agreed to assign the contract as security for the joint note. Bower's sworn answer denies that he agreed to the assignment. Upon this important point the testimony of Brown and Gimber is not sufficiently definite in statement of what was said to support their conclusion. Both Brown and Gimber testified that Bower agreed that the proposed method of raising money was a very good idea and said: 'Write that down. That is a good idea.' This testimony must be taken in connection with the fact that what was agreed to was that Brown and Gimber, being dissatisfied with Bower's proposed agreement, should submit the terms suggested by the plaintiff and that Bower wanted it put into writing for further consideration. The contract with the railway company by its very terms renders all payments thereunder nonassignable. The engineer of the Philadelphia & Reading Railway Company had sent the contract in duplicate to Mr. Bower for his signature on July 26th, so that he was familiar with its terms during the discussion of his proposed agreement on July 30th, and during the discussion of the plaintiff's proposed agreement on August 1st. The contract, according to the chief engineer's letter, was not to be dated until executed by the officers of the railway company and was dated August 3d. It is difficult to believe that Bower would have agreed to an arrangement which he could not carry out and which, if it could have been carried out, would relieve the plaintiff of any burden in financing the operation and put the entire risk upon the contract for the performance of which Bower was individually responsible to the railway company. Regarding the conclusions to be drawn from the evidence of what was said in the light of the circumstances rather than the conclusions of the witnesses, I am unable to find from the evidence that that suggestion of the plaintiff was ever agreed to by Bower. Brown and Gimber further objected to the provisions that Bower was to be the sole and supreme judge of all expenses and was to have sole and absolute authority to perform the work under contract.

"Bower and Gimber suggested as a substitute terms which were afterwards embodied in a draft of agreement prepared by Gimber. While their agreement set out that Bower should, during the progress of the work, consult with the engineers of the Brown-King Construction Company, it provided that if he failed to secure their full concurrence, he would have final authority to determine plans upon which the work should be executed. It further provided that he should consult with the plaintiff's engineers in the matter of expenses to be incurred, but should have final authority to determine such expenses himself. There could be no serious question that these suggested modifications, if agreed to, would have left Bower in full control of supervising the work, as well as of incurring expenses, and therefore did not differ materially from the terms proposed by him. Both parties agreed to an allowance of $250 a month for Bower's services. Brown and Gimber objected to the proposed post-

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ponement of the division of the profits until the final completion of the work and final payments. There is no evidence to show that Bower specifically agreed to any other terms for the division of profits, except that in its connection with the suggested arrangement for a loan to be carried by means of the funds derived from the monthly estimates and payments by the railway company, he agreed that it was a good idea and asked those present to write it down, and Brown testified that Bower agreed with him that it was a very good way of carrying on the work.

"It is apparent from the testimony that, on July 30th, while there was a general discussion between the parties and an exchange of ideas, there was no definite agreement on Bower's part to the plaintiff's terms. As a result of the conference, it was merely agreed that a written agreement should be drawn up for the plaintiff, which was to be the subject of further discussion upon a later day. On August 1st the defendant again called at the plaintiff's office and was shown the form of agreement set out in the plaintiff's bill as drawn by Mr. Gimber. Mr. Nolan was present with him, and Mr. Nolan suggested that a rental form of contract be drawn. This was discussed between Mr. Nolan and Mr. Gimber, and when Bower and Nolan left the office, after Gimber had requested Nolan to make a suggestion, it was with the statement on Nolan's part, 'We will take this into consideration and you think up a rate of rental for your equipment.' On August 16th Bower informed the railway company that he had sublet to H. C. Ambler the subcontract for the 65,000 cubic yards part of the work. After the interview of August 1st, there was some correspondence between the plaintiff and Bower, which, however, was not offered in evidence. Bower entered upon and at the time of the hearing was engaged in the performance of his contract with the railway company. The remedies which the plaintiff ask are based upon a claim of an existing partnership between itself and Bower. The entire situation may be summed up as follows:

"The plaintiff and Bower agreed on June 21st that Bower would endeavor to obtain the contract with the Philadelphia & Reading Railway Company; that, contingent upon the contract being obtained, the plaintiff's equipment would be used upon the work; that the transaction would be upon a fifty-fifty basis. The understanding of both parties in relation to the fifty-fifty basis, as shown by both the subsequent proposed written agreements, was that they should contribute equally to the working capital, and share equally in the profits and the losses. It was agreed that an agreement in writing should be entered into between them. As the relations between them were contingent upon Bower obtaining the contract, it followed that the time for entering into a written agreement was to be postponed until that event was determined. The written agreements proposed by both parties included all of the terms that had been previously mutually agreed upon, but each included other terms. The plaintiff, however, declined to accept the terms proposed by the defendant, the plaintiff's officers basing their objection to the defendants' terms partly upon their contention that it constituted an agreement for a lease of their plant rather than a fifty-fifty agreement, which term, in their minds, constituted an agreement of partnership. While a rental of the plaintiff's equipment by Bower for a share of the profits would not in itself as between the parties constitute a partnership, the addition to that of an agreement to contribute half the working capital and be liable for one-half the losses would very strongly indicate a partnership relation. This form of agreement was, however, repudiated by the plaintiff, because it desired to incorporate therein an agreement that the funds necessary for carrying on the work should be raised by a joint note and that Bower's contract be pledged as security for the note, and as a substitute for Bower's proposed division of profits after completion of the work an agreement for monthly division of profits, and for inclusion within the terms of the contract of any additional work appurtenant to the work to be done under the contract.

"The plaintiff having declined the terms set forth in Bower's agreement, the conference between the parties on July 30th resulted in nothing more than a discussion of the new terms proposed by the plaintiff, and it was agreed that the plaintiff's suggested terms should be incorporated in a written form of agreement and submitted to Bower, so that when the parties parted on that

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day there had been no definite agreement as to terms, but the matter was left open for further consideration. When they met again on August 1st, no agreement was reached and there has never been a final meeting of the minds of the parties. That being the situation, the court cannot hold as a matter of law that a partnership relation exists between the parties, but there was merely an executory agreement to enter into a contract in writing for the joint undertaking.

"It is contended by plaintiff's counsel that what was done by its officers and Bower in inspecting the work, in preparing the bids, in making agreements for letting the subcontracts, and Bower's acceptance of the acts of the plaintiff's officers in this respect are sufficient to show that a partnership was then in existence. It does not follow, because the plaintiff's officers assisted Bower, with a view of obtaining the contract with the railway company, and he consulted with them in relation to what would be done in case the contract was obtained, that their actions were anything more than preliminary to the entering into of contract relations, provided the contract with the railway company was obtained. The final agreement was to be contingent upon Bower's obtaining the contract that was to be the source of profit to both parties, and hence it was to the interest of the plaintiff to consult and co-operate with the defendant.

"As the situation stands, the parties never agreed upon the terms of a contract for the joint undertaking, and that being the situation, the court cannot make a contract for them. What did exist between the parties was merely an executory agreement that at some future time, contingent upon Bower obtaining the contract with the railway company, an agreement, the terms of which were then in part undefined, would be entered into. The plaintiff has failed to establish the existence of a partnership relation between the parties, as alleged in the bill, and the bill must therefore be dismissed."

We agree with the findings and conclusions thus stated, and shall only add that we find it hard to suppose that experienced men of business would undertake an enterprise such as this, without first adjusting the many and obvious details that would be sure to produce immediate and disastrous disputes, if these were not carefully provided against. This was the object of the written agreement that the District Court finds both parties contemplated; the oral agreement was merely preliminary, and as they could not come to terms we see no basis for the interference of a court of equity.

The decree is affirmed.

ST. LOUIS & S. F. R. CO. et al. v. QUINETTE.

(Circuit Court of Appeals, Eighth Circuit. July 24, 1918.)

No. 4951.

1. COURTS ⟸366(13)—FEDERAL COURTS—FOLLOWING RULE OF STATE DECISION.

Under the rule that federal courts follow the interpretation of state statutes adopted by the state's highest judicial tribunal, where no question of general or commercial law or the violation of the federal Constitution is involved, the federal court was bound to follow a decision of the Supreme Court of Oklahoma erroneously construing the statute of limitations (Rev. Laws Okl. 1910, § 4657, subd. 3, and section 4660).

2. COURTS ⟸356—STATE COURT'S ERRONEOUS CONSTRUCTION OF STATUTE—RULE OF FEDERAL COURT—LAW OF THE CASE.

Where, between a federal court's construction of a state statute controlled by the decision of the state Supreme Court, and the time when the

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federal court is again called upon to decide the question, or to enforce its decision therein, the state Supreme Court has reversed its former ruling, or decided at variance with the federal court, the latter court must conform to the latest state decision as an exception to the rule of law of the case.

3. CARRIERS ⟸333(3)—PASSENGERS—PERSONAL INJURY—CONTRIBUTORY NEGLIGENCE.

Where a passenger chose not to alight at a station, but at a water tank, near a bridge, such choice and his knowledge of the location require him to use reasonable care to see that he alighted at the only safe place to alight from the train.

4. CARRIERS ⟸333(4)—PERSONAL INJURY—ALIGHTING FROM TRAIN—CONTRIBUTORY NEGLIGENCE.

A passenger familiar with the conditions at a station, and knowing that he might safely alight from forward end of a smoking car opposite a water tank, who chose to alight from the forward end of a Pullman behind the smoking car, and failed to look where he might have seen the spans of a bridge, and alighted without waiting for the porter to place a step, and before discovering a secure footing, and fell from a bridge, was guilty of contributory negligence.

In Error to the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Action by Jermain P. Quinette against the St. Louis & San Francisco Railroad Company and the Pullman Company. Judgment for plaintiff, and defendants bring error. Reversed, and cause remanded, with directions to render a judgment upon the pleadings in favor of the St. Louis & San Francisco Railroad Company, and to grant a new trial to the Pullman Company.

Charles H. Woods, of Oklahoma City, Okl. (J. R. Cottingham, S. W. Hayes, and George M. Green, all of Oklahoma City, Okl., and H. T. Wilcoxon, of Chicago, Ill., on the brief), for plaintiff in error Pullman Co.

R. A. Kleinschmidt, of Oklahoma City, Okl. (W. F. Evans, of St. Louis, Mo., on the brief), for plaintiff in error St. Louis & S. F. R. Co.

Charles Mitschrich, of Lawton, Okl., for defendant in error.

Before SANBORN and CARLAND, Circuit Judges, and BOOTH, District Judge.

SANBORN, Circuit Judge. The St. Louis & San Francisco Railroad Company and the Pullman Company challenge the legality of the trial of an action brought against them by Jermain P. Quinette for negligence whereby he suffered personal injury. Each of the defendants denied that it was guilty of negligence and alleged the contributory negligence of the plaintiff, and the railroad company pleaded in its answer the statute of limitations of the state of Oklahoma, and insisted that the action against it was barred thereby. This case has taken a long and tedious course. The court below first held that the action against the railroad company was barred by subdivision 3, section 5550, and section 5553 of the Compiled Laws of Oklahoma of 1909, which are now subdivision 3, section 4657, and section 4660 of the Revised Laws of Oklahoma of 1910; but in Hale v. St. Louis & S. F. R. Co.,

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39 Okl. 192, 134 Pac. 949, L. R. A. 1915C, 544, Ann. Cas. 1915D, 907, the Supreme Court of Oklahoma so construed these sections that they constituted no bar to this action, and in deference to the opinion of that court this court was constrained to reverse the judgment in favor of that company and to order a new trial. Quinette v. Pullman Co., 229 Fed. 333, 143 C. C. A. 453. That trial to a jury has been had, and it has resulted in a joint judgment against the companies for $10,000 and costs. After the second trial and judgment, and on October 30, 1917, in St. Louis & S. F. R. Co. v. Taliaferro, 168 Pac. 788, L. R. A. 1918B, 994, the Supreme Court of Oklahoma overruled its decision in Hale v. Frisco Co., and so interpreted these sections of the statutes that this action was when it was commenced, and is, barred thereby, as the court below had held on the first trial of this case.

The Frisco Company asks a reversal of the judgment against it on the ground that according to the latest and the true interpretation of these statutes the action against it was barred thereby before it was commenced. Counsel for the plaintiff below objects to such a reversal of the cause because: (1) The ruling of the court below on the plaintiff's demurrer to the answer of the defendant pleading the statute of limitations as a defense has not been assigned as error; (2) the question was not raised on the motion for a new trial; (3) rule 11 of this court provides that "errors not assigned according to this rule will be disregarded"; (4) the decision of this court upon the plea of the statute of limitations in 229 Fed. 333, 143 C. C. A. 453, remains the law of this case; and (5) the defendant railroad company has ceased to have any legal existence, and has been dissolved according to the judgment and decree of the federal court, it has no assets, it has given no supersedeas bond, and nothing can be collected on the judgment against it.

[1, 2] But the true construction of the sections stated, which have been the subjects of debate and interpretation, has been the same all the time, and from a time prior to the commencement of this action they have barred it. The error has not been in the statutes, but in the first decision of the Supreme Court of Oklahoma interpreting them, an error which, under the rule that the federal courts follow the interpretation of the statutes of a state which the highest judicial tribunal of that state has adopted, where no question of general or commercial law, or of violation of the Constitution or laws of the United States, is involved, this court followed, as in duty bound; and while the general rule is that the decision of a legal question by a federal court on a review of a trial of a cause becomes the law of that case in a subsequent trial, and in a subsequent review of that trial by this court, there is a just and salutary exception to that rule, under which this case falls. It is that where, between the time of the decision of a federal court of a legal question, like the construction of a state statute which is controlled by the decision of the Supreme Court of the state, and the time when the federal court is called upon again to decide that question, or to enforce its decision in the same case, the Supreme Court of the state has either reversed or changed its former ruling, or made a decision at variance with that of the federal court, it is the duty of the lat-

ter court, that still has jurisdiction of the case, to conform its decision and judgment to the latest decision of the Supreme Court of the state. Messenger v. Anderson, 225 U. S. 436, 443, 444, 32 Sup. Ct. 739, 56 L. Ed. 1152. This rule is just and salutary, because the latest decision is presumptively the right decision, and the federal court should apply that, rather than the erroneous one.

No doubt remains now that the judgment here against the railroad company rests on an erroneous interpretation of the statutes of Oklahoma. The rules of this court permit it to notice and to remedy a plain error, though it is not assigned; and in view of the fact that counsel were doubtless led into their failure to assign error in the overruling of the demurrer to the plea of the statute of limitations by the error of the Supreme Court of Oklahoma, which this court followed, it is undoubtedly our plain duty to take notice of the error on which this judgment is founded and to correct it.

There is no proof that the railroad company has ceased to exist, or has been dissolved by any decree or judgment of any court, nor are the facts that it has no assets, and that no judgment against it can be collected, sound reasons why unlawful judgments against it should be affirmed. The judgment against the railroad company must therefore be reversed.

[3, 4] One of the alleged errors assigned by the Pullman Company is that the court denied its request that it instruct the jury to return a verdict in its favor, on the ground, among others, that the undisputed evidence established the fact that the plaintiff was not free from negligence which directly contributed to his injury. Laying aside the contradictory testimony, and considering those facts only which are admitted by the plaintiff or are established by the uncontroverted testimony, this is the case. The plaintiff was the general manager of Rice & Quinette, who were engaged in the business of buying and selling general merchandise at Ft. Sill, Okl. On October 21, 1910, when the accident to be considered happened, he was about 51 years of age. In earlier life he had been a traveling salesman for about 17 years. He went with Rice & Quinette at the agency in 1898, four years before the Frisco Railroad was built through there across Medicine creek. He had fished in the creek, had traveled on the railroad over the railroad bridge across it, and was familiar with the railroad, the bridge, and the water tank, and with their relative locations to each other. He was living with the commanding officer at Ft. Sill, something less than half a mile from the bridge of the Frisco Railroad Company over Medicine creek, and this bridge was nearly a mile from the railroad station. To avoid traveling the distance from the station to the residence of the commanding officer, he was accustomed to step off the train when the engine stopped to take water at the water tank near the bridge. This water tank was about 100 feet from the south end of the railroad bridge. At the time of the accident, and for some time prior thereto, the railroad company operated a train carrying a Pullman car, which left Oklahoma City about 6 and arrived at Ft. Sill about 10 in the evening. This train usually consisted of an engine, a tender, a baggage car, a combination or smoking car, a day coach, and

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a Pullman car, and it was made up in this way on the evening of the accident. When the engine stopped at the water tank to get water, the forward end of the combination car stood on the railroad embankment, and the rear end on the bridge. The plaintiff had frequently stepped off of the forward end of the combination or smoking car of this train while its engine was standing at the water tank taking water, and he knew that when it was in that position the rear end of that car and the cars back of it were upon the bridge. On previous occasions, when he stepped off in this way, he had chosen to get off at that point, because it was nearer to the home of the commanding officer than the station was, and he had walked to the front end of the combination car and stepped off onto the railroad embankment by the side of the car, after previously asking the railroad conductor if the train was to stop at the tank for the engine to take water. On previous occasions, however, he had not been riding in the Pullman car.

The plaintiff testified that on the evening of the accident he rode on this train in the Pullman car from Oklahoma City to Ft. Sill, where he arrived about 10 p. m., that on his way he asked the railroad conductor if he was going to stop at the water tank at Ft. Sill, and the conductor answered, "Yes; do you want to get off there?" and he replied, "Yes, sir;" that he told the porter he wanted to get off at the water tank, but said nothing to the Pullman conductor about it; that when the train was slowing up for its stop at the water tank the porter said to him, "I guess this is where you want to get off, at the water tank at Ft. Sill," took his suit case and grip, and went out the forward end of the Pullman car; that the plaintiff followed him; that the plaintiff did not see him, but he heard him say, "Here you are, boss;" that it is the custom, when a passenger alights from a Pullman car, for the porter to precede him and to place the step or box, take the baggage, and assist the passenger in alighting; that the porter did not do this; that the plaintiff did not wait for him to do it, but got off the car, leaving his baggage on the platform; that the lights in the Pullman car radiated light, so that, if he had looked to the right or left, he might have seen the span of the bridge; that he looked in front of him and down, but did not take the time to look to the right or left; that no one warned him that there was a bridge, or any danger there; that he was anxious, in a hurry to get off; that he looked down, and thought he saw the right of way, when it was the bed of the creek, and thought he was getting off at a safe place—that is why he did not pay attention to it; that he "walked down from the vestibule, and down on the step, and took hold of the rail, and reached down like this, expecting to get my foot upon the right of way, and in reaching down there so far, not knowing that I was near the creek, I lost my balance and fell through," and was injured.

The plaintiff knew the relative location of the bridge, the water tank, and the train when the engine was standing at the water tank; he knew that he had theretofore alighted at the forward end of the smoking car, and that the rear end of that car was on the bridge when the engine stood at the tank, so that, if he had taken time to give attention to it, the fact would have come at once to his mind that the Pullman

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car must be on the bridge, and he would have walked to the forward end of the smoking car, as he had previously done, before he alighted. It was he, and not the Pullman porter, or the Pullman Company, that chose that he should alight, not at the station provided for that purpose, but near the water tank, and that choice and his knowledge of the location imposed upon him the duty to use reasonable care to see that he alighted at the only safe place to alight from that train, and that was at the forward end of the smoking car, where he had always alighted before. Because he failed to give this necessary attention, because he failed to look to the right or left, where he might have seen the spans of the bridge, and because he hurried down the steps of the car and let himself down, before the porter stepped off the car, or placed his box, or took off his baggage, and before he discovered whether or not there was secure footing beneath him, this court is unable to avoid the conclusion that the uncontroverted evidence in this case conclusively proves that he failed to exercise that reasonable degree of care which a man of ordinary intelligence and prudence would have used in his situation, and that this failure directly contributed to cause his injury. The court below was therefore in error in its refusal to instruct the jury to return a verdict in favor of the Pullman Company. Gilbert v. Burlington, C. R. & N. Ry. Co., 128 Fed. 529, 532, 63 C. C. A. 27, 30; Pyle v. Clark, 79 Fed. 744, 747, 25 C. C. A. 190, 193.

This conclusion renders it unnecessary to consider the other assignments of error. Let the judgment below be reversed, and let the case be remanded to the District Court, with directions to render a judgment upon the pleadings in favor of the Railroad Company and to grant a new trial to the Pullman Company.

RICE v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. June 22, 1918.)

No. 1339.

1. CRIMINAL LAW ⇐394—MATTER OF OBTAINING EVIDENCE.
 Admissibility of documentary evidence tending to establish accused's guilt of using mails to defraud is not affected by the alleged fact that it was secured in violation of the constitutional prohibition against unreasonable searches and seizures, so that, where search warrant called for two letters and four were seized, all were admissible.
2. CRIMINAL LAW ⇐442—DOCUMENTARY EVIDENCE—ADMISSIBILITY.
 In prosecution for using mails to defraud, communications sent in accordance with a written threat are admissible, where papers referred to in the threat and the copy of the original threat, found in accused's safety deposit box, sufficiently connected him with the letters.
3. WITNESSES ⇐352—REPUTATION—EVIDENCE—ADMISSIBILITY.
 In prosecution for using mails to defraud, where accused had testified and put in issue his good reputation and profession, his letter to the alleged paramour of the person whom he sought to defraud was admissible to refute his contentions as to his reputation and the nature of his business.

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In Error to the District Court of the United States for the District of Massachusetts; Jas. M. Morton, Judge.

Charles W. Rice was convicted of using the mails in pursuance of a scheme to defraud, and he brings error. Affirmed.

William H. Garland, of Boston, Mass., for plaintiff in error.

Lewis Goldberg, Asst. U. S. Atty., of Boston, Mass. (Thomas J. Boynton, U. S. Atty., of Boston, Mass., on the brief), for the United States.

Before DODGE, BINGHAM, and JOHNSON, Circuit Judges.

JOHNSON, Circuit Judge. The plaintiff in error, hereinafter called the defendant, was indicted and convicted in the District Court of Massachusetts, under section 215 of the Criminal Code of the United States (Act March 4, 1909, c. 321, 35 Stat. 1130 [Comp. St. 1916, § 10385]), for use of the mails in pursuance of a scheme to defraud one A. Blakeley Smith, by claiming to have certain information of immoral relations between said Smith and one Miss Borowski, which he threatened to make public unless Smith would pay him the sum of $1,000. There were two counts in the indictment on which he was tried, each alleging the mailing of a letter by the defendant to said Smith,—one dated April 6 and the other April 12, 1917. A verdict of "guilty" was returned upon both counts, upon which he has been sentenced to be imprisoned, and he now seeks a reversal of the judgment against him, alleging as the first assignment of error the refusal to receive certain evidence offered by him, and in the other six assignments the reception of certain evidence against his objection.

The first assignment of error relates to the offer of proof in regard to the seizure of certain letters and photographic prints which were made by a police officer of the city of Boston, under a warrant issued by the municipal court of that city upon the complaint of Roy E. Nelson, a United States post office inspector, who had arrested the defendant without a warrant, and turned him over to the police department of the city of Boston, where he had been searched and a key to a safety deposit box in the vaults of the United States Trust Company taken from him. After the key was obtained, a complaint was made by the post office inspector, and a warrant was issued to search the safety deposit box of the defendant for two paper writings, two photographic prints, and two photographic negatives, alleged to be the property of A. Blakeley Smith and to have been stolen from him by some person unknown.

The defendant's bill of exceptions contains the following statement in regard to the papers seized under the warrant, and their identification:

"They consisted of a letter from A. Blakeley Smith to Miss Borowski, a letter from said Smith to one Burrows, both of which said Smith in his testimony identified as having been written by him, a carbon copy of a letter from Burrows to Smith, which he in his testimony identified as an accurate copy of a letter received by him and a carbon copy of a letter signed 'Thomas Dolan,' which said Smith identified as being a copy of a letter received by him,

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and which was in fact a copy of the letter set out in the first count in the indictment.

"The photographic copies taken from the box were copies of said letter from Smith to Miss Borowski. This letter did not bear Smith's signature, but his signature had been cut off from his letter to Burrows and pasted on a separate piece of paper, also taken from the defendant's safety box, which was produced and identified."

Smith also testified that he received through the mails the letters alleged in the indictment to have been mailed to him. The government offered in evidence the letters and photographic prints taken from the defendant's safety deposit box. The defendant objected to their admission and claimed that they had been seized in violation of his constitutional rights under the Fourth Amendment, and that if received in evidence he would be thereby compelled to furnish evidence against himself, in violation of the Fifth Amendment to the Constitution of the United States.

His counsel stated to the court "that he proposed to offer evidence from which he would argue that the complaint was not made in good faith by said Nelson for the purpose of obtaining stolen property, or for any other proper or legal purpose, but was made solely for the purpose of obtaining evidence for use in this trial; that instead of taking from the safety deposit box what the search warrant called for, viz. "two paper writings and two photographic prints," the officer took therefrom "four paper writings, being the ones already described, and the photographic prints in question."

The learned District Judge declined to admit this evidence, and permitted the government to introduce in evidence all the contents of the defendant's safety deposit box, assigning the following reasons for his ruling:

"Property was seized by a state officer under a state warrant. No United States official had anything to do with bringing about the seizure or making the seizure, except that the search warrant itself was applied for by one of the post office inspectors. It is said for the defendant that I ought to go into the good faith of that application, and try to determine whether or not the state court was imposed upon in that manner. I do not think so. It seems very clear to me that that is a question for the court which issued the warrant to decide, and that it ought to be raised by appropriate proceedings in that case. What I have said is enough to decide the matter, of course, but I think, also, that if there was, as far as the additional papers are concerned, a taking of them, that may well be regarded as an incident to a search made under the warrant and to come within that doctrine of an incidental seizure. It seems to me therefore that the evidence should be admitted."

No motion was made to quash the indictment, nor had the defendant moved in the municipal court of Boston to have the validity of the complaint or the warrant determined. The seizure under the warrant was made on May 9, 1917, and the trial was had at the October term, 1917, and not until the papers were offered in evidence by the government did the defendant do anything to indicate that he intended to attack the validity of the complaint and warrant and the seizure of the papers on the ground that it had been made in violation of his constitutional rights, and then he only objected to the admission of the papers in evidence, with offer of proof as to what he claimed to be

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an unreasonable search and a violation of his constitutional rights. The ruling of the learned District Judge is fully supported by the case of Adams v. New York, 192 U. S. 585, at page 594, 24 Sup. Ct. 372, at page 374 (48 L. Ed. 575), in which the court said:

"The question was not made in the attempt to resist an unlawful seizure of the private papers of the plaintiff in error, but arose upon objection to the introduction of testimony clearly competent as tending to establish the guilt of the accused of the offense charged. In such cases the weight of authority as well as reason limits the inquiry to the competency of the proffered testimony, and the courts do not stop to inquire as to the means by which the evidence was obtained."

And also (192 U. S. at page 598, 24 Sup. Ct. at page 375, 48 L. Ed. 575):

"The security intended to be guaranteed by the Fourth Amendment against wrongful search and seizures is designed to prevent violations of private security in person and property and unlawful invasion of the sanctity of the home of the citizen by officers of the law, acting under legislative or judicial sanction, and to give remedy against such usurpations when attempted. But the English and nearly all of the American cases have declined to extend this doctrine to the extent of excluding testimony which has been obtained by such means, if it is otherwise competent."

In this circuit, in the case of N. Y. C. & H. R. R. Co. v. United States, 165 Fed. 833, the court held, at page 843 (91 C. C. A. 519):

"Notwithstanding Boyd v. United States [116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746], the usual rule is that, where papers are in fact in court, they may be used in evidence, even though the party who offers them in evidence procured them illegally. Adams v. New York, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575, and other cases. Indeed, independently of any particular decisions, such has always been understood to be the rule."

The defendant relies upon the case of Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, the opinion in which was drawn by the same learned Justice who spoke for the court in Adams v. United States; but the facts in that case were materially different from those in the case under consideration, for, in that, evidence was taken from the house of the defendant, in his absence, by a federal officer, acting without a search warrant, and application was seasonably made to the court, prior to the trial, for its return, and the court there held:

"The evidence thus taken should have been ordered to be returned and that a conviction based upon that evidence would be set aside."

In the case under consideration, the papers offered in evidence were taken by a state officer, acting under and in pursuance of a search warrant issued by the municipal court of the city of Boston, and no steps were taken or proceedings instituted for a return of the papers, or for determining the validity of the complaint and warrant before the trial, nor was the indictment attacked before trial in any way, because obtained upon illegal evidence. In the Weeks Case, 232 U. S. at page 398, 34 Sup. Ct. at page 346, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, the court said:

"As to the papers and property seized by the policemen, it does not appear that they acted under any claim of federal authority such as would make

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the amendment applicable to such unauthorized seizures. The record shows that what they did by way of arrest and search and seizure was done before the finding of the indictment in the federal court, under what supposed right or authority does not appear. What remedies the defendant may have against them we need not inquire, as the fourth amendment is not directed to the individual misconduct of such officials. Its limitations reach the federal government and its agencies."

The opinion also makes it plain (232 U. S. at page 392, 34 Sup. Ct. at page 344, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177) that the Weeks Case does not reach the question decided in Adams v. New York, and that it is not in conflict with that decision, for the court there says:

"Nor is it the case of testimony offered at a trial where the court is asked to stop and consider the illegal means by which proofs, otherwise competent, were obtained."

The case of Flagg v. United States, 233 Fed. 481, 147 C. C. A. 367, which is also relied upon by the defendant, dealt with a seizure by federal officers, without a warrant, and in the opinion (233 Fed. at page 484, 147 C. C. A. 367) it is distinguished from Adams v. New York:

"The case of Adams v. New York, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575, differs from the case at bar in many important particulars, but chiefly in the essential feature that in that case a valid search warrant was issued and incidentally the letters were seized in executing it. Had there been such a warrant issued on proper proof by competent authority in the case at bar the defendant's contention that the seizure of his property was unlawful, wanton and in violation of his constitutional rights might have been unavailing."

In Lyman v. United States, 241 Fed. 945, 154 C. C. A. 581, where there was a seizure of records and papers by federal officers, who acted without a search warrant, and where no application had been made for their return previous to the trial, the court said (241 Fed. page 948, 154 C. C. A. 581):

"In the late case of Weeks v. United States, 232 U. S. 383 [34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177], the Supreme Court, while holding that the federal courts cannot, as against a seasonable application for their return in a criminal prosecution, retain for the purposes of evidence the letters and correspondence of the accused, seized in his house, during his absence and without his authority, by a United States marshal holding no warrant for his arrest or for the search of his premises, still adhered to the rule laid down by it in Adams v. New York, to the effect that a collateral issue will not be raised to ascertain the source of competent evidence, although illegally obtained, where no application had been made by the accused for its return before trial.

"In the present case it is not pretended that any such application was made on behalf of the plaintiff in error for the return of the records and papers, to the introduction of which objection was made on the trial, notwithstanding they had been seized, according to the statement contained in the brief for the government, more than two years before the trial took place; and that the records and papers so offered and received in evidence strongly tended to show the alleged guilt of the defendant to the indictment is not even questioned. We therefore are of the opinion that the trial court was right in its ruling admitting the evidence complained of."

[1] If other letters besides those described in the warrant were taken, their seizure was incidental, and was made in the execution of the warrant. We find, therefore, no error in the admission of all.

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The third, fourth, fifth and sixth assignments of error raise the question whether carbon copies of the second "Thomas Dolan" letter, dated April 12, 1917, which is set forth in the second count in the indictment, and which was received through the mails by the president of the Young Men's Christian Union and the president and secretary of the Algonquin Club, and a photostatic copy of the letter of Smith to Miss Borowski, which was sent to the president of the Young Men's Christian Union, should have been admitted in evidence. A copy of the letter, dated April 6, 1917, signed "Thomas Dolan," being the letter upon which the first count in the indictment was based, was found in the defendant's box. In this letter, directed to Blakeley Smith, Hotel Tuileries, Boston, Smith was directed to get a bank cashier's check for $1,000, payable to Thomas Dolan, to place the check in an envelope, marked "G. 43, Globe Office," take it to the Globe office, hand it in at the letter counter, and that the letter with the check must be at the Globe office not later than Wednesday, April 11; that if the check was not at the Globe office Wednesday, April 11, copies of this letter would be immediately made public; and in it the threat was made that, if he failed to do as directed, information in the possession of the writer would be made public at Smith's Hotel, the Algonquin Club and to officials of the Union.

[2] Communications sent in accordance with the threat were clearly admissible, as the finding of the original letter of Smith to Miss Borowski and a substantial copy of the first "Thomas Dolan" letter in the defendant's safety deposit box sufficiently connected him with these letters to render them admissible as a part of the scheme to defraud with which he was charged.

[3] The seventh assignment of error relates to the reception in evidence of a letter of the defendant to Miss Borowski. This letter was offered in evidence by the government during the cross-examination of the defendant after he had identified it and had introduced evidence of his reputation in the community, and that his business was that of buying and selling real estate, and a stockbroker. The introduction of this letter in cross-examination was clearly admissible to refute the claims made by the defendant as to his business standing in the community and the nature of the business in which he had been engaged, and we find no error in its admission.

The judgment of the District Court is affirmed.

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MAYNARD v. REYNOLDS et al.

(Circuit Court of Appeals, Eighth Circuit. May 17, 1918. Rehearing Denied September 2, 1918.)

No. 5007.

1. APPEAL AND ERROR ⊂=173(6)—REVIEW—DEFENSES NOT PRESENTED IN COURT BELOW.
 Defense that contract upon which suit is based was invalid, because made after creation of relation of attorney and client, there being no evidence that contract was just and equitable, cannot be presented for the first time on appeal, since it involves the trial of two issues of fact.
2. ATTORNEY AND CLIENT ⊂=134(1)—CONTRACT—CONSTRUCTION.
 Contract for attorney's fees *held* fully performed by plaintiffs, when defendant client peremptorily ordered dismissal of suit for his own purpose on the eve of its hearing.
3. ATTORNEY AND CLIENT ⊂=166(1)—SUIT FOR FEES—EVIDENCE.
 In suit to recover attorney's fees under an express contract, evidence *held* to warrant jury finding that defendant client peremptorily ordered dismissal of suit for his own purpose on the eve of its hearing.
4. ATTORNEY AND CLIENT ⊂=167(2)—ACTIONS FOR FEES—DISOBEDIENCE OF INSTRUCTION—EVIDENCE.
 In suit to recover attorney fees under express contract, whether plaintiffs disobeyed instructions of defendant client *held* properly submitted to jury; there being ample evidence to sustain finding that plaintiffs did not.

 Carland, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of Missouri; John C. Pollock, Judge.

Action by Matt G. Reynolds and another, doing business as Reynolds & Harlan, against Samuel R. Maynard. Judgment for plaintiffs, and defendant brings error. Affirmed.

H. M. Langworthy, of Kansas City, Mo. (O. H. Dean and W. D. McLeod, both of Kansas City, Mo., on the brief), for plaintiff in error.

Thomas T. Fauntleroy of St. Louis, Mo. (Chase Morsey, Patrick H. Cullen, and Charles M. Hay, all of St. Louis, Mo., on the brief), for defendants in error.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

SANBORN, Circuit Judge. The single error assigned in this case is that at the close of the trial by the jury the court below refused to instruct it to return a verdict for the defendant, Maynard. This was the case. Reynolds & Harlan, attorneys at law, sued Maynard on an express contract to pay them $4,000 for their legal services, and he defended. The parties went to trial on these pleadings. The plaintiffs allege that the defendant, who was the owner of about 1,100 shares of stock in the Doe Run Lead Company, a corporation, employed them to bring a suit against the St. Joseph Lead Company, a corporation, and the owner of the majority of the stock of the Doe Run Company, to prevent the St. Joseph Company from voting its

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stock at a coming meeting of the stockholders of the Doe Run Company, which was held on May 16, 1916, and agreed to pay him therefor $1,000 in cash and $4,000 when the suit was finally disposed of in the local court, that he paid the $1,000, that they brought the suit, obtained from the court an order on the St. Joseph Company to show cause why it should not be enjoined from voting its stock, returnable on May 15, 1916, that on May 15, 1916, the defendant peremptorily directed the plaintiffs to dismiss the suit, and they did so, but that the defendant has not paid them the $4,000. The defendant answered that he owned 1,099 shares of the stock of the Doe Run Company, that he paid the plaintiffs $1,000 for services to be rendered by them in a suit that was then pending in the court below, but that the plaintiffs never rendered any services to him in that cause, that the suit referred to in plaintiffs' complaint was instituted by them without his knowledge or authority, that he never agreed to employ or pay the plaintiffs on account of any services in the latter suit, and that the plaintiffs refused to follow his explicit directions as to the conduct of his suit, and dismissed the suit referred to in their complaint.

The plaintiffs' witnesses testified to the truth of the averments in their complaint. The defendant testified that he agreed to pay the plaintiffs $1,000 cash and $4,000 later for services in the pending suit described in his answer, that he never agreed to pay them anything on account of the new suit which they commenced, that he directed them to withdraw from that suit the averments regarding and the prayer for a receivership of the property of the Doe Run Company, and that they refused to do so and dismissed the suit.

At the close of the trial the court refused to direct the jury to return a verdict for the defendant. It then charged the jury, first, that both parties agreed upon the amount to be awarded if there was to be any award; second, that if the jury believed from a preponderance of the evidence that the defendant employed the plaintiffs to protect his interests in the matter of the Doe Run Company, and in doing so they prepared the complaint in the suit they brought and prepared for trial under their contract, and then the defendant for any reason of his own ordered them to dismiss the case, then the plaintiffs had done all they could do under the law, and the verdict of the jury should be for the plaintiffs for the sum of $4,000 and interest; but, third, that if they believed from the evidence that the plaintiffs did not, in so far as they could, follow out the directions of the defendant, and if they believed, as contended by the defendant, that the plaintiffs accepted employment to work out the rights of the plaintiff in the case that was then pending, and the plaintiffs undertook to do that, then that was not an employment in a new suit, and that if they believed, as testified to by the defendant, that because he wanted a change in the prayer of the complaint the plaintiffs went into the court, and against his will and consent dismissed the suit they had brought for him, then they could not recover.

[1] One of the assignments of error upon which counsel rely to support their contention that the court below should have instructed

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the jury to return a verdict for the defendant is that the contract to pay $1,000 cash and $4,000 later for the plaintiffs' services was invalid, because it was made after the relation of attorney and client between the plaintiffs and defendant had been created, and there was no evidence that the contract was just and fair. But this defense to the contract was not pleaded in the answer, was not suggested at the trial, was not submitted to the jury or the court below and the defendant tried the case throughout on the theory that, if the contract alleged by the plaintiffs was made and performed, they were entitled to recover. It is too late to present this defense for the first time in this court, and it must now be disregarded, first, because it was essential to its presentation that it should be pleaded in the trial court, so that the plaintiffs would have notice of it and an opportunity to produce at the trial evidence that the relation of attorney and client did not exist at the time the contract was made, and that the contract was just and equitable (Finley v. Quirk, 9 Minn. 194 [Gil. 179], 86 Am. Dec. 93; Northrup v. Mississippi Valley Ins. Co., 47 Mo. 435, 443, 444, 4 Am. Rep. 337; Musser v. Adler, 86 Mo. 445, 449; Bliss on Code Pleading [3d Ed.] § 352); second, in an action at law a federal appellate court is a court for the correction of the errors of the court below exclusively. The defense now presented for the first time involves the trial of two issues of fact, whether or not the relation of attorney and client existed at the time the contract was made, and whether or not the contract was fair and just. These issues were never presented to or tried by the jury or the court below, and this court has no jurisdiction under the Constitution of the United States to try them in the first instance. Again, the question of law whether the contract was valid or invalid, in view of the fiduciary relation of the parties at the making of the contract first alleged in this court, was never presented or suggested to the court below, and it never ruled upon it, therefore there is no error of that court in this regard for this court to review. Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co., 114 Fed. 133, 140, 52 C. C. A. 95, 102; Virtue v. Creamery Package Co., 227 U. S. 8, 38, 33 Sup. Ct. 202, 57 L. Ed. 393; Barnes & Tucker Coal Co. v. Vozar, 227 Fed. 25, 28, 141 C. C. A. 579, 582; Oregon R. & Navigation Co. v. Dumas, 181 Fed. 781, 785, 786, 104 C. C. A. 641; Mesa Market Co. v. Crosby, 174 Fed. 96, 102, 98 C. C. A. 70, 76. "A party may not sit silent and take his chances of a verdict, and afterwards, if it is adverse, complain of a matter which would have been immediately corrected at the time of the trial." McCollom v. Pennsylvania Coal Co., 250 Pa. 27, 32, 95 Atl. 380, 382.

[2] Another contention of counsel for the defendant, Maynard, is that the contract is not susceptible of the construction that the plaintiffs had performed it when the defendant ordered the suit dismissed, and that the action should have been for damages for the prevention of its performance. The contract must be read and its construction must be given in the light of the circumstances surrounding the parties when it was made, and the issue whether or not the plaintiffs performed it must be considered in the light of that construction, and, unless there

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was no substantial evidence to sustain that finding, of the verdict of the jury that they had performed it, for that question was submitted to them. The contract was made on April 22, 1916; the object of the suit which the plaintiffs were to bring was to prevent the St. Joseph Company from voting its stock in the Doe Run Company on March 16, 1916; the contract was that the defendant should pay the $4,000 when this matter was disposed of in the local court; the plaintiffs brought the suit, obtained the order on the St. Joseph Company to show cause why it should not be enjoined from voting the stock returnable on May 15, 1916, and prepared to try that issue on that day. Mr. Morsey, an attorney in the plaintiffs' offices, who was employed by and associated with them in the suit they brought for Maynard, testified that on the morning of May 15, 1916, Mr. Maynard came in to the offices of the plaintiffs and said to him, "I have instructed Judge Reynolds to dismiss this suit;" that he asked Mr. Maynard why he was going to dismiss it, and explained to him that it would leave the plaintiffs in an embarrassing position; that they had the case ready to present that morning, and finally Mr. Maynard said, "Well, I have gotten into difficulties with my Boston brokers;" that Mr. Reynolds then came in, and he and Mr. Maynard went into Mr. Reynolds' office. Mr. Reynolds testified that on that morning, when he came into his offices, Mr. Maynard was there and said he wanted that case dismissed, and he replied, "Why, in the name of common sense, what's the matter with you this morning." Maynard said, "No, no; I want it dismissed." He answered, "Well, now you think about it a minute;" told him he was going to the barber shop, and to think about it meanwhile; that when he came back he tried to persuade him to let him go on with the suit that day; told him they were ready to take the opinion of the court upon it then, that if they lost they would not lose anything, that if they won it would be of great advantage to him; said to him, "For heaven's sake, don't make me dismiss this bill, let me take the opinion of the court; it will meet in a few moments, and by noon we will have the whole matter thrashed out," and asked him what in the world he meant; that Mr. Maynard said, "Judge, I am firm about it; I want that case dismissed, and I can't and won't change my mind;" that he then said, "Look here, sir, you can force me to dismiss that case, but you can't do it and not pay me off. My fee—the balance of that fee is $4,000;" that Mr. Maynard replied, "Oh, I will pay your fee; your fee, don't worry about that;" that he then said, "Then you demand that I dismiss it?" and Mr. Maynard said, "I do," and he went over to the court and dismissed the suit. Mr. Maynard testified that he made a contract with the plaintiffs to pay them $1,000 cash and $4,000 when the litigation in the old pending suit should be carried through the courts for their services in that old suit, but that he made no contract to employ or pay them for services in the new suit; that he signed the complaint in the latter suit; that he afterwards demanded that the plaintiffs take out of the complaint in that suit their prayer for a receiver for the Doe Run Company, but that the plaintiffs did not do so; and that he never ordered or requested Mr. Reynolds to dismiss that suit.

[3] The evidence which has been recited furnished ample support

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to the finding of the jury that the suit was dismissed on the peremptory order of Mr. Maynard on the eve of its hearing for his own purposes, and in view of the fact that its object was to prevent the voting of the stock on the next day, of the impracticability after the dismissal of that suit to accomplish its object by any other litigation, of the peremptory nature of the order of dismissal, and of the renewed positive promise made on the eve of the dismissal to pay the $4,000, there was no error in the ruling of the court that the true construction of the contract and the transaction was that it would be and was fully performed by the plaintiffs when the jury found that such a dismissal was peremptorily ordered by Mr. Maynard. He had the power to finally dispose of the suit, the matter and the litigation in the plaintiffs' hands, by ordering the dismissal of that suit; he did so when he caused its dismissal at the time and under the circumstances that have been detailed, and the plaintiffs had then fully performed their contract.

[4] Finally, counsel argue that the court should have instructed the jury to return a verdict for the defendant, because the plaintiffs violated the instructions of Mr. Maynard not to apply for a receiver and to withdraw from the prayer of the complaint in the suit they brought the prayer for a receiver of the property of the Doe Run Company. On this subject Mr. Maynard testified that before and after the suit was brought he told Mr. Reynolds he did not want an application made for a receiver of the property of the Doe Run Company, and that after the suit was brought he repeatedly demanded, and once on May 15, 1916, that Mr. Reynolds withdraw from the complaint the prayer for such a receiver. Mr. Reynolds testified that he remembered only one or two occasions on which the receivership was mentioned to him by Mr. Maynard; that these were when the suit was brought on May 10, 1916, or a day or two thereafter; that nothing was said about it on May 15th, when the suit was dismissed; that when Mr. Maynard objected to the prayer in the complaint for the receivership and to an application for one, he explained to him that if he did not want a receiver he did not have to take it; that the prayer for it was put into the complaint out of an abundance of caution, so that he would be able to get a receiver on notice in that suit if he should be entitled to it; and that he need not worry about the receivership, for he would not get it. He further testified that he got no idea from Mr. Maynard's statement to him regarding the receivership that it was an absolute demand that he take out of the complaint the prayer for a receiver, or he would have cut it out; that it was just as easy to cut it out as not, rather than have any controversy with Mr. Maynard. Mr. Morsey testified that the complaint was filed on May 10th; that the question of the receivership had never been discussed between him and Mr. Maynard until about two days thereafter; that Mr. Maynard then called his attention to the fact that there was a portion of the prayer of the complaint devoted to the application for the appointment of a receiver, and he explained to Mr. Maynard that that made no difference, that they were not going to press that, that the only thing they were going to press was the question of the injunction against the St. Joseph Company; and Mr. Maynard agreed with him and said, "Well, that won't hurt the bill; as long

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as that is in there, you need not take it out." The question whether or not the plaintiffs disobeyed instructions of the defendant, Maynard, was submitted to the jury upon this evidence, they found that they did not, there was here ample evidence to sustain that finding, and it was not the duty of the court to withhold that issue from them.

The judgment below must be affirmed. It is so ordered.

CARLAND, Circuit Judge (dissenting). I dissent from the opinion of the majority for the following reasons: The suit was to recover attorney fees upon an express contract. We are not concerned with what the jury found, but as to whether the defendant below was entitled to a directed verdict in his favor. The services which were agreed to be performed by the plaintiffs were not performed. It is true their nonperformance was not the fault of plaintiffs, but they agreed to perform the same, subject to the right of the defendant to discontinue the litigation at any time. This right was not subject to any condition that plaintiffs might impose; therefore the remark of defendant that the fee would be paid was unsupported by any consideration and futile to support a verdict for plaintiffs. The result reached by the majority would make the employment of counsel a hazardous proceeding indeed.

BANKERS' TRUST CO. v. MISSOURI, K. & T. RY. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. May 22, 1918.)

No. 4995.

1. Receivers ⇐52—Appointment of Separate Receivers—Discretion.
Where entire railway system was in possession of receiver for benefit of holders of all liens, and all issues involved would have to be decided by same court, it was not abuse of discretion to extend receivership over that part of railway's property covered by another mortgage, and to refuse to appoint separate receiver thereof.

2. Action ⇐56—Consolidation of Suits.
Where entire railway system was in possession of receiver for benefit of holders of all liens, and all issues involved would have to be decided by same court, it was not abuse of discretion to consolidate another suit to foreclose a mortgage on a part of the system with receivership suit.

3. Action ⇐57(2)—Consolidation of Suits.
That one of defendants in foreclosure suit is a Texas corporation, and is not a party to a receivership suit, is no obstacle to consolidation of such foreclosure suit with the receivership cause; no deficiency judgment against such corporation being sought.

4. Appeal and Error ⇐1073(1)—Harmless Error—Decree.
Legal effect of extension of railroad receivership to income of property covered by mortgage on part of system being to impound earnings, etc., for benefit of bondholders under that mortgage, there was no prejudicial error in court's refusal to make more specific order for impounding income.

5. Action ⇐58—Consolidation—Order Segregating Income.
There being no basis for allocation of income between different parts of railway system covered by separate mortgages, an order consolidating causes is not erroneous in failing to order receiver in parent suit to

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segregate income derived from part of system covered by mortgage involved in outstanding foreclosure suit.

6. APPEAL AND ERROR ⟸78(1)—APPEALABLE ORDERS—"FINAL DECISION."
That portion of court's order adjudging that acceptance of benefit of consolidation or extension of receivership should be deemed a consent to all administrative orders theretofore made in consolidated causes would completely deprive appellant, whose mortgage foreclosure suit was consolidated, of substantial right, and was therefore a "final decision," from which appeal would lie under Judicial Code, § 128 (Comp. St. 1916, § 1120).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Decision.]

7. APPEAL AND ERROR ⟸901—ORDERS OF LOWER COURT—PRESUMPTION.
The legal presumption is that the orders of the court below in a suit in equity are just, lawful, and without prejudice to any of the parties to the suit, and the burden is on an appellant, who assails one of them, to show by the record that it was erroneous and prejudicial to him.

Appeal from the District Court of the United States for the Eastern District of Missouri; William C. Hook, Judge.

Consolidated suits between the Bankers' Trust Company and the Missouri, Kansas & Texas Railway Company and others. From an order extending receivership, etc., the Bankers' Trust Company appeals. Affirmed.

Roberts Walker, of New York City (Bryan & Williams, of St. Louis, Mo., and White & Case, of New York City, on the brief), for appellant.

C. S. Burg, of St. Louis, Mo. (Joseph M. Bryson, of St. Louis, Mo., A. C. Rearick, of New York City, and Boyle & Priest, of St. Louis, Mo., on the brief), for appellees Missouri, K. & T. Ry. Co. and Edwards.

Edward C. Eliot, of St. Louis, Mo. (Edward Cornell, Charles E. Hotchkiss, and Davies, Auerbach & Cornell, all of New York City, and Eliot, Chaplin, Blayney & Bedal, of St. Louis, Mo., on the brief), for appellee Central Trust Co. of New York.

Frederick Geller and Edward H. Blanc, both of New York City, and Arthur B. Shepley, of St. Louis, Mo., for appellee Farmers' Loan & Trust Co.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

SANBORN, Circuit Judge. The Missouri, Kansas & Texas Railway Company, a corporation of Kansas, is the owner of an extensive system of railroads stretching southwesterly from St. Louis, lying in Missouri, Kansas, and Oklahoma. There is a blanket mortgage upon the railroads constituting this system, and there are many divisional mortgages, which rest upon respective parts of the system. Under a creditors' bill against the railway company the court below on September 27, 1915, appointed Charles E. Schaff receiver of all its railroads and property, to take and hold possession of them and to apply their income and proceeds to the payment of the expenses of the operation of the railroad and to the payment of the just debts of the company

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in the order of the equities of their holders. On the same day, upon a like bill filed by another creditor, the receivership of Mr. Schaff was extended by order of the court over the second suit, and it was consolidated with the first. The receiver immediately took possession of all the property and has been operating the system of railroads ever since.

On November 13, 1915, the Central Trust Company of New York, as trustee in the consolidated mortgage of April 1, 1910, the blanket mortgage, filed its petition in the consolidated cause for leave to file its bill to foreclose its mortgage, and the court granted its prayer, ordered that the receivership of Mr. Schaff be extended to all the property covered by that mortgage, and that the suit to foreclose that mortgage, which had been commenced, and the suits then pending for the sale and disposition of the property of the railway company, should be consolidated into and should proceed in one case under the title: "Central Trust Company of New York v. Missouri, Kansas & Texas Railway Company, Defendant. In Equity. No. 4564. Consolidated Cause." This consolidated or blanket mortgage covered all the property of the railway company. Every other mortgage covered only a part of its property. On April 17, 1916, the Farmers' Loan & Trust Company, as trustee in the first and refunding mortgage of September 1, 1904, and on June 27, 1916, the New York Trust Company and Benjamin F. Edwards, as trustees under the general mortgage of January 1, 1906, filed their petitions in the consolidated cause for leave to file their respective bills to foreclose their mortgages, and on June 27, 1916, the court granted their petition, ordered that the receivership of Schaff be extended over the property covered by their mortgages, and that their suits to foreclose be consolidated with the consolidated cause No. 4564.

On June 27, 1916, the appellant, Bankers' Trust Company, the trustee in the second mortgage dated June 1, 1890, filed its petition in the consolidated cause for leave to be made a party defendant therein, and the court ordered that it should henceforth be a defendant in that cause, with the opportunity to plead and be heard on all matters, and that it should be given notice of all proceedings therein. On November 17, 1916, the appellant filed a petition in the consolidated cause for leave to file a bill to foreclose its second mortgage, and the court granted it leave to do so. The appellant filed in the court below its complaint to foreclose this second mortgage, and thereafter, on December 11, 1916, it filed its petition for the appointment of a receiver of the property subject to the lien of that mortgage, that, if Mr. Schaff or any other receiver should be appointed, he should be directed to keep separate accounts of his receipts from or on account of, and of his expenses paid and disbursements made from or on account of, the property covered by the lien of this second mortgage, and that he should apply such receipts for the benefit of the appellant and the holders of the bonds secured by that mortgage. On the same day the railway company and the complainants in the creditors' bills, upon which Mr. Schaff had originally been appointed receiver of all the railways and property of the railway company, made a motion

that the suit of the appellant to foreclose the second mortgage be consolidated with the consolidated cause No. 4564, and that the receivership of Mr. Schaff therein be extended to all the railroads and property described in the second mortgage.

After notice to all parties in interest and a full hearing upon this petition and motion, the court below on June 14, 1917, made the order of which the appellant Bankers' Trust Company now complains. That order consists of five paragraphs. By the first the foreclosure suits of the New York Trust Company and Benjamin F. Edwards, trustees in the general mortgage of January 1, 1916, and of the appellant trustee in the second mortgage of June 1, 1890, are consolidated with the consolidated cause No. 4564. By the second the receivership of Mr. Schaff in the consolidated cause No. 4564 is extended to all the property covered by the general mortgage and the second mortgage, and to the receipts from or on account of that property, the powers conferred upon Mr. Schaff in the original and subsequent orders of appointment in the consolidated and constituent causes, including those affecting the property and income covered by or embraced in the second mortgage and the general mortgage, were continued in full force and effect and made as binding upon the parties as though they were then entered; "but," so reads the order, "the relative rights of all the parties to the properties covered by the various mortgages and the income therefrom are hereby reserved for future determination. The acceptance of the benefit of the consolidation, or of the extension of the receivership, by this order, shall be deemed a consent to all administrative orders heretofore made in the consolidated or constituent causes." By the third the bond of the receiver was made to cover additional duties and responsibilities imposed by the order. The fourth and fifth paragraphs read in this way:

"4. The receiver is hereby directed to keep separate accounts of the earnings, tolls, revenues, rents, income, and profits of the railroads, properties, premises and franchises described in and covered by the lien of each of the various mortgages involved in this consolidated cause including the second mortgage, and of the expenses of maintaining and operating the same. A more detailed direction in this matter of separate accounts is reserved for further consideration."

"5. Except as granted herein, the above-mentioned petition of the Bankers' Trust Company is denied. Said trust company excepts to such denial and to this order."

[1] The first error assigned by the appellant is that the court below refused to appoint in its foreclosure suit a separate receiver of the property covered by its mortgage and of the earnings, income, and profits thereof, and instead of doing so ordered the receivership in the consolidated cause extended to the property covered by the mortgage in which the appellant was the trustee and to the receipts therefrom. But all the property of the railway company was in the possession of Mr. Schaff, the receiver in the consolidated cause under appointment under the creditors' bill and the blanket mortgage, and the second mortgage in which the appellant was trustee covered only a part of the railroads and property of the railway company, a part which could not be wisely or conveniently segregated and operated

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apart from the other portions of its system. The extension of a receivership of an entire system of railroads and its receipts, based upon liens which have attached thereto, over a part of that system and the receipts of that part which are covered by a prior or other mortgage, deprives those secured by the lien of the latter mortgage of no rights or equities which they would have had if a separate receiver of the property covered by their mortgage had been appointed. The legal rights of all parties, the equities of all parties, the priorities of all liens, remain the same in either case. There was, therefore, no violation of any legal right, or of any substantial equity, by the extension of the receivership of Mr. Schaff over the entire property to the part of that property covered by the appellant's mortgage, and the impounding of the earnings, income, and profits thereof for the benefit of the bondholders secured by that mortgage, by means of that extension, rather than by the appointment of a separate receiver therefor. It was discretionary with the court below which course it should pursue, and in view of the facts that the entire railway system was in the possession of the receiver for the benefit of the holders of all liens thereon, that there were many liens, some upon the entire system, many upon parts thereof respectively, that separate receivers for separate liens would multiply the labor and expenses of the litigation and of the administration and operation of the property, that receivers are but the hands of the court, that the property ordered into the possession of one or many of its receivers must after all be held, administered, and disposed of, and the issues arising in all these suits must be decided, by one and the same court, it was not an abuse of, but a just and wise exercise by the court below of, its judicial discretion to extend the receivership already in existence of all the railway company's property over that part of its property covered by the appellant's mortgage, and the receipts therefrom, for the benefit of the bondholders secured by that mortgage, and to refuse to appoint a separate receiver therefor.

[2, 3] Appellant also assigns as error the first paragraph of the order by which the court consolidated the foreclosure suit of the appellant with the consolidated cause, No. 4564, in Equity. But it was reasonable to make this consolidation (section 921, Revised Statutes [Comp. St. 1916, § 1547]), and there was no error or abuse of discretion in that part of the order for the same reasons that there was none in the refusal to appoint a separate receiver rather than to extend the existing receivership. Nor is it a tenable objection to the consolidation that one of the defendants in the appellant's foreclosure suit, the Missouri, Kansas & Texas Railway Company of Texas, is not a party to any of the other suits in the consolidated cause. That corporation holds the title to the railroads and property of the system under administration in the state of Texas in the Fifth circuit, which are operated as a part of the railway system of the defendant railway company, and of which the court below has no jurisdiction, and the Texas corporation holds none of the property in this circuit. No deficiency judgment against the Texas company is sought by the appellant in its suit in the court below, nothing but the foreclosure

of its mortgage, the appointment of a receiver, the sale of the mortgaged property, and a judgment against the Kansas corporation. The possession in the consolidated cause by the court below, before the appellant commenced its suit to foreclose, of the res, of all the property of the Kansas company in this circuit, conferred upon it plenary power, in the exercise of its judicial discretion, to draw to itself and to consolidate with that cause the appellant's suit in the court below to enforce a lien upon part of that property, although the Texas corporation was a party thereto. Morgan's Co. v. Texas Central Ry., 137 U. S. 171, 177, 201, 11 Sup. Ct. 61, 34 L. Ed. 625; Mercantile Trust Co. v. Atlantic & Pac. R. Co. (C. C.) 70 Fed. 518, 521, 523; Continental Trust Co. v. Toledo, St. L. & K. C. R. Co. (C. C.) 83 Fed. 642, 644, 645, 646.

The appellant prayed in its petition that the receiver be directed forthwith, first, to keep separate accounts of the earnings, tolls, revenues, receipts, income, and proceeds of the property covered by the lien of the second mortgage and of the expenses and disbursements therefrom; and, second, that he be directed "to set apart, use, and apply such earnings, tolls, revenues, receipts, income, and profits for the benefit of your petitioner, as such successor trustee, and the holders of the bonds issued under and secured by the mortgage." The court ordered the receiver to keep separate accounts of the earnings, tolls, revenues, rents, income, and profits of the property described in and covered by each of the various mortgages involved in the consolidated cause, including the properties covered by the second mortgage, and of the expenses of maintaining and operating the same, stated in the fourth paragraph of the order that "a more detailed direction in this matter of separate accounts is reserved for further consideration," and in the second paragraph that "the relative rights of all parties to the properties covered by the various mortgages and the income therefrom are hereby reserved for future determination." In effect the court granted the first prayer of the appellant regarding the separate accounting and reserved the second to enable it to make directions in greater detail after further consideration.

[4] The appellant complains, first, that the court did not order that the earnings, tolls, rents, income, revenue, and profits from that part of the railway system covered by its mortgage was and should thereafter be impounded for the use and benefit of the bondholders secured by the second mortgage; and, second, that the court refused to make an order that the receiver forthwith segregate, set apart, and keep separate from the other receipts of the system of railroads he is operating the earnings, tolls, rents, income, revenue, and profits he receives from that part of the system covered by the second mortgage, and that he conserve those receipts as a unit, apply them for the benefit of the bondholders secured by that mortgage exclusively, and use none of them upon or for the operation of any of the other parts of the railway system. There was no prejudicial error in the refusal of the court to make a more specific order for the impounding of the income, for the legal effect of the extension of the receivership to the income of the property covered by the second mortgage

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was from the date of the order completely to impound all the earnings, tolls, rents, income, revenues, and profits of the property covered by the second mortgage for the exclusive benefit of the holders of the bonds secured by that mortgage, as against the parties holding liens inferior to it in equity and as against the railway company itself. The receiver and all parties to the consolidated cause are by the order of extension charged with notice that the earnings and profits of that part of the system covered by the second mortgage are charged with a trust in the receiver's hands for the benefit of the bondholders secured thereby, and that they may not be lawfully dissipated or diverted to the benefit of others who have no superior equity.

[5] Nor does the record satisfy that the court either erred or abused its discretion in its failure to order the receiver to segregate, set apart, conserve as a unit, and apply to the benefit of the bondholders secured by the second mortgage, and use none of it for the operation of other parts of the system, the fund he thereafter derived or may derive from the earnings, income, and profits of the property covered by that mortgage. That should be and undoubtedly will be the ultimate effect of the order that has been made, and the detailed directions that will subsequently be made. But the railway system now operated as a unit by the receiver was built up out of many railroads and many extensions. The second mortgage is one of more than 20 mortgages upon various parts of this system. So far as this court is able to learn from the record and the briefs, the earnings and income of the system have never been allocated to the respective parts of it covered by the respective mortgages, nor to the part covered by the second mortgage, nor has the mileage basis, or any other basis, of allocation been agreed upon or established by order of the court, or otherwise, for this purpose. In this state of the case it is possible, nay probable, that the receiver could not have complied with such an order as was asked; the record does not disclose any method by which he could know what part of the income from the entire system, which was operated as a unit, was derived from a particular part of it, so that he could be sure to apply that particular part of the income exclusively for the benefit of the holders of a lien thereon, and the court ought not to require him to do the impossible. As early as June 27, 1916, the court below, after notice to the appellant and a hearing, made an order that the receiver should submit to the court, on notice to the counsel for the parties in the consolidated cause, a report and his recommendations as to the feasibility and method of keeping separate accounts of the earnings and expenses of the properties covered, respectively, by each and every mortgage on any of the property of the railway company. The receiver made his report, and some exceptions were filed to it. This order, and the report following it, were before the court below when it made the order here challenged. It was undoubtedly with a view to a consideration of the foregoing orders, and the report of the receiver, and to the speedy establishment of some basis for the allocation of income and expenses and for the separate accounting, that it deferred further action on this subject, and stated in its order that "a more detailed direction in this matter

of separate accounts is reserved for further consideration." Moreover, this part of the order was not final, and the conclusion is that there is no sound reason for now reversing it.

[8] Finally, counsel insist that the portion of the order which adjudges that "the acceptance of the benefit of the consolidation or of the extension of the receivership, by this order, shall be deemed a consent to all administrative orders heretofore made in the consolidated or constituent causes," deprives it of substantial rights and equities and is erroneous. Appellees challenge this contention, and also argue that it is not a final decision, and is therefore not appealable. Judicial Code (Act March 3, 1911, c. 231) § 128, 36 Stat. 1133, 2 U. S. Comp. Stat. 1916, § 1120. But the appellee held a mortgage upon the property described therein, whose lien thereon was prior in time and superior in equity to that of any of the parties to the consolidated cause, and it sought to impound that property and its income. There had been a default in the payment of the debt secured by its mortgage, and its right to foreclose that mortgage had accrued. Its mortgage embraced the earnings, tolls, income, rents, revenue, and profits of the property described in it. Upon the filing of its bill to foreclose its mortgage, the appellant was by the terms of its mortgage entitled, under the principles, rules, and practice of equity jurisprudence, to the immediate impounding of that income, and to the appointment of a receiver to hold it and the other property mortgaged to it for the exclusive benefit of the bondholders secured by its mortgage, as against all the parties to the consolidated cause, and who had sought a receiver or the impounding or use of any of the income or property of the railway company. The court made an order extending the receivership in the consolidated cause over the appellant's foreclosure suit, and appointing the receiver in the consolidated cause to hold the income from the property mortgaged to the appellant for the benefit of its bondholders; but by the clause in the order above quoted it in effect denied to the appellant and its bondholders any receiver and any impounding of any income for its benefit, or for the benefit of its bondholders, unless it and they consented to all the administrative orders that had been made by the court in the consolidated and constituent causes between September 16, 1915, when the creditors' bills were filed, and December 12, 1916, the date of the order.

Administrative orders, made in the operation of a great railroad system, may, and they frequently do, determine or substantially affect the rank, the amount, and the value of the rights and liens of mortgage bondholders and others holding liens upon the railroad property. For example, courts sometimes make administrative orders for the borrowing of money by receivers on their certificates, which the courts order to be secured on the railroad by lien superior to those of all mortgage and other lienholders. Bibber-White Co. v. White River Val. Electric R. Co., 115 Fed. 786, 53 C. C. A. 282. The compensation of receivers is usually fixed by administrative orders, and those orders are reviewable by the appellate courts generally as interlocutory, but sometimes, as final orders. Ruggles v. Patton, 143 Fed. 312, 314, 315, 74 C. C. A. 450, 452, 453. The general rule is that, upon an appeal

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from the final order or decree in a proceeding in equity, such as a foreclosure suit or foreclosure suits, all the preceding interlocutory orders and decrees, affecting the rights or equities of the parties regarding the matters in controversy between them, are subject to review in the appellate court, and may be heard and decided at the same time. Perkins v. Fourniquet, 47 U. S. (6 How.) 206, 208, 12 L. Ed. 406; Forgay v. Conrad, 6 How. 201, 204, 205, 12 L. Ed. 404; Celluloid Mfg. Co. v. Cellonite Mfg. Co. (C. C.) 40 Fed. 476, 478; Pittsburgh, C. & St. L. Ry. Co. v. Baltimore & Ohio R. Co., 61 Fed. 705, 708, 10 C. C. A. 20, 23; N. K. Fairbanks Co. v. Windsor, 124 Fed. 200, 202, 61 C. C. A. 233, 235; Western Union Telegraph Co. v. United States & Mexican Trust Co., 221 Fed. 545, 551, 137 C. C. A. 113, 119. At the time the order under consideration was made the appellant was, and had been for many months, a defendant in the consolidated cause, and it had the undoubted right to appeal from the final order or decree in that cause, and thereby successfully to invoke a review, certainly of all the administrative orders made after it became a defendant from a review of which it had not estopped itself under the rules of court, and probably of all such orders from the commencement of the creditors' suits. The other parties to the consolidated cause and to the constituent suits still have this right of review. But by reason of the clause of the order in issue, if the appellant takes the benefit of the extension of the receivership, or of the consolidation, it consents to all the preceding administrative orders, however deleterious they may be to it, and to the interests of the bondholders it represents, and it is forever estopped from reviewing them by motion in the court below, by appeal, or otherwise. Albright v. Oyster, 60 Fed. 644, 9 C. C. A. 173; Chase v. Driver, 92 Fed. 780, 786, 34 C. C. A. 668, 674. If it does not consent, then it is deprived of its receiver, and of its impounding of the income to which it was entitled for the benefit of the bondholders secured by its mortgage.

The conclusion is that, as the appellant was entitled to both the right of review of the administrative orders in question by an appeal from the final order or decree that shall be made in the causes, and also to the receiver and the impounding of the income for the benefit of its bondholders, and as the clause of the order under discussion completely deprived it of one of these rights, it was a final decision affecting a substantial right of the appellant and the bondholders he represents, and it made the order which contained it appealable. A decision which completely deprives a party in a pending proceeding who is not jointly liable with others of a substantial right or equity is a final decision, and reviewable by appeal or writ of error under section 128 of the Judicial Code. Standley v. Roberts, 59 Fed. 836, 839, 8 C. C. A. 305, 308; Morrison v. Burnette, 154 Fed. 617, 622, 83 C. C. A. 391, 396; Williams v. Morgan, 111 U. S. 684, 4 Sup. Ct. 638, 28 L. Ed. 559; Hill v. Chicago & Evanston R. Co., 140 U. S. 52, 11 Sup. Ct. 690, 35 L. Ed. 331; Grant v. East & West R. Co., 50 Fed. 795, 1 C. C. A. 681.

[7] The conclusion that this order was appealable is not, however, a conclusion that it is reversible upon this record. It is not reversible, unless some administrative order in the consolidated cause, or in one

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of its constituent causes, was erroneous and prejudicial to the interests of the appellant, or to the interests of the bondholders secured by the mortgage. Those orders were made by the court below, and the legal presumption is that they were just, lawful, and without prejudice to the appellant, that the court below knew them to be so when it made the order from which this appeal was taken, and that the latter order was just, lawful, and without prejudice to the appellant. The burden is on him who alleges error in the ruling, order, or decree of a court of equity to establish that error by the record he presents to the appellate court. Counsel for the appellant have not printed or presented in their record in this court any proceeding or administrative order made in the consolidated cause, or in any of its constituent causes, which was either erroneous or prejudicial to the appellant, or to the bondholders it represents. They have not pointed out in their briefs or argument, or in any way called attention to, any such order in the record of the voluminous proceedings in the court below in the consolidated and constituent causes, and this court has discovered no such order.

In other words, they have failed to show that the order from which they have appealed was either erroneous or prejudicial to the appellant, or the bondholders it represents, and therefore upon this record it is not reversible, and it is affirmed, with costs against the appellant.

RIDGE v. HEALY et al.

(Circuit Court of Appeals, Eighth Circuit. May 18, 1918.)

No. 4904.

1. ATTORNEY AND CLIENT ⟸143—CONTRACTS FOR COMPENSATION—PRESUMPTIONS.

A contract between attorney and client relative to compensation for services, made after the relationship has been entered into, is not per se void, but is presumptively invalid, and will be scrutinized very carefully by the courts whenever the transaction is called in question.

2. ATTORNEY AND CLIENT ⟸166(1)—CONTRACTS FOR COMPENSATION—PRESUMPTIONS.

Where an attorney and client made a contract for compensation after the relationship was established, the attorney has the burden of proving fairness and openness in making the contract, and that he fully explained to the client the facts and legal rights, so far as known to him.

3. ATTORNEY AND CLIENT ⟸144—CONTRACTS FOR COMPENSATION—PRESUMPTIONS.

A contract for compensation of an attorney, made after the relation of attorney and client was established, will be construed most strongly against the attorney.

4. ATTORNEY AND CLIENT ⟸166(1)—CONTRACTS FOR COMPENSATION—PRESUMPTIONS.

Where an attorney and client agreed upon compensation after the relationship was established, and the attorney sues in equity upon the contract, he must show that his claim, independent of the express terms of the contract, is so fair and equitable that a court of equity will not hesitate to enforce it.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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5. TRUSTS ⊂=46—TRUST AGREEMENTS—VALIDITY.
A trust agreement between an attorney and client, accepting a trust without bond, absolved from the duty of collecting money for the trust and of giving personal attention to the detailed management thereof, and requiring a cotrustee to act in such matters and to submit a monthly report, and securing to the attorney no compensation other than for legal services, was unfair to the client and to the other cestuis que trust.

6. ATTORNEY AND CLIENT ⊂=147—CONTRACTS FOR FEES—VALIDITY.
Contract between attorney and client for fees of 20 per cent. if the case came to trial, and 10 per cent. if it were compromised, of the entire amount secured for the client, which recited her refusal of offer to compromise giving her 40 per cent. of the property involved in a will contest, *held* unfair and unconscionable.

7. ATTORNEY AND CLIENT ⊂=147—CONTINGENT FEE CONTRACTS—DUTIES OF ATTORNEY.
An attorney, concluding a contingent fee contract with his client, is bound to explain to her the distinction between a contingent fee in cases where any recovery at all is doubtful and in cases where at least a 40 per cent. recovery is assured by reason of a compromise offered by the adverse party.

8. ATTORNEY AND CLIENT ⊂=147—CONTINGENT FEE CONTRACTS—DUTIES OF ATTORNEY.
An attorney, on concluding a contingent fee contract with his client, the effect of which is to make his fee payable and an interest-bearing obligation upon conclusion of a compromise, is bound to explain to his client such effect of the contract.

9. ATTORNEY AND CLIENT ⊂=166(1)—CONTINGENT FEE CONTRACTS—VALIDITY—EVIDENCE.
Where attorney concluded contingent fee contract with his client, which recited refusal of attempted compromise by his client, and called for the immediate payment of his fee upon any compromise, contract acknowledging his due the sum of $50,000, a statement estimating the value of the property, an order upon trustees to pay the amount of the fee to the attorney and a promissory note for the amount of the fee, all made while the relationship of attorney and client still existed, were of little probative value for the purpose of establishing that the client understood the contingent fee contract.

10. ATTORNEY AND CLIENT ⊂=166(1)—CONTINGENT FEE CONTRACTS—REASONABLENESS—EVIDENCE.
The amount paid to associate counsel in a will contest, which was not questioned and the fairness of which was unchallenged, was proper evidence to be considered as to the reasonableness of the contingent fee agreed upon, and the value of the services of the attorney who claimed the contingent fee.

11. APPEAL AND ERROR ⊂=1009(1)—SCOPE.
The conclusion of the trial court sitting in equity should not be disturbed, unless obvious error in the application of the law was committed, or grave mistake made in consideration of the facts.

12. ATTORNEY AND CLIENT ⊂=166(3)—AMOUNT OF COMPENSATION—EVIDENCE—SUFFICIENCY.
Evidence *held* insufficient to sustain the finding of the trial court as to the value of the services of an attorney who assigned his claim to plaintiffs.

13. EQUITY ⊂=66—MAXIM—DOING EQUITY.
In a suit in equity by the assignees of the claim of an attorney under a contingent fee contract, the maxim that he who seeks equity must do equity is applicable.

Appeal from the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

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Suit by John C. Healy and others, partners as Healy, Ferris & McAvoy, against Margaret D. C. Ridge. From the decree rendered, the defendant appeals. Remanded, with instructions to modify.

Frank Hagerman, of Kansas City, Mo. (Glen Sherman, of Kansas City, Mo., on the brief), for appellant.

John C. Healy, of Cincinnati, Ohio, and H. M. Langworthy, of Kansas City, Mo. (Howard Ferris and Malcolm McAvoy, both of Cincinnati, Ohio, and O. H. Dean and W. D. McLeod, both of Kansas City, Mo., on the brief), for appellees.

Before SANBORN and CARLAND, Circuit Judges, and BOOTH, District Judge.

BOOTH, District Judge. This is a suit in equity to recover on a contract for services as an attorney; also to impress a lien for the amount claimed upon certain property belonging to the defendant, and for a foreclosure of the lien. The contract was originally made between appellee Howard Ferris, of Cincinnati, Ohio, and appellant, Margaret D. C. Ridge, of Kansas City, Mo. It was assigned by Ferris to his firm, who are plaintiffs in the suit. Among the defenses set up were the following: That the contract was unfair and unconscionable, in view of the relationship existing between the parties at the time it was made, and in view of the circumstances under which it was made; that the amount claimed was unreasonable, in view of the services rendered; that the services rendered were not properly nor fully performed.

Trial in the court below resulted in a decree for a money judgment in favor of plaintiffs, the establishing of a lien to secure the same upon certain real estate of defendant, and a foreclosure of the lien. Upon this appeal among the errors assigned and relied upon by the appellant are the following: That the evidence shows that the contract, order, and note upon which the decree and judgment were founded were procured by fraud, misrepresentations, and coercion, and were void; that the services rendered by Ferris were without value to the defendant, and the fee as fixed by the contract, order, and note was exorbitant, and procured from the defendant while the relationship of attorney and client existed between Ferris and the defendant; that the fraud shown in the evidence on the part of Ferris should have barred the complainants from a court of equity and denied them equitable relief. These several assignments of error may properly be considered together, and in considering them it becomes necessary to examine somewhat at length the facts disclosed by the evidence.

The defendant, Mrs. Ridge, was the second wife of Dr. Isaac M. Ridge, of Kansas City. He died May 7, 1907. He left property, real and personal, of the approximate value of $1,125,000 over and above the mortgage liens thereon. There were two mortgages—one for $350,000, covering a portion of the property; the other for $75,000, covering another portion of the property, and covering also, as a second mortgage, the property covered by the preceding mortgage. Dr. Ridge left a will, dated June 14, 1900, by which he bequeathed a small amount to each of three children by a former wife, and the remainder

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of his estate to the defendant, Mrs. Ridge. He had made two prior wills, which were in existence. A will contest was filed by the three children, seeking to set aside the last will, on the alleged ground that the testator was mentally incompetent at the time of making the will, and also on the ground that he had been unduly influenced by his wife in the making of the will. Mrs. Ridge's attorneys were the firm of Lathrop, Morrow, Fox & Moore and Mr. C. O. Tichenor, all of Kansas City. The will contest was still pending, and several offers of compromise had been made between the parties, when plaintiff Ferris entered the case. His entry was brought about largely by the efforts of a mutual friend of Mrs. Ridge and himself, named Smith, of Cincinnati. A letter, dated November 26, 1907, had been written by Smith, who was then temporarily in Kansas City, to Ferris, outlining the situation. This letter was written after consultation by Smith with Mrs. Ridge and Mr. Geo. W. Curtiss, brother-in-law of Mrs. Ridge. Correspondence followed between plaintiff Ferris and Mr. Curtiss or Mrs. Ridge, and in March, 1908, Ferris made his first visit to Kansas City to become better acquainted with the case.

The written contract upon which the suit is brought was entered into December 10, 1908. Ferris had been acting as attorney for Mrs. Ridge for a number of months prior to this date. Just when the relationship of attorney and client began is uncertain from the evidence. Ferris in his testimony is not sure whether it was in March or April, 1908. The exact date is not of vital importance. During the period from March or April, 1908, to December, 1908, Ferris had made several visits to Kansas City, had become acquainted with the property involved, its situation and condition, and the incumbrances thereon, had become acquainted with the claims of the contesting parties, and had conferences with the attorneys of Mrs. Ridge who were in her employ prior to his coming. He knew that propositions of settlement had been made, knew what these propositions were, knew that the attorneys for Mrs. Ridge favored a settlement rather than litigation, and knew that Mrs. Ridge herself had refused offers of compromise made to her. He himself had taken part in negotiations touching one compromise, known as the 40 per cent.-60 per cent. compromise. This offer had been rejected by Mrs. Ridge upon his advice, or at least with his approval. He had looked up questions of law involved in the controversy, and the questions of fact, and the evidence to support the same, to a considerable extent. He knew of the existence of the two prior wills, and was acquainted with the statutory provisions of the state of Missouri in regard to dower. He had assumed the active control in the management of the case, and had carried on an extensive correspondence with Mrs. Ridge in regard to the contest, and the outlook for the same.

The evidence also shows that by the end of this period Mrs. Ridge looked upon Ferris as her most trusted, if not her sole, legal adviser, and placed in him her implicit confidence. This condition had been brought about, in part at least, by the friendly statements of Mr. Smith by extended social intercourse with Ferris, and by the reiterated ex-

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pressions by him of self-praise, accompanied by derogatory remarks as to associate counsel. During this period the position of Ferris was distinctly adverse to a compromise settlement. This is shown conclusively by his letters to Mrs. Ridge and Mr. Curtiss introduced in evidence. January 3, 1908, he writes to Curtiss, who was closely in touch with Mrs. Ridge and was assisting and advising with her in the case:

"I have gained from you the information that Mrs. Ridge would not entertain any proposition of any character at this time, except one for the dismissal of the suit at their costs. This should be her attitude, and doubtless is. I would be very firm in the position thus taken."

May 18, 1908, he writes to the same party:

"I assume the fact to be that Morrow has urged Mrs. R. to compromise and has used the situation as a club for that purpose. This I expected. * * * I knew that Morrow was not in sympathy with any plan, except one that came as the result of a compromise. * * * Mr. Morrow does not seem anxious to have the matter of the will contest heard, and gave me no assurance when it would be reached. * * * He does not intend to fight. He wants to settle."

May 29, 1908, he writes to Mrs. Ridge:

"Do nothing in the matter of compromise or adjustment until I come to Kansas City. * * * I do not need to say that I still entertain the conviction that the contestants will not be fair enough to make a reasonable proposition, and therefore I shall forget all questions of settlement and give my entire attention to the details looking toward a trial. * * * You deserve victory, and for the life of me I cannot see why you are not due to win."

August 27, 1908, he writes to Mrs. Ridge as follows:

"I do not think now at all about questions of compromise. I think I have done my full duty toward you, toward the theories of Mr. Morrow, and have made the courtesies due to Smart and Dean in the efforts made by them to effect a jug handle settlement. I shall take the initiative in matters of this kind only when you direct me to proceed in this direction."

September 14, 1908, he writes to Mrs. Ridge:

"Inasmuch as I have written counsel that propositions of settlement are at an end, I am preparing for a fight, and expect to come to Kansas City as soon as the case is set for trial, and devote myself entirely for at least a week or ten days to an examination of the facts and the preparation of our case for trial."

Numerous other letters by him were in the same vein. The contract entered into on December 10, 1908, reads as follows:

"Kansas City, Mo., December 10, 1908.

"This memorandum of agreement made and entered into this 10th day of December, A. D. 1908, by and between Margaret D. C. Ridge, of Kansas City, of the first part, and Howard Ferris, an attorney at law, of Cincinnati, Ohio, party of the second part, witnesseth:

"The party of the first part has employed the party of the second part to attend to all legal matters growing out of the contest of the last will and testament of Dr. I. M. Ridge, by William E. Ridge, Thos. S. Ridge, and Sophia Lakenan, children of Dr. Ridge in a suit, No. 33639, now pending in the circuit court of Jackson county, Mo., in which suit the said Margaret D. C. Ridge, widow of Dr. I. M. Ridge, is the defendant.

"The party of the first part has authorized the party of the second part to

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conduct negotiations relating to a settlement of all matters in controversy in said suit No. 33639, and a proposition has been submitted by the plaintiffs, offering to give to the widow, M. D. C. Ridge, 40% of the entire estate, and guaranteeing the payment of the sum of $6,000 per year and the free use of the residence for a period of two years from the date of settlement. This proposition was refused, and a counter proposition was made to the contestants to make an even division of the estate, 50% to the contestants and 50% to the contestee. Each party having made an endeavor to settle all matters in dispute, and neither offer having been accepted, it now becomes necessary to prepare the case for trial. Many depositions have been taken and many witnesses have been examined, and much time and labor will be required to properly present the facts and the law to the court and jury, and for that purpose the party of the first part has employed the party of the second part to take entire charge of all matters relating to the preparation and trial of said case, as well as to conduct all negotiations for a settlement of the case, in the event that an adjustment be made. The party of the first part does now therefore constitute and appoint the said Howard Ferris, party of the second part, as her true and lawful attorney to do any and all things necessary in the proper conduct of the litigation over said will, and to enter into and negotiate a settlement with Wm. E. Ridge, Thos. S. Ridge, and Sophia Lakenan, contestants, on the best terms obtainable, and upon such conditions as may seem to him right and proper, and in accordance with instructions heretofore given him by me, and I herewith ratify and approve all that my attorney may do in this behalf.

"In the event that the employment of local additional counsel shall be necessary or advisable in the preparation and trial of said suit, authority is hereby given party of the second part to contract for such assistance on terms to be approved by the party of the first part.

"I hereby authorize my attorney, Howard Ferris, to employ such medical experts as may be required in said case, and I agree to pay, not only all expenses that have been incurred in the preparation of the case up to this time, but also such as may be necessary either in the taking of depositions, traveling expenses, or other expenses in and about said case.

"Contract of employment of Howard Ferris as attorney for Margaret D. C. Ridge, as executrix and widow of Dr. I. M. Ridge, deceased:

"(1) In consideration of legal services rendered to me during the year 1908, in the preparation for trial of case No. 33639 of the circuit court of Jackson county, Missouri, wherein Wm. E. Ridge et al. are plaintiffs and Margaret D. C. Ridge is defendant, said suit being a contest of the last will and testament of Dr. Isaac M. Ridge; and (2) in consideration for legal services rendered in and about various matters of settlement, and for legal advice given me from time to time, in reference to all matters of property; and (3) in consideration of further legal services to be rendered in and about all matters in contest in case No. 33639, Jackson circuit court of Mo., until the same is either settled by a final decree of court or by the acts of the parties all consenting, I, Margaret D. C. Ridge, hereby bind myself to pay to said Howard Ferris, attorney, a sum of money equal in amount to twenty (20%) per cent. of the market value of the property to be received by me in final settlement of all matters involved in said case No. 33639 should said case come to trial, together with such sums of money as may have been expended in my behalf in and about the preparation and trial of said case.

"If a settlement should be made with the contestants before trial, then in consideration of legal services now rendered and to be rendered I bind myself to pay to said Howard Ferris the full sum of the 10% of the market value of the property so to be received by me in such settlement, and I further agree to repay whatever sums may have been expended in the preparation of said case for trial.

"Howard Ferris accepts said employment upon the conditions named herein, and in consideration of such payments to be made as aforesaid agrees to give and furnish all legal services required in the defense of the last will of Dr. I. M. Ridge, as well as to give to Margaret D. C. Ridge all legal advice that may be required by her in the care and management of her estate until

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the final termination of all matters in suit in case No. 33639 of the Jackson county, Mo., circuit court.

"In testimony whereof the parties have hereunto set their hands this 10th day of December, A. D. 1908. "Margaret D. Campbell Ridge.
"Howard Ferris.

"We approve above:
"Geo. W. Curtiss.
"Emma V. Curtiss.
"Dapsilla Robbins."

Bearing the same date as the contract, the following instrument was executed:

Exhibit 86.

"Kansas City, Mo., Dec. 10th, 1908.

"I have this day agreed with Margaret D. C. Ridge to accept at her urgent solicitation the position of trustee to carry into effect a trust arrangement by which the property left by the last will and testament of Dr. I. M. Ridge shall be held in trust until the conditions named in said trust deed shall have been fully complied with.

"This acceptance is upon the following conditions:

"First. I shall not be required to give any bond for the faithful performance of the trust.

"Second. I shall not collect or be required to collect any money belonging to said trust.

"Third. That I shall not be required to give any personal attention to the details of the management of the buildings, the making of repairs or betterments, the collection of rent, the employment of help, the payment of taxes, interest, or charges, or any other matters except those that are legal and of an advisory nature.

"Fourth. That George W. Curtiss will agree to act for me and in my behalf in all matters and under my express directions and shall do all things necessary to be done in and about said duties of the trust, except only such duties as relate to matters that are legal in their character or relate to policies to be pursued in the management of the trust.

"Fifth. That a monthly report shall be made to me, or more frequently if desired, showing all receipts and disbursements on account of said trust after the same has been submitted to and approved by Margaret D. C. Ridge.

"Sixth. I shall receive no compensation for any services except those of a legal character, and that whatever may be allowed to me as trustee for services in the management of the trust shall be paid to George W. Curtiss for services to be performed by him.

"[Signed] Howard Ferris.

"Kansas City, Mo., Dec. 10th, 1908."

[1-4] In the consideration of the foregoing contract the following well-settled principles are applicable:

1. A contract between attorney and client relative to compensation for services, made after the relationship has been entered into, is not per se void, but is presumptively invalid, and will be scrutinized very carefully by the courts whenever the transaction is called in question. Such a contract stands on the same basis as a contract between guardian and ward, or trustee and cestui que trust.

2. The burden of proof is upon the attorney to show fairness and openness in the making of the contract, and that full information and explanation was given to the client, both of the facts, so far as known to the attorney, and also of her legal rights.

3. Such a contract, in case of dispute as to the meaning of its terms, will be construed most strongly against the attorney.

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4. If the attorney comes into a court of equity, seeking the enforcement of such a contract, he must be prepared to show that such enforcement will not be unfair or inequitable to the client; in other words, that his claim, independent of the express terms of the contract, is so fair and equitable that a court of equity would not hesitate to enforce it. Perry on Trusts (6th Ed.) §§ 202, 203; 1 Story, Eq. Jur. (13th Ed.) §§ 310, 311; 3 Am. & Eng. Ency. of Law (2d Ed.) pp. 332, 333; Elmore v. Johnson, 143 Ill. 513, 32 N. E. 413, 21 L. R. A. 366, 36 Am. St. Rep. 401; Trice v. Comstock, 121 Fed. 620, 57 C. C. A. 646, 61 L. R. A. 176; United States v. Coffin (C. C.) 83 Fed. 337; French v. Cunningham, 149 Ind. 632, 49 N. E. 797; Nesbit v. Lockman, 34 N. Y. 167; Hitchings v. Van Brunt, 38 N. Y. 335; In re Holland, 110 App. Div. 799, 97 N. Y. Supp. 202.

In considering the contract in the case at bar, it is to be noted that the client had other attorneys already employed, and that no consultation was had with them in reference to the contract. They were not even apprised of the making of such contract, either by Mrs. Ridge or by Ferris. One reason why they were not informed by Mrs. Ridge is apparent, upon reading the letters from Ferris containing allusions to the other attorneys. No explanation is offered by Ferris why this contract was not disclosed by him to the other attorneys. The contract, when drawn, was presented to Mrs. Ridge for her signature, but was not left for consideration by her before signature. No copy of the contract was left with her after its execution.

As to the provisions of the contract, it is to be noted: (1) The right of Mrs. Ridge to control her litigation was in effect taken from her and placed in the hands of Ferris. The employment of other counsel was left to his judgment, although other counsel had already been employed and were still attorneys in the case. (2) Though Mrs. Ridge's interest in the estate was not dependent solely upon sustaining this will, since under the other wills she would be entitled to a considerable portion of the estate, and possibly almost the whole of it, and, even if the wills should all be set aside, she would still be entitled to a very substantial dower interest in the estate under the statutes of Missouri, yet, notwithstanding this, the contingent fee provided for in the contract was to be computed on the value of the dower right, as well as on the value of any further share that might be secured. (3) The contract itself recited that a compromise giving 40 per cent. of the estate to Mrs. Ridge had already been rejected, yet the contingent percentage fee provided for in the contract was to be paid if a settlement was made, whether this former compromise offer was increased, or even diminished.

[5] The document, Exhibit 86, bears the same date as the fee contract. Whether this Exhibit 86 was discussed in detail with Mrs. Ridge, whether its provisions and effect were known and understood by her, the evidence leaves in doubt. If it was known to her, it should be considered as having a bearing upon the fee contract, being made at the same time and closely connected therewith. If Exhibit 86 was not known and thoroughly understood by Mrs. Ridge, nevertheless it must be considered as having a bearing upon the fairness of the fee

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contract, inasmuch as it shows clearly what was in the mind of Ferris at the time of making the fee contract. Exhibit 86, so far as appears from the record, was never shown to the cotrustee of Ferris under the trust agreement that afterward was entered into. Exhibit 86 was never in fact carried out, and the character of its provisions leads to doubt whether it was ever intended to be carried out. Five of its six provisions were contrary to the provisions contained in the trust agreement as finally entered into, and it is very difficult to understand how any one could have faithfully carried out the terms of Exhibit 86 and also the provisions of the trust agreement actually made, or any other trust agreement that would probably be made. The provisions of Exhibit 86 on their face were unfair to any cotrustee that would be selected to carry out the proposed trust, unfair to all the cestuis que trust, including Mrs. Ridge. No explanation of Exhibit 86 is given by Ferris. Yet no one can read its provisions, bearing in mind that it was drawn up on the same date that the fee contract was drawn, without reaching the conclusion that an explanation was imperatively required.

One of the tests that has been suggested for determining whether a contract between attorney and client, entered into after the relationship has begun, is fair and equitable, is whether an outside, disinterested attorney, having full knowledge of the surrounding facts and circumstances, would have advised the client to enter into the contract. If this test be applied here, it seems hardly conceivable that an attorney could have been found who would have given that advice to Mrs. Ridge, whether the fee contract is considered by itself alone or in connection with Exhibit 86.

[6] The conclusion is that the fee contract, in its possibilities at least, was unfair and inequitable. The contract was entered into on the 10th of December, 1908. The compromise trust agreement was made January 30, 1909. Mrs. Ridge's assent thereto was given on the insistent demand of Ferris. The trust agreement provided in effect that the same share of the estate should eventually go to Mrs. Ridge as had been provided by the compromise agreement, which had been rejected shortly before the fee contract was entered into. Yet this former compromise agreement had been rejected, either with the advice, or at least without protest on the part, of Ferris. The inquiry is therefore pertinent: What had happened between the 1st of December, 1908, and the 30th of January, 1909, which caused Ferris to insist that Mrs. Ridge accept this 40 per cent. settlement? Several developments had occurred during the period mentioned: First, the taking of depositions of medical experts at Cincinnati; second, the attempt by Ferris to get control of the $75,000 mortgage above mentioned, which would fall due February 1, 1909; third, the purchase of said mortgage by the contestants of the will; fourth, the making of the fee contract between Ferris and Mrs. Ridge; fifth, certain letters from Lathrop and Fox to Ferris.

That the taking of the depositions in Cincinnati had no unfavorable effect on the situation, so far as Mrs. Ridge was concerned, we learn from the letters of Ferris himself. On January 8, 1909, he writes to Mrs. Ridge:

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"I write you at the end of a very busy day, spent in the examination of one of our leading expert witnesses on mental diseases, and basing his testimony entirely on the autopsy and the deposition of Dr. Hall. He has annihilated the position of the contestants, and has shown that Dr. Ridge was possessed of a perfectly sound mind, without a sign of impaired mentality. * * * Your case can be won on medical testimony, and I propose to make that so plain that it will be a crime on the part of any one to deny to Dr. Ridge the right to have made the will that he did."

On January 13, 1909, he writes to Mrs. Ridge:

"In regard to the depositions, I think that you will say that we have done unusual work in getting this medical testimony in splendid shape for trial. I think I know that the case is well prepared, and I have no hesitancy in saying now that they cannot meet and overcome the expert medical testimony that will be concluded to-day."

As to the failure by Ferris and the success by opposing counsel in getting control of the $75,000 mortgage:

That this mortgage, falling due February 1, 1909, and being a first lien on the homestead, and a second mortgage on the other real estate, was a serious element in the situation, is apparent, and this fact was recognized by all the parties interested. As early as March, 1908, Ferris knew of this mortgage, as well as the larger mortgage, and that they were a menace to the estate. He knew the advantage it would give to the side having it in control. As early as May, 1908, Ferris thought it would be advisable to take up this matter with Van Dyke, the owner of the mortgage. Later all the parties interested were notified that there were no funds in the estate which could be used to pay the mortgage. Ferris went twice to Milwaukee to see about the matter. In December, by letters from Fox and Lathrop, the attention of Ferris was called to the importance of arranging this matter of the $75,000 mortgage.

The testimony shows that Ferris assured Mrs. Ridge that he could and would make arrangements to meet this mortgage. As a matter of fact, he did not make arrangements to meet it, but the mortgage was bought in by the Pioneer Trust Company for the contestants. This happened prior to January 12, 1909. Ferris was informed of it by Mrs. Ridge. He learned, while taking the depositions in Cincinnati, January, 1909, who the real purchasers were. He writes, however, to Mrs. Ridge, January 12, 1909, as follows:

"Nothing new has developed, except that we have had a full conference with Messrs. L., D. & S., and have learned all about the Van Dyke mortgage. They admit ownership, and have stated to us the reasons for their purchasing it, and insist upon their right to hold it as against you. We told them that we were prepared to make a tender of the $75,000, and expected to carry the matter at once into the courts for the purpose of establishing your rights, if need be. * * * They agree not to take any steps whatever in the matter, and are trying to satisfy us of the sincerity of their course."

Again, on January 13, 1909, he writes Mrs. Ridge:

"We all worked at the office here last night until after ten o'clock going over with D. & S. in a rather fiery way the law questions. We succeeded in coming to a truce. They delayed all matters relating to the $75,000 claim until we can present the matter fully to a court of equity. * * * They expressed a willingness to enter into a stipulation not to take steps until

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after 45 days' notice. They are willing, now that we are ready to assert our rights, to behave themselves."

It would seem from these letters that Ferris at this time did not consider the purchase of the mortgage by the contestants to be an imperative reason for making a settlement. However, on January 15, 1909, Ferris received a letter from Fox setting forth the situation as Fox viewed it; and it appears from this letter that the situation, from Fox's point of view, was a very serious one. He wrote that the situation required the raising of $100,000 by February 1st, and closed as follows:

"If this can be done I can see how we may avert disaster. If otherwise, I favor an immediate settlement on the terms proposed."

The situation, therefore, about the middle of January, 1909, was that the medical depositions had been taken at Cincinnati, and, according to Ferris, had improved the situation; that the contestants had bought in the $75,000 mortgage, but, according to Ferris, this had not imperiled Mrs. Ridge's rights; that the other counsel of Mrs. Ridge did think the situation somewhat desperate, and were strongly urging settlement; that Ferris had secured in writing his fee contract, and had formed in his own mind, at least, the plan of becoming one of the trustees for the management of the estate. After the taking of depositions in Cincinnati, Ferris went to Kansas City and remained there continuously until after the execution of the trust agreement, which he assisted in drawing.

The evidence as to this change of attitude on the part of Ferris leads to the conclusions: First, that Ferris had not fully realized the seriousness of the situation and the necessity for settlement until it was plainly set forth in the letter from Fox; second, that this letter was an important, if not a controlling, factor in bringing about a settlement; third, that the mind of Ferris had become in a more receptive state to entertain the idea of compromise and settlement, in view of the fact that his fee contract had been signed and the plan for a trusteeship formulated.

It is suggested, however, that the letters of Ferris did not represent his real opinions in regard to the situation and the advisability of settlement, but that these expressions on his part were simply for the purpose of assuring and encouraging Mrs. Ridge. This suggestion would seem to lead to a dilemma. If, as suggested, Mrs. Ridge was so nervous, excitable, and flighty as to require constant encouragement, even to the point of mild deception, why did not this state of her mind require the fullest and most careful explanation of the fee contract in all its bearings and possibilities? On the other hand, if she was an unusually capable and keen woman, and able to grasp a situation in all its details, why was it necessary for Ferris to continue writing her that no compromise should be entertained, if this was not his real opinion? And why the numerous slurs toward local counsel contained in his correspondence?

Whatever the compelling motive was in the mind of Ferris, the fact is that he persuaded Mrs. Ridge to enter into the trust agree-

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ment, and that this trust agreement was one of the results of his services under the fee contract. The settlement agreed upon, so far as division of the estate was concerned, was substantially the same as the one contained in the offer which had been rejected prior to the time when the fee contract was made. The settlement contract, however, provided for a trust under which the estate was to be managed; and, while this may have been of some advantage to the interests of Mrs. Ridge, yet it was not without its disadvantages also, for, according to the construction placed upon the fee contract by Ferris, the making of the settlement agreement terminated the fee contract, and his compensation thereunder became due at once, and thereafter was an interest-bearing obligation. Furthermore, the trust agreement not only put the compensation of Ferris as attorney on an interest-bearing basis, but it also provided him with a new position as trustee, with compensation attached thereto. And if Exhibit 86 was to be in force, Ferris might also claim compensation for legal services.

The recital of the services of Ferris and value thereof (Exhibit 3), the valuation of the estate (Exhibit 4), the order on the trustees for the payment of attorney's fees (Exhibit 5), and the promissory note for $50,000 (Exhibit 6), all signed by Mrs. Ridge. are claimed by Ferris to be results of the fee contract. Exhibits 3 and 4 bear date March 10, 1909; Exhibits 5 and 6, February 1, 1909. The date when these various documents were executed, what their exact purpose was, and whether Mrs. Ridge was fully advised and clearly understood their meaning and purpose, are all in dispute under the evidence.[1] Counsel for plaintiffs take the view that these instruments, having been signed by Mrs. Ridge after the termination of the relationship of attorney and client between Ferris and her, tended to show clearly that she understood the fee contract, what it called for, and when it terminated, and were, in effect, a construction by her of the fee contract. This conclusion of counsel is hardly justified by the evidence; on the contrary, there is substantial evidence that Mrs. Ridge still considered that Ferris was acting as her attorney long after these instruments were signed, also that he himself took the same view, and that, as a matter of fact, he did act as her attorney. She writes him as "counsel" long after the date of these exhibits; he writes to her, referring to himself as her "counsel." As late as August 12, 1910, he writes to Mrs. Ridge:

"I have just finished your lengthy letter of August 9. * * * The tone of the letter and its contents confirm the impression that I have had that my

[1] Exhibits 3, 4, 5, and 6 are:

Exhibit 3.

Kansas City, Mo., March 10th, 1909.

I have this day signed, as of Feb. 1st, 1909, an order on Howard Ferris and Jas. G. Smart, trustees, for the sum of fifty thousand dollars, the same being for legal services rendered by Howard Ferris in case No. 33636 of the Jackson county, Mo., circuit court, and being a sum agreed by me to be paid to the said Howard Ferris by contract of Dec. 18th, 1908, in which contract I agreed to pay for his legal services the sum of 10% of the value of property coming to me on distribution in the event of a compromise of said litigation. A careful estimate of the property, of which I am to receive, after payment of debts and expenses, a two-fifths portion, I believe and agree, for the purpose of estimating the amount due Howard Ferris, to be worth the sum

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usefulness to you as counsel has terminated. * * * I simply will not act as counsel when cordial and confidential relations do not exist, and for that reason I have no advice, additional to my recent letter, to offer."

That he was actually engaged in performing legal services for Mrs. Ridge, quite apart from his duties as trustee long after the trusteeship commenced, is shown by the evidence. April 21, 1910, he writes to Curtiss in reference to the matter of the homestead, which Mrs. Ridge claimed had been erroneously included in the trust agreement:

"Tell Mrs. Ridge that we are still working upon the question of the six-acre tract, and both Mr. Healy and myself are drawing very close to the conclusion that we can establish ownership in her. We believe that we can show by competent testimony that the entire trust arrangement related only to the property devised by will. It did not relate to deeds already drawn, and certainly did not contemplate a disposition of lands that had already been granted by Dr. I. M. Ridge to Margaret D. C. Ridge, without her knowledge or the knowledge of any one of the parties to the trust deed. We are concerning ourselves now with the question of when we ought to open fire. * * * When, however, we have matters in such a shape as that we do not have to fear results, this suit ought to be brought, and will be brought. I express no opinion now as to the effect of such an action upon the trust. If, however, we have executed the trust, or so nearly executed it, as to make our position perfectly safe, then this action would not imperil our rights."

of $500,000, and I hereby agree to pay to Howard Ferris for legal services the sum of $50,000. Margaret D. Campbell Ridge.

Indorsement on Back of Exhibit 3.

Cin., O., Feb. 1st, 1909.

For value received I hereby assign and transfer all my interest in the within contract to Healy, Ferris & McAvoy. Howard Ferris.

Exhibit 4.

Kansas City, Mo., March 10, 1900.

To Whom It May Concern:

We, the undersigned, are familiar with the values of land and improvements in Kansas City, Mo., and especially the lands owned by the late Dr. I. M. Ridge, and appraise the market value of the same as follows:

1.	The Main street lot, 151.6 ft. at $5,000 per ft.	$ 758,000
2.	The Walnut street property, 125 ft. at $4,000 per ft.	500,000
3.	The Ridge Heights property, 3,500 ft. at $125 per ft.	437,500
4.	The Brooklyn avenue and Euclid avenue, at	100,000
5.	The Residence property	50,000
6.	The Twenty-Second street property	20,000
7.	The Brooklyn avenue residence	8,000
	Total	$1,873,500

These valuations, in our judgment, are conservative estimates of the properties, and can be realized, if offered at either private or public sale.

[Signed] Mrs. Dr. I. M. Ridge.
Geo. W. Curtiss.

Exhibit 5.

Kansas City, Mo., Feb. 1st, 1909.

To Howard Ferris and James G. Smart, Trustees:

You are hereby authorized and directed to pay to Howard Ferris, my counsel in case No. 33636, Jackson circuit court of Missouri, the full sum of fifty thousand ($50,000.00) dollars, and charge the same to my account.

This order is given you as trustees for myself and others in pursuance of

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Other letters of Ferris to Mrs. Ridge might be cited to the same effect. It seems clear, therefore, that the relationship of attorney and client continued to exist between Ferris and Mrs. Ridge, notwithstanding the making of the settlement trust contract. Consequently the instruments, Exhibits 3, 4, 5, and 6, instead of being executed as between parties at arm's length, were instruments executed between attorney and client, and as such are to be viewed in the light of the same principles as the fee contract, scrutinized with the same care, and construed with the same strictness.

The results under the fee contract were: (a) The making of the settlement agreement; (b) the making, according to Ferris, of Exhibits 3, 4, 5, and 6, in order to carry out the fee contract, and which placed the fee contract upon an interest-bearing basis. The results of the settlement agreement were: (1) A 40 per cent.-60 per cent. division of the estate; (2) according to Ferris the termination of the fee contract; (3) change of status of Ferris from attorney to trustee, or perhaps to trustee and also attorney; and (4) as an indirect result of the advice of Ferris, the suit against Mrs. Ridge to establish the status of the homestead property.

[7] The lower court found the fee contract not unconscionable. But it seems to us that the court, in so holding, viewed the contract as one between parties dealing at arm's length, instead of between parties holding special fiduciary relations to each other. Several matters, which have one aspect when viewed from the former standpoint, take on quite a different aspect when viewed from the latter. Among such matters may be mentioned the dower interest of Mrs. Ridge. A

that provision in article two of an agreement signed January 30th, 1909, by myself and the heirs of Dr. I. M. Ridge, as follows:

"The trustees are authorized and directed to pay to the respective counsel, such sums as may be agreed in writing by the beneficiaries of this trust and charge the amount so paid to their respective accounts."

The written receipt of Howard Ferris will be your voucher in the final settlement of the trust, and is to be charged to my account on distribution.

Margaret D. C. Ridge.

Received copy of the above and of indorsement hereon from Judge Howard Ferris this September 9, 1911. James G. Smart, Trustee.

Indorsement on Back of Exhibit 5.

Cin., O., Feb. 1st, 1909.

For value received I hereby transfer and set over all my right, title, and interest in the within contract and order to Healy, Ferris & McAvoy.

Howard Ferris.

Exhibit 6.

$50,000. Kansas City, Mo., February 1st, 1909.

On demand, after date, I promise to pay to the order of Howard Ferris, at the Fourth National Bank of Conti, O., fifty thousand ($50,000) dollars, for value received, with interest from date at the rate of 6 per cent. per annum.

Margaret D. C. Ridge.

Interest payable ———.
Due ———. Address
No. ——— Payable at ———.

Indorsement on Back.

Pay to the order of Healy, Ferris & McAvoy. Howard Ferris.

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contingent fee contract, based upon the uncertainty of any recovery, is one thing. But a so-called contingent fee contract, based upon a certainty of a substantial recovery by way of dower, and also upon a reasonable expectation of a further recovery, is quite a different thing. It was incumbent upon Ferris to make this distinction clear beyond peradventure to Mrs. Ridge; but the evidence fails to show that he did this.

[8] Again, in view of the fact that the only source from which Mrs. Ridge could obtain funds with which to pay Ferris was such property as she might finally get as her own, and in view of the further fact that this was fully known to Ferris, and in view, also, of the relationship which existed when the fee contract was made, it was incumbent on Ferris to explain to Mrs. Ridge fully and clearly, at the time, that the fee contract, according to his view, would terminate with the making of any settlement agreement, whether she obtained immediate possession or not, and that his fee would become due immediately upon the making of a settlement, and thereafter bear interest. The evidence does not show that he did this, nor does it show that Mrs. Ridge clearly understood that such would be the result.

[9] Exhibits 3, 4, 5, and 6 have little probative force to show that Mrs. Ridge had from the first a full understanding of the fee contract, when considered in view of the circumstances under which these instruments were made, and in view, also, of the relations existing between Ferris and Mrs. Ridge at the time they were made. These instruments do, however, emphasize the inequity and the unfairness of the fee contract, as construed by Ferris.

Stress is laid by counsel on the claim that the work done by Ferris under the fee contract required not only legal, but great financial, skill. We see little force in this suggestion. Whatever financial skill was exercised by Ferris was displayed after the time when he claims the fee contract terminated. He was paid therefor in his capacity as trustee. The evidence clearly shows that this fee contract had been signed with the expectation on the part of Mrs. Ridge of sustaining the will and thereby obtaining practically the whole estate—certainly of obtaining a better settlement than a 40 per cent. division. It resulted in obtaining nothing better than what had been offered theretofore. It was signed, according to the testimony on behalf of Mrs. Ridge, with the understanding that the services of Ferris as attorney were to continue until she actually received her estate or her share thereof. It resulted, according to Ferris, in his services as attorney stopping far short of this goal, and in his compensation being then fixed and placed upon an interest-bearing basis.

Exhibit 86, taken in connection with the fee contract, shows that this result was in the mind of Ferris when the fee contract was made. The evidence falls far short of showing that any such result was in the mind of Mrs. Ridge. Yet, by reason of the relations existing between them, Ferris was bound to explain fully this possible or expected outcome, especially when he had it in his own mind at the time. Light is thrown upon the fee contract and the results of the same by the evidence as to the fees of associate counsel, the firm of Lathrop,

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Morrow, Fox & Moore. This firm had been attorneys for Mrs. Ridge in the probate of the estate before the will contest began, and were her attorneys in the will contest from its beginning until the making of the trust agreement. About the time of the making of the trust agreement, Ferris, acting ostensibly on behalf of Mrs. Ridge, asked the firm the amount of their charges. He was told that the total charge would be $10,000, which would include the services of Morrow as executor, the services of the firm in the probate proceeding, and the services of the firm in the will contest. The evidence shows that this amount was considered fair and reasonable both by Mrs. Ridge and by Ferris, and at the time of the interview Ferris expressed the opinion that he ought to have as much as that for his fee. No mention was made of his fee contract, and the associate counsel were ignorant of its existence.

[10] This matter of the fee of associate counsel has a bearing on the rights of Ferris. The court below took the view that Ferris, under his fee contract with Mrs. Ridge, was obliged to pay the charges of associate counsel, and reduced the amount sued for, namely, $50,000, by that part of the fee of associate counsel apportioned to the will contest, viz. $7,300, thus leaving $42,700 for Ferris. In our judgment, the amount of the charges of associate counsel has a bearing also on the question of the fair and equitable value of the services of Ferris; and it must be borne in mind that it is only the fair and equitable value of his services that Ferris is entitled to recover, notwithstanding his contract, because of the relationship existing between him and Mrs. Ridge when the contract was made.

As heretofore stated, the efforts of associate counsel had an important influence in bringing about the trust settlement. The letter of Fox to Ferris, above mentioned, was instrumental in bringing Ferris to the view that a settlement was absolutely necessary. It was a case of Fox persuading Ferris, and Ferris persuading Mrs. Ridge. The charge of associate counsel stands unchallenged as fair and reasonable for the services rendered. It was fixed after the services were performed. No express contract was involved. The high standing of the firm is unquestioned. The services in their result-producing character were not inferior to those of Ferris. The main element of difference in favor of Ferris was in the amount of time actually expended. The amount of the fee of associate counsel, therefore, does have a probative value touching the reasonableness of the amount claimed by Ferris.

If, however, we are wrong in concluding that the letter of Fox was an important factor in bringing about the change of attitude on the part of Ferris toward a settlement, then, eliminating this factor, we are led to the conclusion upon the face of the record, that this change was due to the remaining factor in the situation, viz. the obtaining by Ferris of his fee contract. But, if this last factor was instrumental in bringing about the change of attitude, then the inequitable and unconscionable character of the fee contract and its results need no further demonstration. The conclusion reached, after a careful consideration of the record, is that the contract was unconscionable and in-

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equitable in its terms, and would be unconscionable and inequitable in its results, if construed and enforced as demanded by Ferris.

[11] The trial court had the witnesses before it, and gave the evidence careful consideration, and its conclusions should not be disturbed, unless obvious error in the application of the law was committed, or grave mistake made in consideration of the facts. But it seems clear that error was committed in overlooking the important fact that this fee contract was made between Ferris and Mrs. Ridge while the relation of attorney and client existed between them, and therefore was presumptively invalid, and also in assuming, though not directly holding, that the burden was upon the defendant to show inequity or unfairness in the fee contract, or in the results under it, instead of requiring the plaintiffs to sustain the burden of proving that the fee contract was fair and equitable in its terms, and that the result of enforcing the same would also be fair and equitable.

[12] It also seems clear that error was committed in holding that the evidence disclosed that the fair and reasonable value of the services of Ferris was the amount of $42,700. This it was incumbent upon the plaintiffs to show by evidence quite apart from the provisions of the contract itself.

[13] Plaintiffs are here seeking the aid of a court of equity. It is a case for application of the doctrine that he who seeks the aid of a court of equity must do equity. In our judgment, the services of Ferris would be fully and adequately compensated by payment of the sum of $15,000. The case should be remanded to the District Court, with instructions to modify the decree, so that it will adjudge that the defendant Margaret D. C. Ridge is indebted to the complainants in the sum of $15,000, that in case Mrs. Ridge pays that amount to the plaintiffs, or into the court below for their benefit, within 60 days after the entry of the modified decree, the contract regarding the compensation of Mr. Ferris, the order on the trustees for the payment of attorney's fees, and the promissory note for $50,000, all of which were signed by Mrs. Ridge, be adjudged discharged, null, void, and of no effect from and after such payment, and that neither party shall recover any costs in the District Court; but that, if said $15,000 is not so paid, then the complainants shall be adjudged to have such a lien on the real estate of Margaret D. C. Ridge described in the original decree for said $15,000 and interest thereon from 60 days after the entry of the modified decree, and such foreclosure of such lien, and such sale of such property as were adjudged in the original decree for the $42,700, interest, and costs therein mentioned.

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In re MID-VALLEY COAL CO.

CAMPBELL v. SPRUKS et al.

(Circuit Court of Appeals, Third Circuit. July 11, 1918.)

No. 2331.

BANKRUPTCY ⇐288(1)—ADVERSE CLAIM TO PROPERTY—SUMMARY PROTECTION OF TRUSTEE.

Where, after the respective rights of a trustee and adverse claimants as to property had fully matured, a watchman placed in charge by the trustee peaceably withdrew, on receiving notice that a person employed by adverse claimants was to take his place, neither force nor threats being used, the trustee had no such possession as called for summary protection by the bankruptcy court.

Appeal from and Petition for Revision of Proceedings of the District Court of the United States for the Middle District of Pennsylvania; Chas. B. Witmer, Judge.

In the matter of the Mid-Valley Coal Company, bankrupt. Petition by George M. Campbell, trustee, for summary protection as to property claimed by him as against David R. Spruks and others, adverse claimants thereof. The petition was dismissed, and the trustee appeals and files a petition to revise. Order modified and affirmed on the petition to revise, and the appeal dismissed.

Lee P. Stark and Knapp, O'Malley, Hill & Harris, all of Scranton, Pa., for appellant.

Cornelius Comegys and Charles B. Little, both of Scranton, Pa., for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. The trustee of the Mid-Valley Coal Company has brought this controversy before us both by appeal and by petition to revise. The respondents are the Bright Coal Company, its superintendent, and the Lillibridge heirs, adverse claimants to the possession of a mining property in Lackawanna county. The bankrupt had been mining under a lease from the Lillibridge heirs, and was adjudged bankrupt on August 1, 1916. On October 27 George N. Campbell was elected trustee, and the next day he filed a bond of $1,000 and put a watchman on the premises. Early in December the place of this man was taken by a watchman in the employ of the respondents and on December 11 Campbell asked the District Court for relief, asserting that by this act his possession as trustee had been interfered with. On the same day the court's restraining order directed the respondents to surrender possession forthwith, and enjoined all persons from interfering with the trustee's possession and management, granting a rule to show cause on December 18 why the order should not be continued. To this rule the Lillibridge heirs set up the claim that before October 28 they had regained their right to possession, and had afterward leased the vein to the Bright Coal Company, which was now the tenant and

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was producing coal. Thereupon the court appointed a master to take testimony and report the facts and his recommendations thereon. This was done, and on February 2, 1917, the master recommended the dismissal of the trustee's petition. On February 5 the court ordered that the Bright Coal Company might continue mining unless within ten days the trustee should indemnify the company against damages caused by the restraining order; directing the company to keep an account of coal produced while the petition was undisposed of. The bond was not given and the company continued to mine. Not long afterward the court considered the report, and on June 26 affirmed it and dismissed the petition, this being the order that is now before us. The dispute belongs to a class that is ordinarily tried out in a plenary action; it presents several questions of fact that are usually for a jury, and from the first the respondents have set up their right to such a hearing, denying the authority of the bankruptcy court to decide the case summarily. In order to make the situation plain, a further statement of the facts is desirable:

In December, 1914, the Mid-Valley Coal Company became the assignee of the lease in question by which the Lillibridge heirs conveyed all the coal in the vein and agreed to a term without limit for its removal. No minimum royalty was fixed, but the company was to pay for such coal only as should be taken out. It agreed, however, to mine energetically and to prosecute the operation in a fair and workmanlike manner. Failure to mine as agreed upon or to pay the royalty might be followed by forfeiture of the lease. The company promptly erected a breaker and otherwise equipped the mine, but for reasons that perhaps do not fully appear its life as a producer was short. It is clear, however, that one reason was insufficient resources; it was in financial trouble from the start, and after a year's experiment it ceased to mine, the royalty for January, 1916, being the last that was paid. The following paragraphs from the master's findings accurately describe the situation after that time:

"After the Mid-Valley Coal Company had ceased its mining operations in February, 1916, it kept only a small force of employés on the premises, who were engaged in repair work. On or before the 18th of May, 1916, practically all of the mining tools and implements, blacksmith tools and other mining instruments had been removed from the leased premises, as likewise all the mine mules. And at this time all the employés had ceased working. From that date no representative of the Mid-Valley Coal Company had been on the premises for the purpose of carrying on any mining operations thereon. * * *

"At the time the Mid-Valley Coal Company ceased its mining operations in February, 1916, it was in financial difficulties, and shortly thereafter decided to make no further attempt to continue the operation; but its officers were negotiating and endeavoring to sell their stock holdings to prospective purchasers. * * *

"During the period from May 18, 1916, until October 28, 1916, while the property remained uncared for by the said Mid-Valley Coal Company and its representatives, great injury and damage was done to said property; water accumulated in the slope and mine workings; the mine motor became rusted and out of repair; the mining machinery was broken and removed; practically all the window panes in the breaker, office building, blacksmith shop, etc., were broken out, and the doors on said buildings destroyed and damaged; mine cars were allowed to run down the slope and pile on top of

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the pump; fires on several occasions were started in the breaker by trespassers, and these fires were put out by Levi Lillibridge and workmen employed by him. * * *

"In July, 1916, an execution having been issued out of court of common pleas of Lackawanna county against the said Mid-Valley Coal Company, and the sheriff having made a levy thereon upon this property, an involuntary petition in bankruptcy was filed against the said Mid-Valley Coal Company and a receiver was duly appointed. Said receiver went on the property some time in the month of July, 1916, looked over the property, but took no actual possession thereof. From the date of said receiver's appointment in July until the 28th of October, 1916, no one representing the Mid-Valley Coal Company or said bankruptcy estate had anything to do with said property. On this latter date a watchman appointed by said trustee went on the property. * * *"

This was the condition of things on July 11, when the petition in bankruptcy was filed, and we think it apparent that the company was not then in actual possession. And it is at least open to doubt whether it still retained the constructive possession that ordinarily follows a legal title, the reason for the doubt being the following facts: On December 10, 1915, the company had borrowed $5,000 from John W. Peale, and to secure the loan had mortgaged, and had also assigned, the leasehold. If the company should default in performing certain covenants, the debt was to become due at once, and accordingly, on May 23, 1916, Peale, asserting the company's default and his right to dispose of the collateral security, sold the lease at broker's board and became the purchaser, taking a conveyance from the formal bidder at the sale.

We do not determine the conflicting rights of the parties under the facts thus far outlined. The company may or may not have abandoned the lease, but it certainly had given up the actual possession of the premises, and its constructive possession was at least assailed by the apparent title that Peale had acquired. Therefore, when a receiver was appointed early in July, he had practically nothing to do. He visited the mine once, and had an appraisement made; but he made no effort to dispose of whatever the company may still have owned upon the premises, and he took no step toward caring for the property or going on with the operation. And there is another matter also to be considered, namely, what the lessors did in the effort to forfeit the lease for nonperformance of the company's covenants. As no mining had been done since January, and as (prima facie at least) there were other grounds of forfeiture, the lessors undertook to exercise their reserved right, and on September 14 notified Peale (who was then the holder of the paper title) that a forfeiture had been declared; and about November 14, after Campbell had been elected trustee, notified him also to the same effect. Assuming that a cause for forfeiture existed, no one attempted to remove it. In December, the lessors, asserting that they had regained possession either in consequence of the company's retirement or abandonment, or of their own proceeding to forfeit, leased the premises to the Bright Coal Company, and this company went into possession and is now producing coal and paying royalty.

The single question for decision is whether the trustee had such possession as called for summary protection by the bankruptcy court. Unless he had, the court was right in declining jurisdiction. There was

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no forcible ouster; the trustee's watchman, having received notice that another person was to take his place, withdrew at once and peaceably, neither force nor threat being used; and, as the change of watchmen did not occur until December, the respective rights of both parties had by that time fully matured, and it is clear that both were asserting rights that they believed to be valid. Indeed, neither disputes the good faith of the other.

Under these circumstances we are not disposed to interfere with the order of dismissal. If the learned judge had seen reason to suppose that his process or his officer had been disregarded, he would certainly have vindicated his own authority, and would have compelled the restoration of the status quo. His means of knowing the true situation was so much better than our own that we are reluctant to run counter to his decision, especially since he and the master agree upon the facts. We repeat that the only question is whether the trustee had received from the bankrupt, or had acquired, so plain a right to the actual and exclusive possession of the property that the court was bound to require all adverse claimants to come before it to assert their claims. We admit that we have reached this conclusion after some hesitation, but in favor of the right of trial by jury we have finally decided that this controversy should be settled in a plenary suit. Murphy v. Hofman Co., 211 U. S. 562, 29 Sup. Ct. 154, 53 L. Ed. 327; In re Rathman (C. C. A. 8) 183 Fed. 913, 106 C. C. A. 253, 25 Am. Bankr. Rep. 262. The trustee seems to have succeeded to little from the bankrupt, and to have acquired but a shadow for himself. At all events, the foundation for summary jurisdiction is too insubstantial.

Perhaps the order under review—which dismisses the trustee's petition "without prejudice"—may sufficiently protect his rights, in case he should proceed in some other court; but we are inclined to believe that future discussion may be avoided by having the order state definitely the ground on which it rests. And this is especially desirable, because the learned judge contented himself with affirming "the material and important findings and conclusions" of the master, without pointing out the findings and conclusions he had in mind. The ground of dismissal was probably lack of jurisdiction, but the order should be so modified as to state this ground distinctly, thus making it clear that nothing else is now decided, and that all other questions, either of abandonment, or of forfeiture, or of irregular sale under the Peale mortgage, are open to future inquiry.

We direct the order to be thus modified, and in that form we affirm it on the petition to revise. The appeal is dismissed.

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WIGHT et al. v. WASHOE COUNTY BANK et al.

(Circuit Court of Appeals, Ninth Circuit. July 1, 1918.)

No. 3091.

1. BANKS AND BANKING ⟸42—LIEN ON STOCK.
Facts *held* to support a finding that the bank did not have knowledge of plaintiff's ownership at the time it acquired a lien on the stock while in the name of another.

2. BANKS AND BANKING ⟸42—LIENS ON STOCK.
Delay of a bank in enforcing a lien, which it had under its by-laws against the stock of an apparent owner for any indebtedness owing the bank, did not raise an equity in favor of a third person, who was actual owner of the stock, where the bank had no knowledge of such ownership.

3. BANKS AND BANKING ⟸42—LIEN ON STOCK—WAIVER.
Where by-law of bank gave it a lien on stock for any debts due it, the bank did not waive its lien by taking other security for a loan to a stockholder.

4. APPEAL AND ERROR ⟸719(1)—MATTERS REVIEWABLE—ASSIGNMENTS OF ERROR.
A point not presented by an assignment of error cannot be considered on appeal.

5. MARSHALING ASSETS AND SECURITIES ⟸7—APPLICATION.
The doctrine of marshaling of assets, to the effect that a creditor cannot assert a lien on the property of a third person, where by his own negligence he has allowed other property in which the third person has no interest to become valueless, has no application, where a bank by its by-laws had a lien on corporate stock for debts due by an apparent stockholder, who had borrowed money and put up security, which the bank allowed to become valueless, where the bank had no knowledge that a third person was the actual owner of the stock.

Appeal from the District Court of the United States for the District of Nevada; Edward S. Farrington, Judge.

Action by Clara M. Wight and Otis B. Wight, her husband, and Gertrude M. Gregory and T. T. C. Gregory, her husband, as stockholders of the Estate of W. O'H. Martin, Incorporated, against the Washoe County Bank and others, to compel the bank to transfer on its books certain shares of stock. Decree for defendants, and plaintiffs appeal. Affirmed.

Mastick & Partridge, John S. Partridge, and Alan C. Van Fleet, all of San Francisco, Cal., and Cole L. Harwood, of Reno, Nev., for appellants.

Harwood & Springmeyer, of Reno, Nev., for appellee Estate of W. O'H. Martin, Inc.

A. E. Cheney, S. S. Downer, and Cheney, Downer, Price & Hawkins, all of Reno, Nev., for other appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Clara M. Wight and others, appellants, sued as stockholders of the Estate of W. O'H. Martin, Incorporated, to compel the Washoe County Bank, appellee, a Nevada corporation,

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to transfer on its books 50 shares of its stock standing in the name of Harry M. Martin, and for accrued dividends. Upon a trial these facts were developed:

W. O'H. Martin died in 1901, owning 300 shares in the Washoe County Bank. Distribution to the widow and children followed, and thereafter the heirs formed a corporation, known as the Estate of W. O'H. Martin, Incorporated. The shares of stock were transferred to the corporation, and on February 19, 1903, 300 shares in the name of the estate were represented by a single certificate. Mrs. Martin testified that some time before February, 1903, she interviewed several directors of the bank about having a representative upon the board of directors of the bank; that she was told by them that she would only have to have a transfer of some stock to her son, Harry M. Martin, in order that he might appear on the books as a stockholder, but that the Estate Company would not have to surrender the ownership of the shares to be transferred. But Mr. Mapes, one of the directors referred to, said that he told Mrs. Martin that no one could be a director unless he owned stock in his own name, and that Mrs. Martin said that either she would let him have stock, or give him stock. In February, 1903, Mrs. Martin went to the bank, and saw Mr. George Taylor, who was then the assistant cashier and assistant secretary, but not a director of the institution. Mr. Taylor went with Mrs. Martin to the stockholders' room in the bank, and there opened her safe deposit box and took out the certificate for 300 shares of stock. Two new certificates were made out by Mr. Taylor, one for 250 shares in the name of the Estate Company, and one for 50 shares in the name of Harry M. Martin. After the certificates of stock were signed by Mr. Ward, a vice president of the bank, Mr. Taylor delivered them to Mrs. Martin, and she handed the 50-share certificate to her son, Harry M. Martin, who immediately indorsed it and handed it back to his mother, who put it in the safe deposit box of the Estate Company. On the following day the son, Harry M. Martin, was appointed a director of the bank; the minutes of the appointment being kept by Mr. Taylor as assistant secretary.

Harry M. Martin remained a director until June, 1905, when he went to Tonopah, and became the owner of 479 shares of stock in the Nye County Mercantile Company. Thereafter, in 1906, Mr. Martin, through Mr. Taylor, who was at that time the agent and bookkeeper of the Martin Estate Company, and also assistant cashier of the bank, obtained a loan of $15,000 from the bank, and gave as security 479 shares which he owned in the Nye County Mercantile Company. At that time the shares in the Nye County Mercantile Company were worth approximately $75,000, and under the agreement of pledge the bank had the right at any time, on nonpayment, to sell the stock or to compel the deposit of additional security. On January 15, 1909, the loan was renewed by Mr. Martin, and again the security of 479 shares of the Mercantile stock were pledged. Checks for the dividends paid upon the shares of stock of the bank were sent by the bank to Harry M. Martin up to 1909. Mr. Martin indorsed them and sent them to his mother, who in turn indorsed them, "Estate of W. O'H. Martin,

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Inc., by Louise W. Martin, President," and deposited them with the bank, whereupon they were entered upon the books of the Estate Company as being credited to that corporation; but after 1909 checks were delivered directly to the Estate Company, and, although drawn to Harry M. Martin, were not indorsed by him, but were indorsed by his mother, Mrs. Martin, and deposited in the bank.

It is not disputed that the stock was transferred to Harry M. Martin without consideration, and with a view of having him qualify as a director in the bank, or that the certificate has always remained in the possession of the estate, as heretofore explained. Among the by-laws of the bank there was a provision that no transfer of stock shall be made upon the books of the corporation until after the payment of all calls and assessments made or imposed thereon, and of all indebtedness due to the banking corporation by the persons in whose name the stock stands on the books of the corporation, except with the consent in writing of the president.

Mr. Mapes, who was the president of the bank in 1903, testified that he believed Mr. Martin was the owner of the shares in his name, and that he would not have consented to his being a director if he had not so believed, and that in 1906, when Mr. Martin borrowed the money loaned to him, he had no intimation or knowledge that Martin was not the real owner of the 50 shares. Mr. Rowland, who was also a director when Mr. Martin was appointed, testified to the effect that he believed Martin owned the shares, and that not until 1911 did he know that the shares had been indorsed back to the Estate Company. Mr. Bender, who was the cashier and a director when Mr. Martin was chosen a director, said that it was in 1909 that he first learned that Mr. Martin was not the true owner of the shares in his name. It appeared that on August 9, 1904, at a stockholders' meeting, H. M. Martin represented 50 shares for himself and by proxy 250 shares for the Estate Company, and that at a later stockholders' meeting in 1906 Mr. Bender had a proxy for the H. M. Martin shares, and that Mrs. Martin, at a stockholders' meeting in 1907, voted the H. M. Martin stock and the Estate Company stock, and in July, 1908, the Estate Company voted 250 shares, but that the H. M. Martin shares were not represented. Mr. Bender said that in 1909 Mrs. Martin asked a transfer, claiming ownership for the estate, but that he declined to comply.

The District Court held that prior to the 1909 loan to Mr. Martin the bank had no notice or knowledge that the 50 shares of stock were to stand on the books of the bank in the name of H. M. Martin for the sole purpose of enabling him to qualify as a director, and that the real ownership should be with the estate. The opinion of the District Judge upon this important point shows that the court carefully analyzed and weighed the testimony in reaching a conclusion which would resolve the conflict between the witnesses. In referring to the testimony the court said that conflict and unsatisfactory testimony were not a matter of surprise, when it was considered that the witnesses testified "from memory in 1915 as to conversations which occurred in 1903."

[1] There is, therefore, no sufficient reason for disturbing the finding of lack of knowledge by the bank before the loan of 1909. Mr.

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Taylor was not called as a witness, and we agree with the view of the lower court that, although he was a witness of and took part in the matter relating to the formal transfer of the shares, and even saw the delivery of the certificate and the indorsement, it was not proven that he knew that Mr. Martin had no interest in the shares. But if we assume that Taylor knew of an arrangement between Mrs. Martin and her son, as contended for, nevertheless the act of Mr. Taylor in seeking the loan for Mr. Martin does not lead to the belief that Mr. Taylor communicated to the directors of the bank any information that he may have had that Martin was not the real owner of the shares. The loan to Martin was made more than three years after the time and events connected with the transfer, and it is hardly to be presumed that Taylor, who was acting for Martin in obtaining the loan, would disclose to the bank directors that Martin did not own the shares. They say that they had no knowledge, and as against their positive statements, which were accepted by the lower court, we may not safely place possible opposing inferences. Yellow Jacket S. M. Co. v. Stevenson, 5 Nev. 231; Hillyer v. Overman M. Co., 6 Nev. 51; Edwards v. Carson Water Co., 21 Nev. 470, 34 Pac. 381.

[2, 3] The circumstances that Martin was paid the dividends of the 50 shares, and that the bank did not at an earlier date assert its lien, will not raise an equity in favor of the Estate Company which will defeat the lien; nor did the bank, by taking the security of the Mercantile Company shares, waive its lien. Union Bank v. Laird, 2 Wheat. 390, 4 L. Ed. 269; Clark & Marshall on Private Corporations, 171–771. The Estate Company transferred the stock to the name of H. M. Martin, permitted the stock to be voted at stockholders' meetings as the stock of H. M. Martin, and by the evidence made no demand for transfer until after the Mercantile Corporation shares pledged had lost their value. The position of the estate is not strong enough to prevail over the lien created by the by-laws for the indebtedness of Martin, in whose name the stock stood on the books of the Estate Company.

[4, 5] The appellants invoke the doctrine of marshaling of assets, and argue that a creditor cannot assert a lien on the property of a third person, where by his own negligence he has allowed other property, in which the third person has no interest, to become valueless. No assignment of error presenting this point was made, and we therefore pass it, merely observing, however, that the principle seems inapplicable to the case.

These views dispose of the main points, and lead to an affirmance of the decree of the District Court.

Affirmed.

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ILLINOIS SURETY CO. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. July 1, 1918.)

No. 3072.

1. Customs Duties ⟸49½, New, vol. 6 Key-No. Series—Free List—Sundries—Exhibition of Theatrical Scenery.

 Act Aug. 5, 1909, § 1, Free List, par. 656, providing that theatrical scenery, etc., brought by proprietors or managers from abroad for temporary exhibition, and not for sale, shall be admitted free of duty, bond being given for payment of duties imposed upon all articles not exported, does not require, as condition precedent to validity of bond, that importers of theatrical effects must have actual possession of or accompany same at time of arrival, or be a person immigrating to the United States.

2. Customs Duties ⟸49½, New, vol. 6 Key-No. Series—Surety on Redelivery Bond—Importation of Theatrical Scenery.

 In action by United States against surety on redelivery bond, conditioned that principal, within six months, would redeliver to collector of port theatrical scenery imported, surety is in no position to say goods ought not to have been admitted temporarily free of duty, because unaccompanied by importer; it having become surety with knowledge of fact goods were so admitted.

3. Customs Duties ⟸49½, New, vol. 6 Key-No. Series—Free List—Theatrical Scenery—Redelivery Bond.

 A redelivery bond, given by the importer of theatrical scenery for temporary use only in this country, and conditioned that he would redeliver the scenery within six months to the collector of a port, and reexport it, was not void, as restricting exportation from any port other than that mentioned only as place of redelivery to collector to prove identity.

4. Customs Duties ⟸49½, New, vol. 6 Key-No. Series—Statutes—Construction—Redelivery Bonds.

 Statutes requiring the execution of redelivery bonds for imported goods are remedial in their character, and should be construed liberally, to carry out the purpose of their enactment.

5. Customs Duties ⟸49½, New, vol. 6 Key-No. Series—Free List—Theatrical Scenery—Redelivery Bond—Statute.

 Redelivery bond, executed by the importer of theatrical scenery, etc., was not void because conditioned that importer within six months would redeliver to collector of port and export it, though Act Aug. 5, 1909, c. 6, § 1, Free List, par. 656, requires that bond be given for payment of such duties as may be imposed by law in case goods are not exported within six months.

6. Bonds ⟸35—Statutory Bond as Common-Law Bond.

 Redelivery bond, given by importer of theatrical scenery, etc., conditioned that he would within six months redeliver to collector of port, and enter effects for exportation within six months, as prescribed by Act Aug. 5, 1909, c. 6, § 1, Free List, par. 656, was valid as common-law obligation, though not conditioned for payment of such duties as might be imposed by law; the statutory requirement.

In Error to the District Court of the United States for the Southern Division of the Northern District of California; Frank H. Rudkin, Judge.

Action at law by the United States against the Illinois Surety Company, a corporation. To review judgment for the United States defendant brings error. Affirmed.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

F. De Journel and T. C. West, both of San Francisco, Cal., and Roy V. Nye, of Monrovia, Cal., for plaintiff in error.

John W. Preston, U. S. Atty., and Ed. F. Jared, Asst. U. S. Atty., both of San Francisco, Cal.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The plaintiff in error was the surety on a redelivery bond for one Grazi, the condition of which was that Grazi would within six months redeliver to the collector of the port of San Francisco certain theatrical scenery, properties, and apparel which had been imported from France to the United States, and enter the said effects for exportation from the United States within said six months in the manner prescribed by law and the regulations of the Treasury Department. Grazi was the proprietor of a theatrical exhibition at San Francisco, and he imported the effects from France to the port of New York, whence they were brought under an immediate transportation order to the port of San Francisco, where the duties were to be paid or the redelivery bond was to be given. After entry the goods were appraised, and the valuation fixed at $15,558, upon which the duty was $9,726. Upon the execution of the bond the goods were surrendered to Grazi, and a portion thereof was thereafter delivered to the collector and exported. The remainder of the goods, subject to a duty of $6,108.66, were not exported or delivered for exportation. The penalty of the bond was $6,000. For that sum, and for interest and costs, the court below rendered judgment against the plaintiff in error.

[1, 2] It is contended that, inasmuch as the theatrical effects covered by the bond did not come into the United States on the same vessel with Grazi, they were not at the time of arrival in his possession, and that therefore the bond is absolutely void. The statute applicable to the case is Act Aug. 5, 1909, c. 6, § 1, Free List, par. 656, 36 Stat. 78. While that statute places upon the free list professional books, implements, instruments, and tools of trade, etc., in the actual possession at the time of arrival of persons emigrating to the United States, it provides that the exemption shall not be construed to include theatrical scenery, properties, and apparel; "but such articles brought by proprietors or managers of theatrical exhibitions arriving from abroad for temporary use by them in such exhibitions and not for any other purpose, and not for sale, and which have been used by them abroad, shall be admitted free of duty under such regulations as the Secretary of the Treasury may prescribe, but bonds shall be given for the payment to the United States of such duties as may be imposed by law upon any and all such articles as shall not be exported within six months after such importation, provided that the Secretary of the Treasury may, in his discretion extend such period for a further term of six months, in case application shall be made therefor." This statute cannot be construed to mean that the importer of theatrical effects must have the actual possession thereof or accompany the same at the time

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of their arrival, or that he shall be a person emigrating to the United States. It is sufficient if they are brought by him from abroad for temporary use, and not for sale, and that they have been used by him while abroad. Again, the plaintiff in error is in no position to say that the goods ought not to have been admitted temporarily free of duty, because unaccompanied by the importer. The fact was that they were so admitted free of duty, the plaintiff in error knew it, and with knowledge of that fact became surety on the bond, and it cannot now dispute the terms of the bond.

[3] We find no merit in the contention that the bond is void because it restricts the exportation of the imported effects from any port other than San Francisco. It is not so nominated in the bond. San Francisco is mentioned only as the place for the redelivery of the goods to the collector for the purpose of furnishing proof of the identity thereof. The bond goes on to provide that the importer shall enter said effects for exportation from the United States within six months, in the manner prescribed by law and the regulations of the Treasury Department.

[4, 5] But it is said that the bond is void, because it is not conditioned as required by law; that it is conditioned for redelivery of the goods, and not for the payment of the duties. The statute, it is true, requires that the bond shall be given for the payment of such duties as may be imposed by law in case the goods are not deported within six months, and that in the bond under consideration there is no such provision, but the condition is for redelivery to the collector for exportation within six months. It is clear, however, that, if the bond had been drawn strictly under the terms of the statute, the condition thereof would, in effect, have been complied with by redelivery to the collector, and it is also clear that liability under the bond which was given would have been avoided, if the duties had been paid. The bond is therefore not substantially different from the bond required by the statute. It is a bond to hold the United States harmless against the loss of duties on goods imported into the United States, and its obligation is complied with either by redelivery or by payment of the duties. Statutes requiring the execution of such bonds are remedial in their character, and should be construed liberally, to carry out the purpose of their enactment. In United States v. Hodson, 10 Wall. 395, 406 (19 L. Ed. 937), the court said of a bond which had not been executed in the manner specified in the statute:

"A bond in this form is not prohibited by the statute, nor is it contrary to public policy. It was founded upon a sufficient consideration, and was intended to subserve a lawful purpose."

In Moses v. United States, 166 U. S. 571, 17 Sup. Ct. 682, 41 L. Ed. 1119, in a case where the bond was voluntarily given, the court said:

"The consideration or the condition of the bond must not be in violation of law: it must not run counter to any statute; it must not be either malum prohibitum or malum in se. Otherwise, and for all purposes of security, a bond may be valid though no statute directs its delivery."

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That language was approved in United States v. Dieckerhoff, 202 U. S. 302, 26 Sup. Ct. 604, 50 L. Ed. 1041, and was cited by this court in United States Fidelity & G. Co. v. United States, 150 Fed. 550, 80 C. C. A. 446.

[6] We think, also, that the bond is valid as a common-law obligation. In United States v. Tingey, 5 Pet. 115, 8 L. Ed. 66, the court held that a voluntary bond, taken by authority of the proper officers of the Treasury Department to whom the disbursement of public moneys is intrusted, to secure the fidelity in official duties of a receiver or an agent for the disbursement of public moneys, is a binding contract between him and his sureties and the United States, "although such bond may not be prescribed or required by any positive law." The court said:

"The right to take such a bond is, in our view, an incident to the duties belonging to such a department; and the United States having a political capacity to take it, we see no objection to its validity in a moral or legal view."

The same was held in United States v. Bradley, 10 Pet. 343, 9 L. Ed. 448. In Jessup v. United States, 106 U. S. 147, 152, 1 Sup. Ct. 74, 78 (27 L. Ed. 85), the court, after citing prior decisions, said:

"These authorities show that the United States can, without the authority of any statute, make a valid contract, and that when the form of a contract is prescribed by the statute, a departure from its directions will not render the contract invalid. The bond is good at common law."

Among the cases applying that doctrine are Diamond Match Co. v. United States (C. C.) 31 Fed. 271; Rogers v. United States (C. C.) 32 Fed. 890; Carnegie, Phipps, & Co. v. Hulbert, 70 Fed. 209, 16 C. C. A. 498; Stephenson v. Monmouth Min. & Mfg. Co., 84 Fed. 114, 28 C. C. A. 292; Grady v. United States, 98 Fed. 240, 39 C. C. A. 42.

The judgment is affirmed.

THE GREAT NORTHERN.

(Circuit Court of Appeals, Ninth Circuit. July 1, 1918.)

No. 3084.

1. SHIPPING ⟸166(4)—INJURY TO PASSENGER—MANNER—EVIDENCE.
On steamship passenger's libel for injury from fall in bathroom, evidence *held* to sustain trial court's finding that fall did not result from negligence of vessel, its owner, or servants, but from libelant's loss of balance when vessel lurched as he entered bathroom.

2. ADMIRALTY ⟸118—APPEAL—CONCLUSIVENESS OF FINDING—DEPOSITION.
In a steamship passenger's libel in admiralty for personal injury from a fall in the bathroom, a finding that there was no faulty construction and that a handhold was then there would be taken as conclusive, where there was but one deposition on the issue, and that was made by appellant.

3. SHIPPING ⟸166(4)—PERSONAL INJURY—NEGLIGENCE—RES IPSA LOQUITUR.
The presumption of negligence must rest upon the premise that the accident would not have happened, if proper care had been exercised by

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a carrier by sea, and cannot rest on the mere fact that a passenger falls and is injured.

4. NEGLIGENCE ⊂⊃121(2)—RES IPSA LOQUITUR—PLEADING—APPLICATION.
Where the plaintiff in an action for negligence specifically sets out in full in what the defendant's negligence consisted, the doctrine of res ipsa loquitur has no application.

5. SHIPPING ⊂⊃166(1)—PASSENGERS—CARE REQUIRED.
A ship is bound to a high degree of care for the safety of a passenger.

6. SHIPPING ⊂⊃166(3)—PASSENGERS—CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK.
A passenger must exercise reasonable care for his own safety, and where a passenger, falling on bathroom floor, knew that the floor was slippery when wet, and that the ship might lurch, and must have seen what handholds there were, he assumed the obvious risk of using the bath.

7. SHIPPING ⊂⊃166(1)—NEGLIGENCE OR INCOMPETENCY OF SHIP SURGEON—LIABILITY—STATUTE.
A steamship is not liable for the negligence or incompetency of its physician, either under the common law or under Act Aug. 2, 1882, § 5 (Comp. St. 1916, § 8002), requiring the carrying of a competent surgeon or medical practitioner, whose services shall be given to passengers needing them.

8. SHIPPING ⊂⊃166(1)—EMPLOYMENT OF SHIP SURGEON—STATUTE.
Under Act Aug. 2, 1882, § 5 (Comp. St. 1916, § 8002), requiring passenger vessels to carry a competent surgeon or physician, whose services shall be given to passengers needing them, the owner and master discharge their full duty when, in employing a physician, they inquire as to his fitness and obtain recommendations.

9. SHIPPING ⊂⊃166(1)—SHIP'S PHYSICIAN—SELECTION—STATUTE.
Act Aug. 2, 1882, § 5 (Comp. St. 1916, § 8002), requiring passenger vessels to carry a competent surgeon or physician, whose services shall be given to passengers needing them, requires no more than that, in his selection, reasonable care shall be exercised.

10. SHIPPING ⊂⊃166(4)—COMPETENCY OF SHIP'S PHYSICIAN—EVIDENCE.
On a libel by steamship passenger for injuries from a fall in a bathroom, evidence *held* not to show the incompetency of the ship's physician and surgeon in treating the passenger.

Appeal from the District Court of the United States for the District of Hawaii; Horace W. Vaughan, Judge.

Libel in admiralty by Clinton J. Hutchins against the American steamship Great Northern, and A. Ahman, master, bailee, and claimant, and the Great Northern Pacific Steamship Company, owner. Decree for libelees, and libelant appeals. Affirmed.

Frederick Milverton, of San Francisco, Cal. (Thompson & Cathcart and George A. Davis, all of Honolulu, T. H., of counsel), for appellant.

Charles H. Carey, James B. Kerr, and Carey & Kerr, all of Portland, Or. (Smith, Warren & Whitney, of Honolulu, T. H., of counsel), for appellees.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The appellant brought his libel in the court below to recover damages for injuries sustained from a fall while he was a passenger on board the steamship Great Northern

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on her voyage from San Francisco to Honolulu. The accident occurred while the appellant was taking a shower bath in one of the bathrooms of the steamship. He alleged that the bathroom was negligently constructed, and dangerous and unsuitable for bath purposes; that the base or bottom of the shower bath was a porcelain bowl about two feet or so square, with sides from three to four inches high, with a slight depression in the center and a slope thereto from all directions to the drain in the center of the bowl, and that the sides of the shower bath were constructed of marble slabs, with service pipes for hot and cold water running up one side thereof; that the bowl was slippery and difficult to stand upon, and that there was no provision by means of rails or otherwise for grasping or holding on in case of slipping, nor was there a rubber mat in said bath. The answer denied negligence and faulty construction, and alleged that the bath was well lighted by electric light, and that facilities were provided for holding on, and that the condition of the bath was plainly visible to the appellant, and the appellees alleged contributory negligence.

[1, 2] The evidence in regard to the manner in which the accident occurred consisted of the testimony of the appellant taken before the court, and the testimony of a fellow passenger taken by deposition. The appellant testified that his injury was caused by slipping on the floor of the bathroom, and that, as there was no handhold on the wall, he was unable to avoid falling. The other witness was present, observing the appellant, and waiting for him to enter the shower bath compartment, so that the witness could enter the opposite compartment. He testified that the appellant fell before he entered the bathroom, and while standing upon the tile floor in front thereof, that his fall was not caused by slipping on the floor of the bathroom, but was caused by the rolling of the vessel, which caused him to lose his balance when he started to step into the basin, at which moment the ship lurched. The trial court upon the evidence found that the appellant did not slip on the bottom of the basin, "that he fell when he lost his balance, on account of the vessel lurching when he was about to step into the bathroom, and that his fall was not caused by any negligence of the vessel, or its owners or servants."

In giving credence to the testimony of the fellow passenger in preference to that of the appellant, the court was influenced by the consideration that the former appeared to be disinterested, intelligent, and in every respect worthy of credence, and that the appellant was not a disinterested witness. Although the rule which makes the finding of the trial court in cases of conflicting testimony conclusive upon an appellate court is modified in cases where a portion of the testimony is taken by deposition, we are not convinced, after a careful consideration of the testimony, that the finding of the trial court should be set aside. Nor do we find ground to disturb the finding of the court below on the question of the alleged faulty construction of the bathroom. The court found that there was sufficient equipment to prevent slipping or falling, that the appellant might have grasped the curtain over the entrance, or the rod from which it hung, or the

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outer edge of the wall at the entrance, or the handle on the rear wall, which could be reached from the outside, and that it was not negligence not to provide a mat or covering for the bottom of the basin.

There was conflict in the evidence as to whether or not the handhold on the rear wall was there at the time of the accident, or was placed there soon thereafter. The trial court reviewed the evidence, and said: "The evidence that the handhold was there at the time is overwhelming." A portion of the evidence concerning this issue was taken by deposition, and it is contended that for that reason the finding of the court below is not controlling. There was, however, but one deposition on that issue, and that was a deposition for the appellant. We think the finding of the trial court, therefore, should be taken as conclusive. But, irrespective of that consideration, we have examined the testimony, and we find no ground for holding that the facts should have been found otherwise than as they were.

[3, 4] The appellant contends that a presumption of the appellees' negligence arises from the fact of the injury which he received, and he invokes the rule that the occurrence of an accident, which according to the ordinary course of things would not happen if proper care had been exercised, gives rise to a presumption against the carrier. Concededly, under that rule, the presumption of negligence must rest upon the premise that the accident would not have happened, if proper care had been exercised by the carrier. It cannot rest alone upon the mere fact that the passenger falls and is injured. The fact that a passenger, in a bathroom or elsewhere on board ship, falls, creates no presumption of negligence on the part of the ship. The rule of res ipsa loquitur applies only where the cause of the injury is shown to have been under the management or control of the carrier or its servants. In 3 Thompson, Negligence, § 2756, it is said:

"It has been pointed out by an able judge that the presumption which arises in this case does not arise from the mere fact of injury, but from a consideration of the cause of the injury. Thus it was said by Ruggles, J.: 'A passenger's leg is broken while on his passage in the railroad car. This mere fact is no evidence on the part of the carrier until something further be shown. If the witness who swears to the injury testifies also that it was caused by a crush in a collision with another train of cars belonging to the same carriers, the presumption of negligence might arise—not, however, from the fact that the leg was broken, but from the circumstances attending the fact.'"

See, also, Irvine v. Delaware, L. & W. R. Co., 184 Fed. 664, 106 C. C. A. 600; Lee Line Steamers v. Robinson, 218 Fed. 559, 134 C. C. A. 287, L. R. A. 1916C, 358.

Again, the general rule is that, where the plaintiff in an action for negligence specifically sets out in full in what the negligence of the defendant consisted, the doctrine of res ipsa loquitur has no application. Midland Valley R. Co. v. Conner, 217 Fed. 956, 133 C. C. A. 628, and cases there cited; White v. Chicago G. W. R. Co., 246 Fed. 427, 158 C. C. A. 491. "Res ipsa loquitur, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is whether the

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preponderance is with the plaintiff." Sweeney v. Erving, 228 U. S. 233, 240, 33 Sup. Ct. 416, 418 (57 L. Ed. 815, Ann. Cas. 1914D, 905).

[5, 6] Even upon the appellant's statement of the facts, his own contributory negligence is strongly indicated. While a ship is bound to a high degree of care for the safety of a passenger, the passenger is also required to exercise reasonable care for his own safety. Elder Dempsey Shipping Co. v. Pouppirt, 125 Fed. 732, 60 C. C. A. 500; Savage v. New York N. & H. S. Co., 185 Fed. 778, 107 C. C. A. 648; International Marine Co. v. Smith, 145 Fed. 891, 76 C. C. A. 423; Plant Inv. Co. v. Cook, 85 Fed. 611, 29 C. C. A. 377; Chesapeake & O. Ry. Co. v. Needham, 244 Fed. 146, 156 C. C. A. 574, L. R. A. 1918A, 1169; Van Anda v. Northern Nav. Co., 111 Fed. 765, 49 C. C. A. 596, 55 L. R. A. 544. The appellant was a man 47 years of age. He had been in the plumbing supply business, and had dealt in materials such as that of which the floor of the bathroom was constructed. He must have known, as every one who takes a bath knows, that such enameled ware is smooth, and when wet is slippery. He saw that the floor of the shower bath was wet. He had opportunity to observe, and must have seen, what handholds there were. The whole situation was visible to him, and there were no latent defects. He knew that a ship at sea was likely to lurch. He knew that stationary bathtubs were available for his use. He chose to use the shower bath, and he assumed whatever risk its obvious condition subjected him to.

[7, 8] The appellant filed an amendment to his libel, in which he alleged that it was the duty of the owners and master of the steamship to employ and have on board on said voyage a skillful and competent physician and surgeon, that it was their duty to exercise the highest degree of care to render to the appellant the best possible surgical and medical attention after he was injured, and that in disregard of that duty they knowingly furnished him an unskillful and incompetent physician, who failed and neglected to give him proper care, and exercise proper medical skill and attention. The answer denied that the surgeon was incompetent, or unskillful, or negligent, or that the owners or the master knew that he was unskillful or incompetent. The appellant relies upon the act of August 2, 1882 (22 Stat. 186), which provides that:

"Every steamship or other vessel carrying or bringing emigrant passengers, or passengers other than cabin passengers, exceeding fifty in number, shall carry a duly qualified and competent surgeon or medical practitioner, who shall be rated as such in the ship's articles. * * * And the services of such surgeon or medical practitioner shall be promptly given, in any case of sickness or disease, to any of the passengers, or to any infant or young child of any such passengers, who may need his services."

We pass the appellees' contention that the statute is inapplicable here, in the absence of a showing that the Steamship Company carried emigrant passengers, or passengers other than cabin passengers exceeding 50 in number, and approach the question whether or not, under the statute or the common law, the steamship is liable for the neglect or incompetency of the steamship's physician. In McDonald

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v. Massachusetts General Hospital, 120 Mass. 432, 21 Am. Rep. 529, it was held that a corporation established for the maintenance of a public charitable hospital, which has exercised due care in the selection of its agents is not liable for injury to a patient caused by their negligence. The court said:

"If, however, any contract can be inferred from the relation of the parties, it can be only on the part of the corporation that it shall use due and reasonable care in the selection of its agents."

In Laubheim v. De K. N. S. Co., 107 N. Y. 228, 13 N. E. 781, 1 Am. St. Rep. 815, a case which arose after the act of 1882 went into effect, the court said:

"If, by law or by choice, the defendant was bound to provide a surgeon for its ships, its duty to the passengers was to select a reasonably competent man for that office, and it is liable only for a neglect of that duty. * * * It is responsible solely for its own negligence, and not for that of the surgeon employed."

And the court held that if, in the case under consideration, the surgeon had erred in his treatment, it did not prove that he was incompetent, or that it was negligence to appoint him.

In O'Brien v. Cunard Steamship Co., 154 Mass. 272, 28 N. E. 266, 13 L. R. A. 329, the court held that a shipowner who provides a competent physician, whom the passengers may employ if they choose, is not liable for his negligence in the medical treatment of a passenger, either at common law or by the United States statute of August 2, 1882, and said:

"Under this statute it is the duty of shipowners to provide a competent surgeon, whom the passengers may employ, if they choose in the business of healing their wounds and curing their diseases. The law does not put the business of treating sick passengers into the charge of common carriers, and make them responsible for the proper management of it. The work which the physician or surgeon does in such cases is under the control of the passengers themselves. It is their business, not the business of the carrier. * * * The master or owners of the ship cannot interfere in the treatment of the medical officer when he attends a passenger. He is not their servant, engaged in their business, and subject to their control as to his mode of treatment. They do their whole duty if they employ a duly qualified and competent surgeon and medical practitioner, and supply him with all necessary and proper instruments, medicines, and medical comforts, and have him in readiness for such passengers as choose to employ him. This is the whole requirement of the statute of the United States applicable to such cases, and if, by the nature of their undertaking to transport passengers by sea, they are under a liability at the common law to make provision for their passengers in this respect, that liability is no greater."

In Allan v. Steamship Co., 132 N. Y. 91, 30 N. E. 482, 15 L. R. A. 166, 28 Am. St. Rep. 556, a case in which the court was called upon to construe the British Passengers Act of 1855, which required that every passenger ship shall carry a duly qualified medical practitioner, "who shall be rated on the ship's articles," and in other respects is similar to the statute of the United States, the court said:

"When the shipowner has employed a competent physician, duly qualified as required by the law and has placed in his charge a supply of medicine sufficient in quantity and quality for the purposes required, which meet the ap-

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proval of the government officials, and has furnished to the physician a proper place in which to keep them, we think it has performed its duty to its passengers. From that time the responsible person is the physician, and errors and mistakes occurring in the use of medicines are not chargeable to the shipowner."

In The Napolitan Prince (D. C.) 134 Fed. 159, a case also involving the British law, it was held that the errors and mistakes or negligence of the ship's physician are not imputable to the ship; it being shown that the ship was not negligent in selecting him.

In the present case the regulations of the statute were complied with, a surgeon or medical practitioner was employed, who was carried on the ship's articles, and hospital accommodations and medicines were provided. The services of the physician were engaged by the marine superintendent of the steamship, after having made diligent inquiry and relying, also, upon the written recommendations of the assistant general manager of the Oriental Steamship Company, the recommendation of the master of the steamship Honolulan, and upon the certificate of the Medical Society of the State of California, stating that the physician was a regular graduate physician, licensed to practice in that state, "and for some time has been known favorably to this office." We think it clear that the appellees had discharged their full duty when they employed the physician, after taking pains, as they did, to inquire of his antecedents and his fitness.

[9, 10] But it is said that the physician was incompetent, and that the vessel is liable for the failure of the owners and master thereof to comply with the provisions of the statute, which required them to employ a competent physician. We do not think that the statute requires more than that in the selection of a physician reasonable care shall be exercised. We add that in our opinion the evidence fails to show that the physician was in fact incompetent. He found the appellant suffering from a bruised shoulder. He manipulated the bruised arm sufficiently to see that it moved freely in the socket. He refrained from further manipulations for the reason, as he said, that they would cause pain which was unnecessary, in view of the fact that at the conclusion of the voyage two or three days later the appellant would have the opportunity to go to his own physician at Honolulu, where an X-ray picture could be taken, and the precise nature of the injury could be ascertained; and he advised the appellant to have the X-ray picture taken immediately upon his arrival in Honolulu. In the meantime the appellant's arm was held in a sling. If there was error in the treatment, it was a mistake in judgment, and it does not prove incompetency.

The decree is affirmed.

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WESTERN UNION TELEGRAPH CO. v. THOMASSON.

(Circuit Court of Appeals, Fourth Circuit. May 7, 1918.)

No. 1591.

1. APPEAL AND ERROR ⟸1050(1)—HARMLESS ERROR—EVIDENCE.
In an action for malicious prosecution, based on arrest of plaintiff on a charge of embezzlement, admission in evidence of newspaper clippings giving an accurate account of the arrest was not harmful to defendant.

2. MALICIOUS PROSECUTION ⟸71(2)—QUESTIONS FOR JURY.
In an action for malicious prosecution, based on arrest of plaintiff on a charge of embezzlement, where there was conflicting testimony as to probable cause, that issue was for the jury.

3. PRINCIPAL AND AGENT ⟸169(3)—RATIFICATION OF ACTS OF AGENT—PLEADING.
In a suit for malicious prosecution, based on arrest of plaintiff on charge of embezzlement, an answer requiring plaintiff to prove his whole case did not constitute a ratification by defendant of the acts of its agents in causing plaintiff's arrest, so as to justify the imposition of exemplary damages.

4. MALICIOUS PROSECUTION ⟸68—EXEMPLARY DAMAGES—GROUNDS.
In a suit for malicious prosecution, based on arrest of plaintiff by defendant's agents on the charge of embezzlement, where there was evidence from which the jury might find that defendant's agents were so anxious that plaintiff should not get away with defendant's money that they were reckless of what injustice they might do him, it was not error to allow the jury to award exemplary damages.

5. MALICIOUS PROSECUTION ⟸23—MALICE—PROBABLE CAUSE.
Lack of probable cause is not inferable, even from the most express malice.

6. MALICIOUS PROSECUTION ⟸24(3)—WANT OF PROBABLE CAUSE—ABANDONMENT OF PROSECUTION.
Abandonment of the prosecution has no tendency to prove lack of probable cause.

In Error to the District Court of the United States for the Eastern District of Virginia, at Richmond; Edmund Waddill, Jr., Judge.

Action by C. F. Thomasson against the Western Union Telegraph Company. Judgment for plaintiff, and defendant brings error. Reversed.

Leon T. Seawell, of Norfolk, Va. (Hughes, Little & Seawell, of Norfolk, Va., on the brief), for plaintiff in error.

M. J. Fulton, of Richmond, Va. (Byrd, Fulton & Byrd, of Richmond, Va., and W. H. Daniel and J. Toomer Garrow, both of Hopewell, Va., on the brief), for defendant in error.

Before KNAPP and WOODS, Circuit Judges, and ROSE, District Judge.

ROSE, District Judge. In an action for malicious prosecution, the defendant in error, here called the "plaintiff," obtained a judgment for $5,000 against the plaintiff in error, herein referred to as the "defendant."

On the 30th of November, 1915, at Hopewell, Va., an agent of defendant swore out a warrant charging plaintiff with embezzlement of

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its funds. He was arrested about half past 2 on the afternoon of that day, was at once locked up in a large, but dirty, cell, with a score of other prisoners of various ages, colors, sexes, and degrees of personal cleanliness, or lack of it. Some 4½ hours later the charge against him was, with the consent and at the instance of the defendant, dismissed, and he was released.

Something over a month before he had entered the employ of the defendant as an operator and clerk in its Hopewell office, which at that time was conducted as a branch of the older station at Petersburg. Hopewell was then a busy place. Many messages were sent from it, and considerable sums were there paid in for telegraphic transmission to other points. Every one of the four or five operators employed was authorized to receive money. He was expected at once to enter its receipt upon the sheet kept for that purpose, charging himself with it, by putting his initials against the entry. After the close of the office in the evening, this sheet was checked up, and each operator turned over the money for which he was responsible. He was not authorized to retain any of it. His own salary was paid, not out of these funds, but direct from the Petersburg office. The operators were in the habit of going out for their meals, and, while there was a safe in the office into which, at such times, they could put money, it does not appear that they were required so to do, or even that such was the usual practice.

On the morning of the day named, one Strickland, the head of the Petersburg office, received a letter from a superior official, directing him to dismiss plaintiff for misconduct. In what the misconduct consisted was not stated, and, so far as the record shows, was not known to anybody who had anything to do with the prosecution. Strickland went to Hopewell, and somewhere about 11 o'clock in the forenoon read the letter to the plaintiff. He had occasion to go elsewhere in Hopewell, and while he was away from the office it so happened that its head, one Seagle, was also called out. During their joint absence, the plaintiff left, taking with him what money he had collected that morning, which, as was subsequently discovered, amounted to a few cents over $246. Strickland subsequently came into the office and learned that neither the plaintiff nor the money was there. As his train was about to leave for Petersburg, he did nothing at the time, but on his arrival at his destination telephoned Seagle. On learning that the plaintiff had not been seen, he told Seagle to find the plaintiff and get the money. If he could not get it in one way, to get it in another; if he had to have the plaintiff arrested, to do so, but that he should get the money, if he could, without having an arrest made. About 2:30, Seagle swore out the warrant and the arrest followed. The plaintiff had the money with him, and, when taken into custody, turned it over to the police officials, with the statement that it belonged to the defendant.

The defendant numbers its assignments of error from 1 to 6; but, as one of these contains three specifications of respects in which it is said the court below went wrong, there are in reality eight assignments in all. They will be discussed, not in the order in which they appear

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in the record, but in that in which we find it most convenient to deal with them.

Refusal of a New Trial.

The defendant complains that its motion for a new trial was denied. That ruling is not reviewable here.

Exclusion of Evidence of Plaintiff's Intoxication.

The court refused to permit the defendant to prove by the police justice that the plaintiff, when brought before him some 4½ hours after his arrest, seemed to be under the influence of liquor. This assignment was not argued by the defendant, orally or in its brief. Upon the record in this case, the court was right in excluding the testimony, however admissible it might have been under some other circumstances.

Admission of Newspaper Accounts of the Arrest.

[1] Newspaper articles telling of plaintiff's arrest were put in evidence by him over the objection of the defendant. The natural, proximate, and indeed almost inevitable consequence of instituting a prosecution is that the newspapers shall make mention of it. The plaintiff in such case should be free to show that they have. The production of the papers in question would ordinarily be the best evidence of what they contained, and yet frequently it would be unfair to permit a newspaper account to be read to the jury, as the imagination of the reporter or his desire to make a readable story may run away with him. The defendant usually has nothing to do with the article, and it would be unjust to hold him responsible for its language. In the case at bar, it so happens, however, that the clippings offered in evidence were colorless. They truly stated what had taken place, and stopped there. Their admission did not hurt the defendant.

Refusal to Instruct Verdict.

[2] The defendant asked for an instructed verdict. It said the evidence disclosed the existence of probable cause for the prosecution, and did not show that in instituting it the agents of the defendant acted within the scope of their authority. The defendant did not make the latter contention, either in oral or printed argument, doubtless because it was clearly unsustainable upon the record. The defendant does strenuously insist that there was probable cause for the prosecution. Whether what was known to the defendant's agents would have led a reasonably prudent and cautious person to feel that there was probable cause to believe the plaintiff guilty of embezzlement depended to a large extent upon the precise words passing between Strickland and the plaintiff, upon the length of time before his arrest during which plaintiff had been absent from the office, the thoroughness of the search made for him, and other such matters. On these points there was conflicting testimony upon which it was the province of the jury to pass. The court was right in refusing to tell them that they must return a verdict for the defendant.

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Punitive Damages.

[3] The defendant complains that the instruction of the court allowed the jury to award punitive damages. It says that it cannot be made to pay smart money for the acts of its servants, unless it ordered them to do what they did, or subsequently ratified or adopted that which, without its orders, they had done. There is no evidence here of ratification. So far as appears, the bringing of this action may have been the first notice that the defendant, as distinguished from Strickland and Seagle, ever had that the plaintiff had been prosecuted. The latter contends that defendant, by its pleadings, adopted what its servants had done. In point of fact, the defenses set up can scarcely be said to do more than, by proper traverses, to require the plaintiff to prove his case, and all of it. The defendant ordinarily should be able to do that without rendering itself liable to punishment; but, even if the pleadings went further, they would not, in this court at least, entitle the plaintiff to exemplary damages. We said in Norfolk & Portsmouth Traction Co. v. Miller, 174 Fed. 607, 98 C. C. A. 453:

"Where a right to recover punitive damages from a master arises from a ratification by the master of the act of the servant, assuredly the act must have been ratified before the action was instituted."

[4] But in this case is there any necessity for ratification? A corporation cannot act, except through a human agent. When it authorizes him to cause the arrest of its employés when in his discretion such action is necessary for the protection of its rights or interest, his act in causing such arrest is its. Neither in its pleadings, nor by its evidence, does the defendant question Strickland's right to act in the premises for it. He directed the arrest, in order that he might get its money for it. There is no hint or suggestion that, in so doing, he was not acting within the scope of his duties. If he was, the jury were free to award punitive damages if they saw fit. It is true there is nothing in the facts to suggest that either Strickland or Seagle had any personal ill will against the plaintiff, or any wish to make things disagreeable for him; but there is testimony from which the jury might find that they were so anxious that plaintiff should not have a chance to get away with defendant's money that they were reckless of what injustice they might do him. There was no error in allowing the jury to award exemplary damages.

The Claim for False Arrest.

Originally the plaintiff claimed both for false arrest and for malicious prosecution. The defendant asked the court to tell the jury that there was no evidence of the former. This instruction was not given. In the testimony not a word was said as to any false arrest, as distinguished from the malicious prosecution. It is therefore not probable that the omission of the court hurt the defendant. It is unnecessary to decide whether it did or not, as for another reason the case must go back.

Motive Immaterial, if Probable Cause Existed.

[5] The defendant requested an instruction that if its agents had probable cause to believe the plaintiff guilty, and acted upon such belief, it made no difference what their motive for instituting the prosecution was. This the court did not do, either by granting the instruction asked for, or by including its substance in other parts of the charge. If there is probable cause for the prosecution, it makes no difference what motive inspired the prosecutor. "Malice may be presumed from lack of probable cause; but the lack of probable cause can never be inferred, even from the most express malice." Brown v. Selfridge, 224 U. S. 192, 32 Sup. Ct. 444, 56 L. Ed. 727; Staunton et al. v. Goshorn, 94 Fed. 52, 36 C. C. A. 75.

In this case it was highly important to the defendant that the jury should be made to understand that, if Strickland and Seagle had probable cause to believe that the plaintiff had embezzled its money, it could not be mulcted, notwithstanding the evidence showed that defendant's agents, in what they did, had no other purpose than to recover its funds, then in plaintiff's possession. In the instructions actually given, we do not find that this rule of law was stated to the jury with the clearness which the defendant had the right to ask.

Is Abandonment or Dismissal of the Prosecution Evidence of Want of Probable Cause?

[6] The defendant asked the court to say to the jury that the abandonment of the prosecution was not evidence of want of probable cause for its institution. The authorities are in hopeless conflict as to what significance should be attached to the way in which the criminal proceedings came to an end. The Supreme Court of Appeals of Virginia, in common with the overwhelming majority of the state courts of last resort, holds that the acquittal of the plaintiff by the tribunal which has the right to try and decide the case, is not evidence of lack of probable cause. Singer Manufacturing Company v. Bryant, 105 Va. 403, 54 S. E. 320. All that was determined was that the guilt of the prisoner had not been proved beyond the possibility of reasonable doubt. We are in full accord with this view, although there is respectable authority to the contrary. In at least five out of six jurisdictions, a different rule is held applicable when, after hearing, the prosecution terminated in a dismissal by a magistrate whose power is limited to an inquiry as to whether reasonable cause had been shown to hold the accused for trial. Such a dismissal is said to be prima facie evidence that there never was any probable cause for the prosecution. The highest court of Virginia has declared its adherence to this doctrine, although in the case in which it did so the question was not directly in issue. Jones v. Finch, 84 Va. 208, 4 S. E. 342.

This rule gives equal weight to all dismissals after hearing. The real probative force of such action, of course, in fact, if not in theory, depends upon the character and capacity of the particular official who heard the charge, and upon the completeness with which the evi-

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dence was brought out before him. In a malicious prosecution case, it would be, of course, utterly inadmissible to go into inquiry as to what kind of a man the justice of the peace was. The jury in the instant case would have been entitled to find that the police magistrate, who made the order of dismissal, did so at the request of the defendant's agents, and without having heard or considered any testimony. The instruction for which the defendant asked was based upon the assumption that they might reach that conclusion. There are authorities which hold that the abandonment by the prosecutor is evidence against him, whether a dismissal of the charge by the magistrate would or would not be, and there are still other decisions which come to precisely the opposite conclusion; that is to say, that such abandonment is without evidentiary value.

We do not find that this question has been passed upon in Virginia. For ourselves we are of opinion that the safest rule is to hold that acquittal, dismissal, and abandonment are equally inadmissible to prove lack of probable cause, although, of course, always competent evidence to show that the prosecution has terminated favorably to the accused. The whole question is well considered in Davis v. McMillan, 142 Mich. 395, 105 N. W. 862, 3 L. R. A. (N. S.) 928, 113 Am. St. Rep. 585, 7 Ann. Cas. 854. In coming to our conclusions, we have not limited our consideration to the citations made by the parties, but have tried to examine all the cases to which text-books and digests give reference. No good purpose would be served by here listing them. We think that the conclusions to which we have come are in accord with the deductions which may be reasonably drawn from what the Supreme Court said in Brown v. Selfridge, 224 U. S. 189, 32 Sup. Ct. 444, 56 L. Ed. 727; and in Stewart v. Sonneborn, 98 U. S. 187, 25 L. Ed. 116.

Between the time in which an original complaint may be made and the end of the prosecution, many things may happen, even when, as in this case, the interval does not exceed a few hours. After the plaintiff had turned in defendant's money, it was highly improbable that the prosecution could be carried to a successful conclusion, and yet a reasonable man, who knew all the jury were entitled to find the defendant's agents knew when they swore out the warrant, and nothing more, might well have done precisely what they did. If the criminal case had gone to trial, almost any jury would have felt that the prompt return of the money raised a reasonable doubt of guilt. A thousand other things leading to the conclusion that a successful prosecution was scarcely to be hoped for might happen, or might come to the knowledge of the prosecutor after the proceedings had been begun, and before they were finally dismissed by the magistrate, either at the request of the prosecutor, or upon his own judgment. It is not well that one who has caused an arrest, and who comes to recognize the hopelessness of going further, should, by stopping there, be held in a subsequent malicious prosecution case, to have made evidence against himself. To persist in a criminal prosecution after a conviction has become unlikely is, in the absence of exceptional circumstances, to persecute the accused, to waste the time of the court

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and of the witnesses, and to bring the administration of criminal justice into disrepute. The prosecutor should not be put in a position in which self-defense may seem to compel him to go on. Moreover, many a prosecution is dropped because the prosecuting witness is moved to pity, and is there any reason why his yielding to the pleadings of mercy should be evidence against him? In the absence of controlling authority in Virginia, it is not necessary for us to pass on the question as to whether, if it existed, we would be bound by it. In Phillips on Instructions to Juries in Virginia, § 563, it is stated that the instruction asked for by defendant in this case, and refused by the court, was given in Evans v. Atlantic Coast Line R. R. Co., 105 Va. 72, 53 S. E. 3. The Supreme Court of Appeals in that case said that the instructions given below accurately stated the law.

For error in refusing this instruction, and for failure to instruct the jury, as requested, that, if there was probable cause, the defendant's motives in instituting the prosecution were immaterial, the judgment must be reversed.

SCHERMERHORN v. DOZIER et al.

(Circuit Court of Appeals, Fourth Circuit. April 2, 1918.)

No. 1565.

1. NAVIGABLE WATERS ⟸1(1)—NAVIGABILITY—NONTIDAL BAY.
 A nontidal bay, at the extremity of a larger bay and connected therewith by a channel, the waters of which had been immemorially, but not extensively, navigated by craft of light draft, is navigable.
 [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Navigable.]

2. GAME ⟸2½—NAVIGABLE WATERS—RIGHTS OF RIPARIAN OWNERS—FOWLING.
 Under Code Va. 1904, § 1389, and in view of section 1338, an owner of land, upon nontidal navigable waters of a bay, has no exclusive right of fowling on its waters below low-water mark, or the mark during the dry season, as such waters may be used in common.

3. GAME ⟸2½—NAVIGABLE WATERS—RIPARIAN RIGHTS—TRESPASS—FOWLING.
 So long as the boat of one engaged in "mat blind shooting" for fowl does not touch the shore and is outside of the low-water mark, or the mark during dry seasons, of a nontidal navigable bay, he does not trespass on any exclusive right of the riparian owner.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge.

Bill for injunction by F. Augustus Schermerhorn against Addie Dozier and others. Judgment for defendants, and plaintiff appeals. Affirmed.

John C. O'Conor, of New York City, and Thomas H. Willcox, of Norfolk, Va. (Baker & Eggleston and Willcox, Cooke & Willcox, all of Norfolk, Va., on the brief), for appellant.

H. H. Rumble, of Norfolk, Va. (Rumble & Campe and Jeffries & Jeffries, all of Norfolk, Va., on the brief), for appellees.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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Before KNAPP and WOODS, Circuit Judges, and McDOWELL, District Judge.

McDOWELL, District Judge. The appellant, who was the plaintiff below, is one of the tenants in common of a tract of land of some 2,675 acres in Princess Anne county, Va., lying on and adjoining the north and northeast shore of North Bay. North Bay is the northern extremity of a very large body of water, which commences some 10 or 12 miles south of Cape Henry and extends southward below Cape Hatteras, and which is separated from the Atlantic in the vicinity of the land in question by a rather narrow strip of land. North Bay contains approximately 1,500 acres. It is a part of a much larger sheet of water known as Back Bay. However, sundry islands, which in some sense partially separate North Bay from Back Bay, afford a reason for giving the upper body of water a separate name. According to the evidence, the waters of North Bay, at least at and near the northern end, are fresh. Whether or not North Bay is affected by the ocean tides is left in some doubt by the evidence; but we shall assume for present purposes that the effect of the tides, if any, is in North Bay too slight to justify treating the bay as tidal water. The tract of land above mentioned is used by plaintiff's associates, or lessees, as a hunting resort. On the land is a clubhouse, and the property has no considerable value, except for the purpose for which it is used. The waters of North Bay during certain seasons abound in wild duck and geese. The plaintiff claims title under sundry grants from the commonwealth. So far as we can discover from the descriptions in the title papers, in connection with the plats and charts filed in evidence, no one of these grants purports to include any part of the waters of North Bay, and the plaintiff is merely a riparian owner. There is much evidence in the record to the effect that the waters of North Bay have been immemorially used as a common for fowling. The commonwealth grants under which the plaintiff claims are all of later date than April 1, 1873, except one, which was issued in 1809. The government chart introduced in evidence shows that the bay generally is from 4 to 5 feet deep, and the channel connecting North Bay and Back Bay is nowhere less than 2½ feet in depth at mean low water. The narrow strip of land to the east and southeast of North Bay is inhabited, as is the territory to the west, northwest, and north. There is a public landing on the eastern shore of the bay, and certainly one, and according to several of the witnesses two, public landings on the north or northwestern shore.

The bill sought an injunction to prevent the numerous defendants named therein from fowling on the waters of North Bay and from using and trespassing on the shores of the plaintiff while fowling. The defendants denied having trespassed on the shores, and asserted a right of fowling on the waters of the bay. After hearing the evidence the trial court dismissed the bill. The evidence fails to show use of or trespasses upon the shores by the defendants, except in one instance by one of them; and the sole question for discussion is as to the plaintiff's alleged exclusive right of fowling on the waters of

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North Bay, in so far as his land abuts upon and surrounds the northern end of that body of water.

[1] We think the first question in this case is whether or not North Bay is navigable. L. W. Brown testified that the waters of Back Bay and North Bay are used for the transportation of merchandise, and that a boat of 20 tons could start from the north end of North Bay and go down through the chain of sounds, Albemarle, Currituck, and Pamlico, and out into the ocean, and that the witness had been all the way through. This witness holds a pilot's license for all the above-mentioned waters. M. J. Eaton testified:

"That the waters of North Bay and Back Bay are used for commercial purposes for transporting merchandise all through the year; that the government station gets all their provisions and fuel through that North Bay; that there are fisheries in Back Bay, and their catch and supplies are transported to the head of North Bay; and that it is a regular commercial fishing operation, and the fish buyers come to Point of Woods, right at the head of North Bay, to buy their fish as a regular business, and the fish are transported over these waters to the head of North Bay."

On cross-examination, the witness stated that these fish are caught in Sheep's Bay, Back Bay, and North Bay, that he has seen a boat come from Back Bay to the Point of Woods (on the northwestern shore of North Bay) loaded with fish, and that he has seen this every season more than once.

J. E. White testified:

"The waters of North Bay are used for the transportation of goods and merchandise and commerce generally, and that most anything is transported over these waters; that people go to the store, and go across to and fro, and he has known timber to be rafted down and carried off, as a general thing with motorboats passing with goods of different varieties."

M. W. James testified:

"That No. 5 and also No. 4 life-saving crews and other people that he knows of used motorboats and transport their provisions from witness' father-in-law's store across North Bay, and witness has seen, about from four to six years previous, a raft with about 40,000 feet of lumber rafted at the Point of Woods and taken across the bay."

Witness stated that he had helped his brother the previous season load 5½ cords of wood, and had also a barrel of flour with provisions enough to last him two or three weeks, which they pulled across the bay in a boat. Continuing, witness stated that frequently the bay is used by the people who reside in that neighborhood for the transportation of goods and merchandise, and that witness works with the Northern clubmen in the winter at the Little Island Gunning Club, and lately a clubhouse was under construction there; the former clubhouse had been burned down, and the stuff to build a house, the lumber and material, was hauled across Back Bay.

J. T. Malbon, a former member of the Virginia House of Delegates, testified that the waters of North Bay "are used for the transportation of property and commerce." From the cross-examinations of these witnesses and other testimony, we think it is true that the navigation of North Bay has not been extensive or continuous; but the water is undoubtedly navigable by water craft of light draft, and it has im-

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memorially been navigated in the not very considerable commerce of that thinly settled section. In The Daniel Ball, 10 Wall. 557, 563, 19 L. Ed. 999, it is said:

"The doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all of the navigability of waters. * * * Those rivers must be regarded as public navigable rivers in law which are navigable in fact; and they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

In The Montello, 20 Wall. 430, 441, 22 L. Ed. 391, it is said:

"It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway."

In 29 Cyc. 289, it is said:

"Water is navigable in law, although not tidal, where navigable in fact, and is navigable in fact where it is of sufficient capacity to be capable of being used for useful purposes of navigation; that is, for trade and travel in the usual and ordinary modes."

See, also, 1 Farnham, Waters, 127, 130; 21 Am. & Eng. Ency. (2d Ed.) 428; State v. Water Power Co., 82 S. C. 181, 63 S. E. 884, 22 L. R. A. (N. S.) 435, 129 Am. St. Rep. 876, 17 Ann. Cas. 343; Water Power Co. v. Water Commissioners, 168 U. S. 349, 359, 18 Sup. Ct. 157, 42 L. Ed. 497.

Under these authorities we must hold that North Bay is navigable.

[2] The question, therefore, now presented, is as to the riparian rights of owners of land abutting upon navigable waters in the state of Virginia in respect to fowling on such waters. The following is from 2 Henning's Statutes at Large, p. 456, under date of April, 1679:

"Robert Liny haveing complained to this grand assembly, that whereas he had cleared affishing place in the river against his owne land to his greate cost and charge supposing the right thereof in himselfe by virtue of his pattents, yett nevertheless severall persons have frequently obstructed him in his just priviledge of fishing there, and in despight of him came upon his land and hale their sceanes on shore to his greate prejudice, aleadging that the water was the kings majesties, and not by him granted away in any pattent, and therefore equally free to all his majesties subjects to fish in and hale their sceanes on shore, and praying for releife therein by a declaratory order of this grand assembly; it is ordered and declared by this grand assembly that every mans right by virtue of his pattent extends into the rivers or creekes soe farre as low water marke, and it is a priviledge granted to him in and by his pattent, and that therefore noe person ought to come and fish there above low water marke or hale their sceanes on shoare (without leave first obtained) under the hazard of committing a trespasse, for which he is sueable in law."

We know of no reason why the principle enunciated in the foregoing legislative declaration should not apply to fowling as well as to fishing

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in navigable waters. The modern form of this rule is found in section 1389, Code of Virginia 1904. Moreover, section 1338 of said Code (taken from Act April 1, 1873 [Acts 1872–73, p. 310]) reads, so far as material, as follows:

"All the beds of the bays, rivers, creeks, and the shores of the sea within the jurisdiction of this commonwealth, and not conveyed by special grant or compact according to law, shall continue and remain the property of the commonwealth of Virginia, and may be used as a common by all the people of the state for the purpose of fishing and fowling, and of taking and catching oysters and other shell fish, subject to the provisions of chapters ninety-five, ninety-six, and ninety-seven, and any future laws that may be passed by the General Assembly."

In Taylor v. Commonwealth, 102 Va. 759, 770, 47 S. E. 875, 102 Am. St. Rep. 865, it was held that this statute is declaratory of the pre-existing common law of Virginia. And we are unable to accede to the soundness of the contention that this rule applies only to tidal waters. If the water be navigable, it may beyond low water mark be used as a common for fowling and fishing. In Taylor v. Commonwealth, supra, 102 Va. page 773, 47 S. E. at page 880 [102 Am. St. Rep. 865], is the following enumeration of the rights of riparian owners whose lands abut on navigable waters:

"First. The right to be and remain a riparian proprietor and to enjoy the natural advantages thereby conferred upon the land by its adjacency to the water.

"Second. The right of access to the water, including a right of way to and from the navigable part.

"Third. The right to build a pier or wharf out to navigable water, subject to any regulations of the State.

"Fourth. The right to accretions or alluvium.

"Fifth. The right to make a reasonable use of the water as it flows past or laves the land."

See, also, Norfolk v. Cooke, 27 Grat. (Va.) 430, 433, and cases cited; McCready v. Com., 27 Grat. (Va.) 985; Grinels v. Daniel, 110 Va. 874, 877, 67 S. E. 534; Meredith v. Triple Island Club, 113 Va. 80, 84, 73 S. E. 721, 38 L. R. A. (N. S.) 286, Ann. Cas. 1913E, 531; 19 Cyc. 992.

We regard the above-quoted enumeration as complete, and hold that the plaintiff has no exclusive right of fowling on the waters of North Bay.

[3] We have not overlooked the contention that "mat blind shooting" involves necessarily a trespass on the shore. It is true that in following this method the gunner places his boat near the shore, and by placing around the boat a blind made of corn sage or reeds he creates the appearance of an extension of the shore. However, so long as his boat does not touch the shore and is outside of the low-water mark—by which we mean the line of the water during dry seasons—he is not trespassing on any exclusive right of the landowner. We are of opinion to affirm, with costs to the appellees.

Affirmed.

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CALKINS v. LICHTIG.

In re SCHLEGEL.

(Circuit Court of Appeals, Sixth Circuit. June 29, 1918.)

No. 3128.

1. BANKRUPTCY ⟸180—CHATTEL MORTGAGE—RIGHTS OF SUBSEQUENT CREDITORS—FRAUD.
 On the issue of a bankrupt's chattel mortgage in fraud of subsequent creditors, it is not the acts which apparently show good faith that prevail, but the acts which show bad faith, as fraud taints every transaction into which it enters.
2. CHATTEL MORTGAGES ⟸185—RECORD—EFFECT.
 The filing of a chattel mortgage is only a substitute for the possession, which otherwise must accompany the delivery of a pledge.
3. BANKRUPTCY ⟸178(1)—CHATTEL MORTGAGE—FRAUD.
 The filing of a chattel mortgage was not a protection against a secret fraud, in part consummation of which the bankrupt's mortgage, though valid on its face, was given.
4. BANKRUPTCY ⟸180—CHATTEL MORTGAGE—FRAUD ON SUBSEQUENT CREDITORS—EVIDENCE.
 A chattel mortgage given by a bankrupt to a former partner, covering stock and other assets on hand and subsequently acquired property, *held* to have been made in furtherance of a scheme for the mortgagee's benefit, and in fraud of the mortgagor's subsequent creditors.

Appeal from the District Court of the United States for the Northern Division of the Eastern District of Michigan; Arthur J. Tuttle, Judge.

In the matter of the bankruptcy of Irwin R. Schlegel. From a decree sustaining the objection of David B. Lichtig, trustee in bankruptcy, to the bankrupt's chattel mortgage, because made in fraud of his subsequent creditors, the mortgagee, Charles W. Calkins, appeals. Affirmed.

The only question on this appeal is raised by the claim of the trustee in bankruptcy that a chattel mortgage given August 24, 1914, by Schlegel, the bankrupt, to Calkins, his uncle, the appellant, with whom he had been in partnership in general merchandising at Farwell, Mich., covering stock and other assets on hand and subsequently acquired property, was made in furtherance of a scheme for Calkins' benefit, to defraud Schlegel's subsequent creditors.

Calkins, engaged in a number of enterprises and conversant with the value of stocks of general merchandise, had some means. Schlegel had none. Prior to June, 1912, they had been in business together for a year and a fraction under the name Calkins-Schlegel Mercantile Company, at Lansing, Mich., whence, after unprofitable business and a fire, followed by a fire sale of the stock, they moved the unsold salvage to Farwell, a village of about 600 people, and carried on business there under that name for about 26 months. Calkins lived at Clare, 5 miles away. Such stock as from time to time was added was paid for by Calkins, if the money was not on hand at the store. Goods were ordered, sometimes by one and sometimes by the other. Schlegel had no salary, no interest in the stock, and no agreed share in profits, but took money out of the till as he or his wife wanted it, without making any memorandum in writing. No books were kept, excepting a cash book, in which was a record also of the money Calkins said he put in. The invoices, as they came in, were paid from time to time. The cash book was not forthcoming at the

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trial. Concerning it Schlegel said, "He [Calkins] either took them, or I destroyed them, or something."

The business was not profitable, and on August 24, 1914, Calkins sold the assets to Schlegel, who on that date gave his note to Calkins for $10,522.08, payable $50 down, $50 one week from date, and $50 on Monday of each week thereafter until the note was paid, with 7 per cent. interest. No other sum than the $50 in cash was ever paid. The consideration was the amount Calkins said he had put in, and was made up from a memorandum said by him to be a copy of a sheet from a ledger which, at the first meeting of creditors, he said was in his possession. At the hearing before the referee he said he had lost the original after the copy was made. His explanation of why he had no check stubs or returned checks was that he had burned them, as he had no use for checks older than a year. He testified July 20, 1915.

To secure the note Schlegel executed a chattel mortgage covering the entire stock, furniture, fixtures, book accounts, notes, and mortgages running to the Mercantile Company, as well as such of these choses as might be taken by Schlegel in the future, present and future goods in transit, and all after-acquired stock and goods, "it being the intention of the parties hereto that this mortgage shall be a continuing security upon such stock of goods as fast as put into such store," and giving power to the mortgagee to take possession on certain contingencies, as well as requiring insurance in his favor. The mortgage was filed with the township clerk at Farwell, who was a physician having his official and professional office in the same room in his residence, two blocks out of town; and notice, which contained no affidavit, was also filed that the business formerly conducted under the name Calkins-Schlegel Mercantile Company was on that day dissolved by mutual consent and would be conducted by Schlegel. About a week afterwards the sign at the store and the stationery were changed to show that Schlegel was the successor of the Mercantile Company.

Preliminary to the sale an inventory was taken by Calkins and Schlegel, values fixed at cost, without depreciation of any kind, showing assets: Stock, $8,918.83; fixtures, $1,644.62; notes receivable, $135.92; book accounts $129.50—total, $10,923.87. Calkins admits that the values fixed were high, and that if the business had been closed out at that time it would not have brought over $7,000 to $8,000. The reason given by Calkins for the dissolution was that Schlegel was "a little bit heavy on the buy," that salesmen would come in and sell him goods Calkins thought were not needed, and that just before the dissolution Schlegel wanted Calkins to furnish him money with which to buy hogs, which Calkins declined to do, apparently because Schlegel did not intend to purchase them on partnership account. It does not otherwise appear that up to that time Schlegel had bought goods improvidently or extravagantly. On paper Schlegel's equity was about $300, but the property was worth much less than the inventory value. Assuming that he really owed Calkins the amount of the note, he was insolvent, and both he and Calkins knew it.

Calkins had kept the credit of the business good. At the time of the sale the firm owed nearly $1,400, which after the sale Calkins furnished to Schlegel, who in September and October paid out all of the creditors of the old firm. So Schlegel started in business on his own account with excellent credit. Immediately he began buying large amounts of merchandise on credit. In September, October, and November his purchases aggregated about $11,000 in value. Calkins looked in occasionally and knew of the receipt of these goods. He knew, also, that business was not good. In December he took a trip to California. Before going, Schlegel said to him, "I have got the stock, and you need not worry." Whether or not he was accustomed to go away in the winter does not appear. He returned about April 1, 1915, and found the store, as he described it "so darned packed full of goods you couldn't walk through." From August 24, 1914, to April 19, 1915, Schlegel had bought on credit $19,789.55 worth of goods, for which he had paid only $2,706.83, and the schedule in bankruptcy showed stock in trade (including fixtures, returned by him at $517.50) of a value of $17,657.55.

In the meantime no demand was made by Calkins for the weekly payments

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of $50 each, nor any demand whatever until in March, when, Calkins says, he wrote to his attorney to see if he could get any money out of Schlegel—"some money I could use out there." While away Calkins corresponded with his nephew "about general topics of the country," and in one letter only asked him about business, and learned that "it was absolutely rotten." An involuntary petition in bankruptcy was filed May 10, 1918.

Calkins testified to a need for money during the months prior to December, and that he sold farmers' notes held by him to Schlegel at 5 per cent. discount. Whether or not these notes, if there were any, were paid by their makers to Schlegel, does not appear. The auditor found payments to Calkins from August 24, 1914, to December 7, 1914, of $923.90, made up, it is claimed by Calkins and Schlegel of moneys paid for notes, $100 on the sale of Dinner's tools left with Schlegel by Calkins for sale, and of which there is no record, and $300 to Calkins on account of the purchase of a house owned by Calkins and occupied by Schlegel and his wife, the deed to which was taken in the wife's name.

Schlegel says he notified creditors of the old firm of the dissolution and the assumption of the business by him. Perhaps he did; but, as they had been paid, his credit with them would be good. Some, however, wanted a statement before extending credit. To the Pittsburgh Steel Company (debt scheduled at $1,099.63) he wrote October 7, 1914: "In regard to us making you a statement, we deem it not necessary, as our Mr. Schlegel purchased the Calkins interest of the Calkins-Schlegel Merc. Co., and we paid every cent we owed in full to date, leaving Mr. Schlegel sole proprietor of the $14,000 stock. It seems very queer that you are holding up the order for these goods; we want this month, as our storeroom is ready to receive them now, and the fence we have for sale every day. If in doubt of, as to our credit, we give you a few of the best concerns in the country as references. Some may not, as they will be losing the business that you are to receive."

To Baldwin Stove Company, of Cleveland, he wrote similarly October 15, 1914.

To Butler Bros., Chicago, he wrote October 12th: "Please find inclosed order for I. R. Schlegel, who has assumed the Calkins interest of the Calkins-Schlegel Merc. Co. We paid every dollar that we owed in full."

These concerns made sales to Schlegel, presumably on the strength of these letters and the credit of the old firm; but to Myer, Wise & Kalchen Company, of Cincinnati, with whom apparently the firm had not dealt, he wrote in 1914, the month not appearing: "Below I hand you a full and correct statement of my affairs, for the purpose of establishing a credit with you." He showed cash value of merchandise, $14,000; total assets, $17,700; total liabilities, $3,700; net worth, $14,000—and said: "About September 1st I. R. Schlegel purchased the Calkins interest of the Calkins-Schlegel Merc. Co. We paid every dollar we owed up at that time and as fast as it comes due. We do not see why you hold goods upon us, as we can buy goods by the carload. We are financially better off than ever before. Kindly consign these goods rush to I. R. Schlegel, Farwell, Mich., Successor to Calkins-Schlegel Merc. Co."

Not a word in these letters about the mortgage. The statement of the value of the assets was grossly misleading, and the item of total liabilities was deliberately untrue. When pressed on cross-examination, Schlegel said he did not understand making out statements, and that the statement to the concern last named was made, he said at one time, by a young woman clerk, and at another time by his wife, who sometimes came to the store. He said there might be other letters telling about the mortgage, and that "a mortgage, as long as it is filed, is news to them." No other letters were produced.

He says he told salesmen of all of his creditors that his equity amounted to about $300, but only when their salesmen asked him about it, of whom "lots" did. Under pressure of cross-examination he mentioned several of such salesmen; but his testimony, sometimes contradictory, sometimes reckless, and at all times highly unsatisfactory, leaves the impression of want of reliability. He may have told some salesmen; but, if he did, it was only when they asked him about it, and it was in pursuance of Calkins' instructions to him.

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Calkins, when asked if he knew of Schlegel's representations to the Pittsburgh Steel Company and Butler Bros., said: "No, it was none of my business. I told him to buy the stuff right, and not to lie to anybody. * * * If they ask about this mortgage, tell them the exact financial condition. There is no use lying to anybody." Calkins himself did not notify the concerns from which the partnership had bought goods that he had withdrawn, because he said he did not think it necessary, when they were all paid up. He did not notify the mercantile agencies. He told of the mortgage only when salesmen of business houses asked him, and did not at any time tell them what Schlegel's financial condition was. There was but one creditor to whom he said he had volunteered information that he had a mortgage.

Schlegel at the date of the sale was about 27 years of age and had had considerable experience in the kind of business in which he was engaged, but in explanation of his extraordinary purchases on credit he says that he was overpursuaded by salesmen to purchase from them, and he gives four instances. From one he bought a carload of roofing; from another a carload of mattresses; from another a carload of fencing, wire, and nails, and flour from another; all staple commodities, subject to little, if any, depreciation, and for which there was always a sale. His letter to Pittsburgh Steel Company shows that the reason he gives for overstocking with fencing was false, though the statement to Myer, Wise & Kaichen that he could buy goods by the carload was true.

In endeavoring to account for assets the auditor found should have been on hand when his creditors closed in on him, Schlegel said he spent $300 or $400 in September on horse racing at Detroit, and that his store was robbed of about $300 worth of goods in the same month.

It is not charged that Schlegel actually secreted any money or goods, but it plainly appears that the firm had conducted a losing business; that business was bad from the time he started in on his own account, and he stocked his store with goods on credit in large quantities, knowing that he could not pay for them out of receipts from sales in the ordinary course of trade in the limited field in which he operated.

On the facts the District Court, as had also the referee, sustained the claim of the trustee and set the mortgage aside. Calkins appealed.

E. L. Beach, of Saginaw, Mich., and Clyde I. Webster, of Detroit, Mich., for appellant.

Kinnane & Lane, of Bay City, Mich. (Selling & Brand, of Detroit, Mich., of counsel), for appellee Lichtig.

Before KNAPPEN, Circuit Judge, and HOLLISTER, District Judge.

HOLLISTER, District Judge (after stating the facts as above). [1] In view of the facts and the reasonable inferences to be drawn from them, it is idle to urge that a chattel mortgage of after-acquired property is good in Michigan, that one partner may sell his interest in the partnership to another partner, that filing the mortgage was technical notice to the world of its existence, or, in the absence of further information than the record discloses, that the consideration for the mortgage was valuable, and that there were many evidences of good faith in the transaction, such as filing the mortgage and notice of dissolution, and changing the name on the sign and on the stationery; for these, though correct statements of the law and important facts tending to show good faith, do not tell the whole story, and when all the facts are considered, must fail to accomplish the fraudulent purpose their appearance of good faith was designed to cover. In such a case as this, it is not the acts which apparently

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show good faith that prevail, but the acts which show the want of it; for fraud taints every transaction into which it enters, and the law protects subsequent creditors against actual fraud on them. Bump on Fraud. Con. (4th Ed.) §§ 290, 291.

In dealing with rules of law and with circumstances tending to show good faith under cover of which a fraud was perpetrated, it was said by Judge Hook in Amundson v. Folsom, 219 Fed. 122, 125, 135 C. C. A. 24, 27:

"But all such things, especially when in close consecutive association, are to be considered, with what else appears, in determining whether the result was the consummation of a preconceived purpose to hinder, delay, or defraud creditors. * * * Transactions apparently innocent when separately regarded may take on a different signification when seen in their true connection with others. And it is not always safe to venture a prohibited course on a mosaic of sound, but unrelated, rules of law."

[2, 3] While Calkins and Schlegel would have it believed that Schlegel's want of power of resistance to the overpersuasive insistence of salesmen was the cause of his extraordinary purchases, yet he had been in the same kind of business for several years, and the record shows he was by no means inexperienced or unsophisticated. On the contrary, there is much evidence of appreciation on his part of the ways of business and the probable effect of concealing from those with whom he was dealing matters of such importance that, had they been known, creditors would not have fallen into the trap set for them. One of the strongest evidences of his full understanding of what he was about was his expressed opinion that specific notice to creditors of the filing of the mortgage was not necessary because the filing itself would be notice to them. He appreciated that filing the mortgage was a conspicuous badge of good faith, and had a keen sense of its legal effect.

Filing a mortgage is, however, only a substitute for the possession which otherwise must accompany the delivery of a pledge. It is not even a protection in cases in which the mortgage contains fraudulent stipulations. Robinson v. Elliott, 22 Wall. 513, 521, 22 L. Ed. 758. Much less is it a protection against a fraud conceived in secret, in part consummation of which the mortgage, though valid on its face, is given.

[4] Assuming, for the purposes of the issue now before us, that all concerns with whom the old firm had dealt, and all with whom Schlegel had dealings on his own account, knew in contemplation of law of the mortgage and of the dissolution of the partnership, yet they had no notice that he had no real interest in the stock of goods and was hopelessly insolvent when the mortgage was given.

Calkins was careful to keep the credit of the old concern unimpaired, and, by furnishing Schlegel with the money to pay its creditors, as if coming from Schlegel himself, imparted a further credit to Schlegel to which he was not entitled. This was enough to cause those who had dealt with the old concern to believe on reasonable grounds that they could safely deal with one of the partners who had succeeded to the business.

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Calkins knew what the effect on the trade would be when he kept the partnership credit good and started his nephew out with a reputation for paying his debts. He knew, also, whatever legal implications might be drawn from filing the mortgage, that in fact few, if any, creditors would probably know of it. Knowing this, he did not notify any commercial agency or the concerns with whom the partnership had been dealing of his withdrawal from the firm and of his protection through the chattel mortgage, nor did he tell any of them of the fact, unless he was directly questioned by salesmen, and even then he did not tell them of his nephew's insolvency, nor advise any of them that he was receiving money from his nephew for the purposes, or any of them, shown by the facts. Even on the assumption that the stock, fixtures, etc., were worth as much as they were inventoried, he nevertheless immediately caused the assets to be depleted by about the same sum Schlegel's equity appeared to be worth. In fact, however, he did this with the knowledge that the inventoried values were far in excess of the actual values of the property. In the item of fixtures alone there was an overvaluation of $1,126.

When Calkins saw that, within three months after he had withdrawn, his nephew had in the store as much as $11,000 worth of goods bought on credit, and had been assured that he need not worry, because the stock was there, he went to California for the winter, his mind easy in the comfortable belief that the loss he had incurred while in a losing business with his nephew would be made good through the scheme his nephew was carrying out, so admirably safeguarded, as it was, by appearances of fair dealing and rules of law established to protect those who act in good faith.

One wonders what thought consistent with honest purpose prompted the injunction to Schlegel not to lie if any one asked him about the mortgage. What Calkins in effect said was: "Do not voluntarily tell anything about it; but, if any one asks, don't lie." Evidently Calkins resolved to tell the truth himself about the mortgage, if any one inquired; but he does not say that he ever told anybody that Schlegel was insolvent. If Schlegel told "lots" of salesmen that his equity was worth about $300, the statement was false in itself. That he informed any salesmen of his insolvency is not believable, for the reason, among others, that no salesman, however limited his authority, would sell his employer's goods on such a slender factor of safety.

Explanation of the policy of truth-telling is found in the danger to be apprehended from discovered falsehood; but that policy did not go so far as to include the whole truth, and stopped at those half-truths which answer the purpose of falsehoods.

Schlegel's conduct, from whatever standpoint it may be viewed, does not give the impression of good faith. One would expect a young man of the proper sort, just starting out in business for himself, with good credit and in debt more than the value of his goods, would be jealous of every expenditure and cautious in contracting debts, and particularly careful about his personal conduct. The purchase of more than $19,000 in stock on credit for a business in a town

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of 600 people, and which had been a losing enterprise from the beginning, is, under the circumstances, evidence of intentional fraud.

In a highly optimistic mind there could be no hope, in the limited field in which Schlegel operated, of disposing within a reasonable time of the large amount of goods he was buying before the persons whom he owed for them would close in on him. He knew the field, and was conscious that, if he and Calkins had made no money in it, he could not dispose of the goods he had bought in time to pay for them on reasonable terms of credit. When he went into bankruptcy in May, he had on hand in merchandise considerably upwards of $17,000, and was owing nearly that sum to unsecured creditors. In the absence of any evidences of extravagant purchases by Schlegel prior to his going into business on his own account, the conclusion is irresistible that the reason given by Calkins for terminating the partnership, that Schlegel was "a little bit heavy on the buy," had no existence in fact, and affords a not even plausible explanation of Schlegel's extraordinary purchases on credit.

Assuming that Calkins discounted farmers' notes with Schlegel, how is it that Calkins, needing money, was dealing in this way with him, without asking for the weekly payments promised in the note?

From all the circumstances it fairly appears that Calkins, realizing that the business was unsuccessful and that the future held out no hope for it, had an understanding with Schlegel involving the sale and mortgage, the payment of the debts of the firm (for which he was liable in any event) in Schlegel's name as a basis of credit, and the purchase by Schlegel of large quantities of goods on credit, which would make Calkins good at the expense of Schlegel's creditors when the crash came. What was done amounted to intentional fraud on those creditors, participated in by both parties.

In Michigan it is enough that such fraud be established by a preponderance of the evidence. Dorrington v. Carpenter, 171 Mich. 652, 655, 137 N. W. 538.

From all of these considerations, it follows that the decree of District Court was right. It will therefore be affirmed, at appellant's costs.

FRONSOE v. BUSHNELL.

(Circuit Court of Appeals, Sixth Circuit. July 1, 1918.)

No. 3144.

1. EVIDENCE ⇐372(3)—"ANCIENT DEED."
A deed of bargain and sale, when 48 years old, was an "ancient deed."

2. EXECUTORS AND ADMINISTRATORS ⇐145—POWER TO SELL REALTY—PRESUMPTION FROM ANCIENT DEED.
After 48 years, bargain and sale deed of executrix, authorized to sell only if personalty was insufficient to pay legacies, which conveyed interest of executrix, and stated she had full power to convey, followed by warranty, raised rebuttable presumption that personalty was insufficient, and justified admission of deed in action of ejectment by heir at law of testator's devisee.

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3. EJECTMENT ⊂=93—SALE BY EXECUTRIX—SUFFICIENCY OF PERSONALTY TO PAY LEGACIES—EVIDENCE.
In ejectment by heir at law of testator's devisee against defendant, claiming under bargain and sale deed of executrix, authorized to sell realty only if personalty was insufficient to pay legacies, evidence *held* insufficient to show conclusively personalty was sufficient to pay expenses of administration, debts, allowances to widow, and legacies.

4. EXECUTORS AND ADMINISTRATORS ⊂=138(4)—SALE OF REALTY—COURT ORDER.
Though, in absence of testamentary power of sale, executrix could not sell realty to pay debts or legacies without court order, testamentary power of sale extending in terms only to legacies, they being postponed to expenses of administration, debts, and allowances to widow, power of sale to meet legacies could be exercised by executrix whenever it was clear personalty would be insufficient, after meeting other expenditures.

5. EJECTMENT ⊂=9(3)—RECOVERY—STRENGTH OF TITLE.
A plaintiff in ejectment must recover on the strength of his own title, not upon the weakness of his adversary's.

6. EJECTMENT ⊂=95(1)—TITLE—PRIMA FACIE EVIDENCE—POSSESSION.
Possession of realty under claim of ownership in fee is prima facie evidence of title in the possessor.

7. EJECTMENT ⊂=86(3)—BURDEN OF PROOF.
Though pleadings in ejectment, in connection with plaintiff's evidence, made prima facie case in her favor, requiring defendant to rebut it, burden of ultimately showing title still rested on her, though in determining whether burden had been sustained her prima facie showing was to be taken into account, as well as contrary presumption afforded by ancient deed under which defendant claimed.

8. APPEAL AND ERROR ⊂=215(1)—RESERVATION OF GROUNDS OF REVIEW—OBJECTION TO INSTRUCTION.
If an instruction was unsatisfactory to plaintiff, fairness to the court and defendant required her to say so, and her right to complain on appeal, if she had any, was lost by her silence.

9. APPEAL AND ERROR ⊂=1050(1)—HARMLESS ERROR—EVIDENCE.
In ejectment, by heir at law of devisee by will authorizing executrix to sell realty only if personalty was insufficient to pay legacies, against defendant claiming under executrix's bargain and sale deed, admission of evidence of will of executrix, giving her own estate, subject to debts and charges, to her daughter for life, etc., *held* harmless to plaintiff.

10. EJECTMENT ⊂=90(1)—EVIDENCE.
In ejectment, by heir at law of devisee by will authorizing executrix to sell realty only if personalty was insufficient to pay legacies, against defendant claiming under executrix's bargain and sale deed, admission in evidence of certified copy of restored transcript of appearance docket of a probate court, so far as relating to proceedings to sell certain other realty of testator assumed to be to pay debts, was proper, having bearing on whether the personalty had proved sufficient.

11. APPEAL AND ERROR ⊂=1050(1)—HARMLESS ERROR—EVIDENCE.
In such action, admission in evidence of certified copy of restored transcript of appearance docket of probate court, so far as relating to sale of certain other real estate of testator, *held* harmless to plaintiff.

In Error to the District Court of the United States for the Southern District of Ohio; Howard C. Hollister, Judge.

Ejectment by Louisa Fronsoe against John L. Bushnell. To review judgment for defendant, plaintiff brings error. Affirmed.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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Charles Broadwell and W. H. Cowguill, both of Cincinnati, Ohio, for plaintiff in error.

J. E. Bowman, of Springfield, Ohio, and C. B. Wilby, of Cincinnati, Ohio, for defendant in error.

Before KNAPPEN, MACK, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. Action in ejectment for the undivided one-half of a parcel of land in Springfield, Ohio, being part of a larger tract, of the undivided one-half of which William Honroth died seised November 26, 1868, leaving a will which was admitted to probate December 2, 1868, by which he disposed of his entire estate as follows: After providing for first paying out of his estate all his "just debts and charges," he gave to his wife, Christine, $4,000 forever, in lieu of her first year's support. He then gave five different legacies, amounting to $9,600, $8,000 of which was given to the trustees of Zion's Society. The entire remainder of the estate was given to the wife, Christine, in lieu of dower, during her natural lifetime. The residue, "unconsumed by her," was to be divided at the wife's death, one-half to the testator's daughter, Louisa Schmidt, during her natural life, and after her decease to her child or children in fee. The other half was given to the trustees of Zion's Society. The wife was appointed executrix. The will expressly empowered her—

"in case there should not be a sufficient amount of personal property to pay the legacies above named to sell at public or private sale, at not less than two-thirds of its value, so much of my real estate as may be sufficient for that purpose, and to give a good and sufficient deed or deeds therefor and reinvest any surplus and enjoy the income thereof as above stated to the benefit of my said wife."

The larger tract referred to had been conveyed on September 6, 1868, and thus less than 3 months before the testator's death, to Honroth and Seegar as tenants in common, upon payment of $3,000, subject to a mortgage for the remainder of the unpaid purchase price, viz. $5,622.77. July 10, 1869, and thus slightly more than 10 months after Honroth and Seegar's purchase of the property, the executrix made and delivered to Seegar, upon consideration of $1,500, a deed of bargain and sale in fee of the undivided one-half of the original tract mentioned, "and all the estate, title, and interest of said Christine Honroth as executrix aforesaid, either in law or equity, of, in, or to said premises"; the executrix expressly covenanting "that she as to said premises has full power to convey the same and further that she will warrant and defend against all claim or claims," except the purchase-money mortgage, which Seegar assumed and agreed to pay. Mrs. Honroth also released "her right and expectancy of dower in said premises." Mrs. Honroth died in 1878. Louisa Schmidt, who was the second life tenant, purchased from Zion's Society its interest in the premises. She died in December, 1908. The plaintiff (who is plaintiff in error here) is a daughter of Louisa Schmidt, and claims title to the premises as devisee under Honroth's will, as heir at law of her mother, and by deed from her brothers and sisters, also devisees

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under the will and heirs at law of their mother. The defendant claims under conveyance from Mrs. Honroth, executrix, etc., to Seegar.

Both parties thus claim directly under the testator, Honroth. Apart from the question of limitation later referred to, the conflicting claims of title depend entirely upon the effect of Mrs. Honroth's conveyance to Seegar, and the validity of that conveyance turns solely upon the question whether the conditions prescribed in the power of sale existed. The trial court held that plaintiff's claim as to the one-quarter interest of Zion's Society was barred by limitation. As to the title to the other one-quarter, derived through the children of Louisa Schmidt, the verdict was made to turn upon the question whether the personal estate was sufficient to pay the debts and administration expenses, together with the $13,600 of legacies, including the widow's allowance. The verdict was in defendant's favor.

[1, 2] 1. The principal contention of plaintiff in error is that her motions, made at the conclusion of the evidence, first, to direct a verdict in her favor as to the undivided one-half in question, and, on its denial, for directed verdict as to the one-quarter interest acquired by plaintiff under the will and by deed from her brothers and sisters, should have been granted.

It is evident that, if the motion to direct verdict as to the one-quarter last referred to was properly overruled, it was equally proper to refuse to direct verdict as to the one-quarter interest conveyed by Zion's Society, regardless of the question of limitation as to that interest. Upon this branch of the case the question is in narrow compass. At the time of the trial the deed from the executrix to Seegar was 48 years old. The conveyance was thus an "ancient deed." The grantee, and those claiming under him, had gone into immediate possession of the premises, paying taxes and making improvements thereon. The possession of the property was thus consistent with the perfect validity of the deed. The records of the probate court in the matter of the Honroth estate had been in 1884 (nearly 23 years before the trial below) consumed by fire, excepting only the appraisement of the personal property of the deceased, the book of docket entries (or administration docket), showing the presentation of the will, its admission to probate, the granting of the letters testamentary to the executrix, the appointment of appraisers, the filing of the inventory, the appointment of an administrator de bonis non with the will annexed after Mrs. Honroth's death, the filing of accounts current by that administrator and their suspension, and the allowance and confirmation of his account current, in 1879. The deed in question purports to have been executed by the grantor as executrix of the estate of the deceased. This deed could be made only on condition that the personal property was not sufficient to pay the legacies after payment of the costs and expenses of administration, the widow's allowance, the debts of the deceased and the legacies. The conveyance of the premises, together with the "estate, title, and interest" of the executrix, coupled with the statement that she "has full power to convey the same," followed by a full warranty, except as to the purchase-money mortgage before referred to, amounted, in legal substance, to a declaration that

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the conditions authorizing the testamentary power of sale existed at the time. Apart from the question hereafter discussed, as to what the inventory showed, there was nothing in the record, so far as preserved, negativing such condition. These circumstances raised a presumption (rebuttable, to be sure) that such conditions actually existed, and justified the admission of the deed in evidence. Wilson v. Snow, 228 U. S. 217, 33 Sup. Ct. 487, 57 L. Ed. 807, 50 L. R. A. (N. S.) 604; Johnson v. Jarvis (C. C. A. 4) 223 Fed. 756, 139 C. C. A. 286; Butterfield v. Miller (C. C. A. 6) 195 Fed. 200, 206, 115 C. C. A. 152, and following.

[3, 4] Plaintiff insists, however, that the testimony conclusively showed that the personal estate was amply sufficient to pay the costs and expenses of administration, the debts of the deceased, the allowances to the widow and the other legacies; second, that in any event the executrix could not validly sell for payment of debts and legacies without an order of the court therefor.

As to the first question, that of fact: The appraisement showed about $27,000 of personalty. There was testimony tending to show that the debts of the deceased were small, and that large sums beyond the inventory were realized. The testimony would have sustained a verdict for the plaintiff. On the other hand, it did not conclusively appear that the appraised valuations were realized, nor that the personal estate collected was sufficient to pay the four classes of items enumerated, taking into account the evidence of the probable expense of administration, the fact that but $3,000 of the legacy to Zion's Society was paid before the sale to Seegar, and the proceedings had in 1871 to sell other real estate for payment of debts. A discussion of the details of the testimony would serve no useful purpose. Upon the question of law, while it is true that in the absence of testamentary power of sale the real estate could not be sold to pay either debts or legacies without court order, and that the testamentary power of sale extends in terms only to legacies, yet it is entirely clear that as legacies were postponed to the other three classes of expenditures, the testamentary power of sale to meet legacies could lawfully be exercised whenever it was clear that the personalty would be insufficient for their payment, after meeting the expenditures which had precedence over legacies. We think the record presented a question of fact on this subject, and that it was not error to deny the motions to direct verdict.

[5-7] 2. The trial court, after instructing that the deed from the executrix to Seegar, with its ancient character, raised a disputable presumption "that whatever was done was rightly done," and that "the executrix would not have made the deed unless there were facts upon which the proper exercise of the power was based," said that this presumption placed on plaintiff the burden of showing, "from all the evidence, and from every fact which has been adduced in this case, and from all reasonable inferences to be drawn from the facts such as they are shown to be, that the amount of money in the hands of the executrix, the $27,000, was sufficient to pay the costs of administration, widow's allowance, debts and legacies."

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The criticism seems to be that as defendant's answer admitted that Honroth died seised of the interest in question, that he left a will containing the provisions for its disposition before stated, and that plaintiff and her grantors were devisees under the will, the burden of showing the existence of conditions authorizing the sale was thereby shifted to defendants. The answer, however, denied generally that plaintiff had any interest in the premises sued for, and asserted defendant's ownership of the same, which presented the ultimate issue under the Ohio Code (sections 11903, 11904). The broad rule is that a plaintiff in ejectment must recover on the strength of his own title, and not upon the weakness of his adversary's and that possession of real estate under claim of ownership in fee is prima facie evidence of title in the possessor. Ricard v. Williams, 7 Wheat. 59, 105, 5 L. Ed. 398; McGuire v. Blount, 199 U. S. 142, 144, 26 Sup. Ct. 1, 50 L. Ed. 125; Cleveland v. Bigelow (C. C. A. 6) 98 Fed. 242, 247, 39 C. C. A. 47. True, the pleadings, in connection with plaintiff's evidence, made a prima facie case in her favor, requiring defendant to rebut it; but the burden of ultimately showing plaintiff's title still rested on her, although in determining whether that burden had been sustained her prima facie showing was to be taken into account, as well as the presumption to the contrary afforded by the executrix's deed, in connection with all the other evidence in the case.

[8] Assuming, however, that plaintiff would have been entitled, had she asked it, to some modification, elaboration, or explanation of the criticized instruction, yet no such request was made, nor was any exception taken to the charge in this respect—indeed, the only exception taken related to the instruction that the recovery of the interest derived from Zion's Society was barred by limitation. If the instruction was not satisfactory, fairness to the court and to the defendant required plaintiff to say so. Her right to complain, if she had any, was lost (Denison v. McNorton [C. C. A. 6] 228 Fed. 401, 407, 142 C. C. A. 631); and if the instruction complained of was to any extent exceptionable (which we do not hold), it is enough to say that prejudicial error is not so apparent as to justify a reversal of the judgment in the absence of exception.

[9] 3. Against plaintiff's objection, defendant gave evidence of the will of Mrs. Honroth which gave her own estate, subject to "debts and charges," to her daughter Louisa Schmidt for life, the remainder to the latter's heirs. The criticism made is that the will had no bearing upon the issues in the case, and that "its admission would indicate to the jury that Christine Honroth had the right to dispose of the property of William Honroth by will." We see no merit in this contention. If the fact of Mrs. Honroth's will was immaterial for any purpose, which we do not hold (another purpose is claimed for it), we do not see how it could have been prejudicial.

[10, 11] 4. Complaint is made of the admission of a certified copy of the "restored transcript of appearance docket No. 3" of Hamilton county probate court, so far as it relates to the proceedings to sell certain other real estate in 1871, assumed to be for the purpose of paying debts. We think the fact of such proceedings to sell had some bearing

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upon the question whether the personalty had proved sufficient to pay debts and administration expenses. The proceeding was by Mrs. Honroth as executrix against herself as widow, Mrs. Schmidt and her husband, and Zion's Society. Whether or not the evidence was competent as against the interest derived under the will, in the absence of proof of representation of the interests of children not shown to have been then born (which we find it unnecessary to decide), it would seem competent so far as the one-quarter interest claimed under deed from Zion's Society is concerned; and after the exclusion by the court of that claim no motion seems to have been made to withdraw the evidence in question, nor did the charge refer to it. Its claimed ineffectiveness to pass title to the premises sold under it would not necessarily make it incompetent for any purpose whatever. To say the least, we are not convinced that there was prejudicial error in its admission.

The judgment of the District Court must be affirmed.

THE BART TULLY.

PATTON-TULLY TRANSP. CO. v. MEMPHIS POWER BOAT CLUB.

(Circuit Court of Appeals, Sixth Circuit. June 4, 1918.)

No. 3107.

1. ADMIRALTY ⊂=19—JURISDICTION—TORTS—INJURIES TO FLOATING STRUCTURE.

A pontoon wharf being a floating structure, injury thereto by a ship constitutes a maritime tort, of which admiralty has jurisdiction.

2. COURTS ⊂=359—JURISDICTION—CONFLICT OF JURISDICTION—RULES APPLICABLE.

Where an alleged tort was committed upon navigable waters of the United States and also within a state, the applicable rules will be determined by the state laws, except where displaced by federal statutes and admiralty law.

3. WHARVES ⊂=22—INJURIES TO FLOATING WHARF.

Where a riparian owner moved its floating wharf further into the stream than necessary, and almost to the edge of the channel necessarily used for navigation, it did so at its own risk, and could not recover for damages from waves produced by passing steamers operated with due care.

4. WHARVES ⊂=22—INJURY—NAVIGATION—CROSSING BARS—CUSTOM—LIABILITY.

It being customary to force a barge over bars of mud by revolving the stern wheel of a tug at full speed, such act does not constitute recklessness, nor render the tug liable for damages to a pontoon wharf, resulting from waves thus produced.

Appeal from the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Libel by the Memphis Power Boat Club against the steamer Bart Tully, claimed and owned by the Patton-Tully Transportation Company. From a judgment holding both parties at fault and dividing

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the damages, the owner appeals. Reversed and remanded for modification.

Just above the city of Memphis, the Wolf river flows into the Mississippi. A short distance above the junction point, and in the edge of the city, and where the Wolf is running south, are located some sawmills and similar establishments. The logs here cut are brought in large quantities from Tennessee, and from other states up and down the Mississippi river, and are carried in the common flat-bottomed river scows or barges, 160 feet by 30. The barges are pushed by steamboats or tugs. The transportation company owned the stern wheel steam tug Tully (120 feet by 22) and other boats, and was engaged in taking log-laden barges from the Mississippi river up the Wolf river to the sawmills. There had been for years a very large traffic of this kind, and the Wolf river, at this point, was navigable—by every criterion. On the east bank of Wolf river, and just below the sawmills, the Memphis Power Boat Club had its clubhouse and landing station. Its members owned and operated small, light-draft launches or similar boats. It maintained a floating wharf and harbor, composed of five pontoons. The up-river one, 20 feet by 8, was fixed at right angles to the bank and at some distance therefrom, and two right-angled arms or branches, running down stream from each end of the upper one, were each composed of two pontoons, 40 feet by 8. The space between was 13 feet wide. This entire structure was maintained in its selected position by anchors and by moorings to the bank; the separate portions were tied together with cables. It thereby provided a landing wharf on the length of the outer edge, a harbor or shelter between the two arms, and a further harbor between the inner arm and the bank.

The amount of water in Wolf river at this point was largely controlled by the height of the Mississippi. In high and in moderate stages, the channel at this point was wide enough and deep enough, so that there was room for everybody, and there seems to have been no trouble. The occurrences here involved (in October and December) happened at extreme low stage. At that stage, the distance from bank to bank was not over 100 feet, and the water was so shallow that the log-laden barges could not get up without danger of injury to the pontoons. Accordingly, and prior to December, the government had dredged a channel from a point downstream, where there was water enough, up to a point just above the clubhouse and a little below the sawmills. This channel was 4 or 5 feet deep at low water, and was over on the western side of the river, as near the west bank at low water as practicable. With the shallow water and spoil bank to the west, it occupied not more than the west half of the river surface. The river bottom is composed of soft mud, which rapidly accumulates and shifts, and the forcing of a boat or barge through a foot or more of this bottom mud is a common incident for such river navigation. Just at the upper end of the excavated channel, there was an accumulation or bar of this character, and there was, sometimes, considerable difficulty in forcing a laden barge up to the sawmills; but it was accomplished customarily and continually.

On the December occasion in question, the boat club's landing stage—which, all together, made a structure 100 feet by 30—had been moved out into the river about one-half of the way across, so that the outer pontoon was along or near the easterly edge of the excavated channel. Since the Tully and other boats similarly employed, while pushing a barge at this stage of water, could navigate only in the excavated channel, it is clear that the boat club had placed its landing stage not more than 10 feet away from the path that the barges must take, and very close to the paddles of the Tully's stern wheel. While things were in this situation, a barge stuck on the bar, or with its corner on the bank. The Tully used all her power and revolved her wheel rapidly in an effort to force the barge through, and the waves made by the paddle wheel caused one of the nearest pontoons to break away from its fastenings to the next one and be drawn into the wheel and suffer some injury. For this injury, and a prior similar one, the boat club libeled the Tully. The District Court held both parties in fault and divided damages. The owner of the Tully brought this appeal.

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R. G. Brown, of Memphis, Tenn., for appellant.
F. S. Elgin, of Memphis, Tenn., for appellee.

Before WARRINGTON and DENISON, Circuit Judges, and SATER, District Judge.

DENISON, Circuit Judge (after stating the facts as above). [1] 1. The alleged injuries to the pontoons were by a ship to a floating structure. They constitute maritime torts, and admiralty has jurisdiction. The Blackheath, 195 U. S. 361, 25 Sup. Ct. 46, 49 L. Ed. 236; Atlantic Co. v. Imbrovek, 234 U. S. 52, 34 Sup. Ct. 733, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157; The Mackinaw (D. C.) 165 Fed. 351.

[2] 2. The boat club did not appeal from the decree finding it in fault; but that question must be met and passed before we can decide that it was solely in fault—which proposition is the basis of the transportation company's appeal. The place in question was plainly upon the navigable waters of the United States and was also within the limits of Tennessee; the applicable rules would therefore be determined by the state laws in so far as they were not displaced by federal statutes and the admiralty law. It was claimed that certain Tennessee statutes and decisions forbade a private wharf along the edge of a navigable river, and that therefore the boat club was without foundation of right in maintaining this structure. Whatever might have been thought about this, the Supreme Court of Tennessee, by an opinion filed in May, 1918, in an action as to this very location and between these parties, has expressly adopted the federal rule on the subject, and has distinguished the earlier Tennessee cases relied upon by the transportation company. It therefore becomes necessary to decide whether the boat club's acts were within the limits which the nature of the stream and the character of its navigation prescribed for the rights of a riparian owner. The principles involved are too familiar and well settled to justify discussion. Illustrations may be found in 29 Cyc. 341.

[3] We entertain no doubt that the boat club had the right to have a landing stage or floating wharf at and along this bank for the use of the small boats of its members. A riparian owner's wharf may extend out to the edge of navigability; but this is a relative term. It does not follow that, because there is a 35-foot channel in a harbor, every riparian owner may wharf out to that channel, regardless of his interest in reaching it, or of the obstruction to general navigation which he thereby causes. Particularly must this be true when, as here, the deep-water channel is upon the opposite side of the river, and the building of the wharf to that extreme limit is bound to interfere with the reasonable use of that channel by the boats which must use it.

The draft of the tugboats was 4 feet; the draft of the barges, loaded as customary in low water and as actually loaded at this time, was 3½ feet. The draft of the launches belonging to the members of the club does not appear; but it is shown that they could be and were drawn up close alongside and some of them even partly upon the bank, and it must be assumed that their draft was much less than 3½ feet. It is therefore a reasonably certain inference that the ordinary pur-

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poses of a landing stage or wharf for these boats could have been served, as well as ought to be demanded in this 100-foot stream, by pushing out from the bank not more than one-quarter or one-third across—25 to 33 feet. This would have left room for the tugboats and barges to go up on the west side, occupying 50 feet, or one-half the channel from bank to bank (that being the width of the barge plus 10 feet on each side), and would have left a fair clearance space between this zone of barge navigation and the pontoons. Under these conditions, and making reasonable adjustment of the relative rights of the parties, we are clear that the boat club could not fix its pontoons out any farther into the channel, except at its own risk of injury by the ordinary and reasonably necessary operation of the tugboats and barges passing along. Further, a mere wharf or landing stage is not the thing here involved. Not satisfied with that, the boat club put out a second line of pontoons, extending more than 20 feet further out, making a harbor between the two, and occupying half the river. We therefore must agree with the court below that the boat club was at fault.

[4] 3. It only remains to consider whether the tug and barge were operated with due and ordinary care, for, of course, the tug might not recklessly or wantonly injure the pontoons, even if they were occupying water that the relative rights of the parties did not justify. We find nothing to indicate recklessness or want of ordinary care and skill under the circumstances. It was certainly customary at this locality, as it is said to be generally customary in this class of navigation (see Western Co. v. Inman Co. [C. C. A. 2] 59 Fed. 365, 367, 8 C. C. A. 152), to force a boat through or over a foot of soft mud on the bottom. The bar in question existed, and it must be crossed, or this traffic must cease—until higher water. There is no claim in the pleadings or in the testimony that revolving the stern wheel at full speed for a few minutes in an effort to overcome an obstacle is not a common and ordinary incident of such navigation. Whether the barge ahead of the tugboat actually struck this bar, or whether one corner grounded on the channel bank, is not important. There is nothing to support the inference of recklessness, except the fact that the injury happened; and when we observe that the boat club had so placed its pontoons that injury was certain, if the tug deviated 20 feet from its ideal line of navigation, the happening of the injury lends no support to the inference. Especially is this true when we also observe that the injury happened because the pontoon fastenings gave way.

4. The October incident is controlled by similar considerations. Indeed, the relative right of the boat club was rather better in December, after the digging of the channel had thrown the barge navigation zone to the extreme west.

5. There is nothing in the recent decree of the Supreme Court of Tennessee inconsistent with our conclusions; nor is it important that the transportation company at a nearby point maintained a dry dock extending further out than these pontoons. The stream was there much wider.

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We conclude that the boat club was solely at fault, and the decree below should be modified accordingly. For that purpose it is reversed, and the case remanded.

FINLEY v. HALLIBURTON.*

(Circuit Court of Appeals, Eighth Circuit. April 8, 1918.)

No. 5034.

1. APPEAL AND ERROR ⟸878(1)—FAILURE TO APPEAL—EFFECT.
Where a trust company, which made advances to a lessee to enable her to build on the demised ground, sued the lessee and lessor to foreclose its liens, etc., and the lessor in the same proceeding recovered for rent due, and foreclosure was ordered, the original decree, not having been appealed from by the lessee, is conclusive as to her, notwithstanding lessor's appeal from the decree in favor of the trust company and a subsequent agreement between parties.

2. JUDGMENT ⟸843—EQUITABLE ASSIGNMENT.
Where an agreement in effect worked an equitable assignment of a judgment, a court of equity will treat the judgment as assigned, though the formal assignment was not executed.

3. JUDGMENT ⟸843—ASSIGNMENT—AGREEMENT.
Where a trust company, which advanced money to a lessee of land to enable it to construct a building thereon in accordance with the lease, recovered in a suit against the lessee and lessor, *held*, that an agreement between the trust company and the lessor, whereby the latter paid the amount of the trust company's recovery, etc., was an equitable assignment of the judgment and claims of the trust company.

4. SUBROGATION ⟸22—PERSONS ENTITLED TO SUBROGATION.
Where lease required lessee to construct building, and he incurred obligations which it failed to discharge, lessor's rights were not limited to paying off claims and recovering therefor as for rent, but it was merely given such an option; and where trust company had advanced funds to enable lessee to construct a building, lessor, having been compelled, in order to protect property, to pay amount of trust company's recovery, etc., was entitled to be subrogated to its rights.

5. LANDLORD AND TENANT ⟸96—MERGER OF LEASEHOLD ESTATE.
Where a trust company, which advanced funds to a lessee to enable it to construct a building on the demised premises, recovered judgment, which the lessor paid, receiving an equitable assignment of the judgment, etc., *held*, that there was no merger as to the leasehold estate which would defeat the rights of the lessor under its purchase.

6. APPEAL AND ERROR ⟸1073(1)—REVIEW—HARMLESS ERROR.
Judgment of foreclosure against Oklahoma property is not open to objection on the ground that by Rev. Laws Okl. 1910, § 5162, no order of sale could issue until the expiration of six months from its entry, where no sale had occurred, though nearly a year had elapsed.

Appeal from the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Suit by the St. Louis Union Trust Company against Dora Finley, formerly Dora Patterson, and Mary E. Halliburton, formerly Mary E. Mellon. From a decree for the Trust Company, the defendant Mellon appealed, and, before the mandate of the Circuit Court of Appeals was remitted to the trial court, she entered into an agreement

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*Rehearing denied July 22, 1918.

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with the Trust Company relating to foreclosure. A final decree was entered in accordance with the agreement, and defendant Patterson, who objected, appeals. Affirmed.

Homer N. Boardman, of Oklahoma City, Okl., for appellant.

J. H. Everest, of Oklahoma City, Okl. (R. M. Campbell, of Oklahoma City, Okl., on the brief), for appellee.

Before HOOK, CARLAND, and STONE, Circuit Judges.

CARLAND, Circuit Judge. This is an appeal from a final decree entered in an action wherein the St. Louis Union Trust Company, hereafter called Trust Company, was plaintiff, and appellant and appellee and others were defendants, and an order entered in said action, subsequent to said final decree, striking the supplemental answer and cross-bill of appellant from the files of said cause. The status of the case at the time the final decree and order above mentioned were entered cannot be understood without some statement as to the prior proceedings in said action.

On November 1, 1909, appellee was the owner in fee of two lots in Oklahoma City, Okl. On said date she leased the same to appellant for the term of 99 years at the yearly rental of $6,000, payable in advance in monthly installments of $500. The lease obligated appellant to erect upon the premises a modern building not less than three stories high in addition to the basement. The building was to cost not less than $40,000, and the erection thereof was to be commenced within one year. Appellant subsequent to the execution of the lease entered into a contract for the erection of a building on the leased premises for the sum of $130,000. Subsequently she borrowed from the Trust Company $75,000, to be used in the erection of the building contracted for, and executed a mortgage, in which appellee joined, whereby they conveyed to the Trust Company as security for the contemplated loan the fee to the lots, as well as the improvements and buildings to be erected thereon. Appellant failed to pay the contractors the full amount due them for the erection of the building, and a mechanic's lien was filed for the balance. In this lien was included the sums due materialmen and subcontractors. The architects also filed a separate lien. The liens were claimed on the leasehold interest of appellant and the building, and not against the fee. The subcontractors also filed separate lien claims. The Trust Company purchased all these claims. Appellant defaulted in the payment of interest on the mortgage debt, and the Trust Company filed its bill of foreclosure, and by a supplemental bill included the claims of the lien creditors.

To the original bill the lien claimants answered, setting up various mechanics' and materialmen's liens. The appellee also answered, and filed a cross-bill, setting up and asserting a lien upon the leasehold interest, the improvements erected thereunder, and the rents and profits for the rent then due her under the terms of the lease above mentioned. She alleged a default in the payment of the rent, and sought a foreclosure of her lien for the amount of the rent and attorney's fees which might be found due, and that her lien be declared prior and

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superior to the liens of the mechanics and the Trust Company as to the leasehold interest. The appellant answered, and denied the defaults generally. The case went to trial, and a judgment of foreclosure was rendered in favor of the Trust Company for the amount of its debt, including the amount paid for the liens of the mechanics and materialmen, and in favor of appellee for the amount due her for rent, which was $6,900 and an attorney fee of $1,500. The trial court adjudged the priority of the several claimants to be as follows: First, the Trust Company for the entire sum due under its mortgage; second, the materialmen; and, third, appellee. From this judgment appellee alone prosecuted an appeal to this court.

This court on July 7, 1915, affirmed the judgment of foreclosure, but reversed the decree in regard to the priority of the liens. Before the mandate of this court was remitted to the trial court, appellee entered into the following stipulation and agreement with the Trust Company:

"Stipulation and Agreement.

"On the 5th of January, 1914, a decree of foreclosure was rendered and filed in the above-entitled cause. Defendant Mary E. Mellon appealed from said decree to the United States Circuit Court of Appeals, which court by its opinion and judgment filed on the 7th day of July, 1915, sustained said appeal to the extent as in said opinion and judgment set forth. A petition for a rehearing of said cause in the United States Circuit Court of Appeals was duly filed by St. Louis Union Trust Company, appellee, and on the 22d day of October, 1915, was denied. An application for a writ of certiorari has been granted by the Supreme Court of the United States upon the application and in favor of St. Louis Union Trust Company, appellee in the Court of Appeals, and petitioner in the Supreme Court of the United States; and said cause is now pending in the Supreme Court of the United States on said writ.

"Since the rendition of the decree and judgment of the United States court at Guthrie above referred to, counsel for St. Louis Union Trust Company in said cause have performed the following services, to wit: (1) They have prepared, submitted, and made oral argument upon their brief in the United States Circuit Court of Appeals; (2) they have prepared and sued out their application for writ of certiorari; and (3) they have prepared and at this time are ready to file their brief in the Supreme Court of the United States. On this date J. H. Everest, Esq., of counsel for Mary E. Mellon, now Mary E. Mellon Halliburton, tenders and offers to pay to St. Louis Union Trust Company the sum of $109,101.80, the same being the amount established by the said judgment on January 5, 1914, in favor of St. Louis Union Trust Company, plus interest thereon to this date, less payments received from time to time by St. Louis Union Trust Company, and agrees to pay court costs accrued and to accrue in this cause in the United States Circuit Court of Appeals and in the Supreme Court of the United States, and all subject to the terms of this stipulation and agreement. The St. Louis Union Trust Company is willing to receive said sum, and does receive the same from J. H. Everest, Esq., upon the terms and conditions set forth herein.

"Counsel for Mrs. Halliburton claim that because of said payment they are on this date entitled to be fully subrogated to all the rights of St. Louis Union Trust Company under the judgment of said District Court of the 5th of January, 1914, as well as under the decree and judgment of the United States Circuit Court of Appeals above referred to, and that the receipt of said sum by the St. Louis Union Trust Company works an equitable assignment of all its right, title, and interest in and to the same. It is expressly understood between the St. Louis Union Trust Company and Mrs. Halliburton that said sum of money is received by St. Louis Union Trust Company without prejudice to the St. Louis Union Trust Company, or to any of its

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rights, and it makes the claim that the receipt of said money does not work an equitable assignment, as claimed by Mrs. Halliburton, because it claims that Mrs. Halliburton has not paid the judgment and costs in full. There is an issue between the parties as to whether the services of counsel for St. Louis Union Trust Company in the Court of Appeals and in the Supreme Court of the United States, and a reasonable value to be placed upon said services, are and should be proper costs in this suit. Mrs. Halliburton insists that the fees of counsel for the Trust Company, as fixed by the said decree of the 5th of January, 1914, were and were intended to be in full payment to said counsel for all services rendered and to be rendered in said cause.

"It is agreed that this statement shall be and shall be construed as a stipulation and agreement between St. Louis Union Trust Company and Mary E. Mellon Halliburton, shall be filed in this cause in the District Court of the United States at Oklahoma City, Okl., shall be submitted to the judge of said court, and that the court will determine:

"First. Whether counsel fees for services rendered to St. Louis Union Trust Company in the United States Circuit Court of Appeals and in the Supreme Court of the United States shall be allowed and are admissible as allowances in addition to the fees allowed counsel for St. Louis Union Trust Company in the foreclosure decree.

"Second. If the court shall determine that counsel are entitled to fees for the further services rendered the St. Louis Union Trust Company, then the court will hear evidence as to the extent of said services, and will fix the amount of said fees, which will be taxed as costs and paid by Mrs. Halliburton as part of the court costs, and the said decree will be revised accordingly.

"If the court shall decide that St. Louis Union Trust Company is not entitled to fees for its counsel, then the said Trust Company will execute a formal assignment of its judgments and of its rights thereunder to Mrs. Halliburton on demand for same. A formal assignment of said judgments will likewise be made if the court shall adjudge that additional counsel fees are payable and the same are paid.

"St. Louis Union Trust Company, Plaintiff,
"By W. F. Wilson, John Tomerlin, and E. E. Buckholts, Its Counsel.
"Mary E. Mellon Halliburton, Defendant.
"By J. H. Everest, R. M. Campbell, Her Counsel.
"Dated January 4, 1917."

On December 15, 1915, the mandate of this court was spread upon the record of the trial court. With the record in this condition the case came before the court on the 9th day of April, 1917, for further proceedings. The court heard and denied the claim of the Trust Company for additional attorney's fees, and continued the cause for further hearing to May 8, 1917. At that time the appellant filed objections to the entering of a final decree and a motion for an order canceling and discharging all liens, charges, and claims paid by appellee under the agreement with the Trust Company. The trial court overruled the objections of appellant to the entering of a final decree, and overruled her motion for a decree canceling and discharging the claims and demands obtained by appellee from the Trust Company, and then proceeded to enter a decree in accordance with the mandate of this court. This decree adjudged the amount then due for rent to be $28,850. After the entering of this decree appellant filed a so-called supplemental answer and cross-bill, which counsel for appellee moved to strike from the files for the reason that said answer and cross-bill wholly failed to state facts sufficient to constitute any defense or for any relief in equity.

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[1] On June 12, 1917, this motion to strike came on for hearing and the motion was sustained. The objections of appellant to the entry of the final decree by the trial court on the mandate of this court were the same in substance as those presented in her so-called answer and cross-bill filed after the entry of the decree, and therefore it will only be necessary to consider the facts stated in the answer and cross-bill. Conceding, but not deciding, that appellant had the right to file the cross-bill in the then status of the case, we do not think it will be necessary to state the allegations of the same at length, as the question raised may be considered without doing so. By the answer and cross-bill appellant claimed that the transaction of appellee with the Trust Company, taken in connection with certain provisions of the lease between appellee and appellant, amounted simply to a payment of the claims and not a purchase thereof, and that after the payment of the same the amount paid became so much rent due, to recover which appellee must proceed under the lease, and that the transaction referred to did not give appellee the right of subrogation, so as to enable her to enforce the decree of the trial court in place of the Trust Company.

Appellant seems to have overlooked or ignored the fact that the decree of foreclosure obtained by appellee for the amount of rent due, viz. $28,850, is a valid and existing decree against appellant not affected by any of the questions which are sought to be raised by the so-called answer and cross-bill. The decree entered pursuant to the mandate of this court, so far as the rent due is concerned, only differs from the decree originally entered by the trial court in the amount found due for rent. The original judgment of foreclosure was not appealed from by appellant, and hence it stands as a valid decree of foreclosure against the leasehold interest, including the buildings erected upon the lots, so that, if appellant should be successful in her contention as to the matters now raised, it would in no wise relieve her from the effect of the judgment of foreclosure for the rent due. Appellant is also asking for equitable relief, and while conceding that all the amounts fixed by the decree are due and owing, not a cent is tendered for the purpose of doing equity.

[2, 3] We are clearly of the opinion that the agreement set forth in this opinion between appellee and the Trust Company amounted to an equitable assignment of the judgments and claims of the Trust Company to appellee. It is true that the formal assignment referred to in the last paragraph of the agreement was never executed, but a court of equity in a case like this will treat that as having been done which ought to have been done. We are clear, also, that the transaction between appellee and the Trust Company was not simply a payment of the claim by appellee, but was a purchase thereof. The intention of the parties is made clear by the instrument itself. If it had been the intention of the parties that appellee was simply paying the claims of the Trust Company, they would not have provided in the agreement for a formal assignment of the judgment, but for a satisfaction thereof. This language would entirely negative the idea that the appellee was simply paying the judgment.

[4] It is also expressly stated in the agreement that counsel for

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appellee claimed that because of the payment, their client was entitled to be fully subrogated to the rights of the Trust Company under the judgment. The Trust Company did not differ with counsel for appellee upon this subject, except it claimed that there was an issue between the parties as to whether its counsel was entitled to additional counsel fees. When this question was determined by the trial court adversely to the Trust Company, it fully acquiesced in the transaction, at least so far as the record shows.

Counsel for appellant base their contention upon certain language found in the tenth paragraph of the lease between appellee and appellant. That language is as follows:

"It is hereby further covenanted, stipulated, and agreed by and between the parties hereto that the lessor shall, at her option, have the right at all times during said demised term to pay any rates, taxes, assessments, water rates or other charges upon said premises and reversionary interest therein remaining unpaid after the same have become due and payable, and to pay, cancel, and clear off all tax sales, liens, charges, and claims upon or against said demised premises or reversionary interest thereon, and to redeem said premises from the same, or any of them, from time to time, and the amount paid, including reasonable expenses, shall be so much additional rent due from the lessee at the next rent day after any such payment, with interest thereon at the rate of 7 per cent. per annum from the date of the payment thereof by the said lessor until the payment thereof by the said lessee to the said lessor."

Also upon certain language found in the fifth paragraph of the same lease, which language is as follows:

"It is hereby covenanted, stipulated, and agreed by and between the parties hereto that there shall, during said demised term, be no mechanics' liens upon such buildings or improvements which may at any time be put upon or be upon said demised premises, and that in the event there shall be any liens filed thereon, then the lessee must pay off the same, and in the event the same shall not be paid off within thirty (30) days after such liens have been reduced to final judgment and after (30) days' written notice by the said lessor to the lessee, said lessor shall have the right and privilege at her option to pay off the same, or any portion of the same, and the amount so paid, including expenses, shall at the option of the said lessor be so much additional rent due from the said lessee to said lessor at the next rent day after such payment, with interest thereon at the rate of 7 per cent. per annum."

Under this language counsel for appellant contends that appellee was limited so far as the claims represented by the judgment of the Trust Company were concerned to paying them off and adding the amount paid to the amount of the rent due at the next rent day, and that if the rent was not paid appellee was limited to the remedies prescribed by the lease for a forfeiture of the same, and that appellee had no right to purchase an outstanding judgment and proceed to foreclose and thus terminate the lease in a different way than prescribed by the lease itself. We do not think that this contention can prevail. It would seem that the plain words of the language quoted from the lease did not limit appellee to the right to pay off claims and add the amount thereof to the rent due, for the reason that the lease in every instance where the subject is mentioned says it shall be at the option of appellee to do so. This means to do so or not, as she might choose. Appellee was in a position where she was compelled to pay off these

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claims in order to protect her property. It presented a clear case for subrogation.

[5, 6] It is suggested that the purchase of the judgment by appellee operated as a merger. Appellant is only interested in the leasehold estate. There could be no merger as to that. It is also complained that by section 5162, Rev. Laws Okl. 1910, an order of sale could not be issued on the judgment of foreclosure until the expiration of six months from its date May 8, 1917. We are of the opinion that as there has yet been no sale under the judgment appellant has not been prejudiced, conceding the statute to be applicable.

We see no equity in the contention of appellant, and the decree and order of the trial court is affirmed.

MURRAY v. RAY.

(Circuit Court of Appeals, Ninth Circuit. July 1, 1918. Rehearing Denied October 14, 1918.)

No. 3126.

1. BANKRUPTCY ⇐303(3)—CONVEYANCE IN FRAUD OF CREDITORS—EVIDENCE.
In suit by trustee of estate of one adjudged a bankrupt on June 15th, to cancel a deed made by the bankrupt to defendant on March 5th preceding, evidence *held* to sustain finding that conveyance constituted a gift, which was voidable at suit of trustee.

2. TRUSTS ⇐30½(1)—WHAT CONSTITUTES—CONDITIONAL GIFT.
The giving of a gift with the hope that the donee will at some time return it or its value does not operate to create a trust, or charge the donee with a trusteeship.

Appeal from the District Court of the United States for the Eastern Division of the District of Idaho; Frank S. Dietrich, Judge.

Suit by H. E. Ray, as trustee of the estate of Alec Murray, bankrupt, against James A. Murray. Decree for plaintiff, and defendant appeals. Affirmed.

Alec Murray, of whose estate in bankruptcy the appellee is the trustee, was adjudged a bankrupt on June 15, 1917. Thereafter the trustee brought a suit against the appellant to cancel a deed whereby, for a recited consideration of $1, the bankrupt on March 5, 1917, conveyed to the appellant land in the city of Pocatello, Idaho, on which was a building known as the "Auditorium"; the trustee alleging in the bill that the transfer of said real estate was made with the intention to hinder, delay, and defraud the creditors of the bankrupt, whose estate was insufficient to meet the claims of his creditors—the unsecured claims, according to the schedule, amounting to the sum of about $59,000, of which $40,000 was owing to the appellant, while the assets were about $2,500. The appellant answered, and alleged that the true and actual consideration for the deed was the fulfillment of a trust placed in the said bankrupt by the appellant a number of years prior to and preceding the date of the deed, by which trust the appellant and the bankrupt stipulated and agreed that, in consideration of the conveyance of said property by the appellant to the bankrupt, the latter was to have and to hold the same in trust for the appellant, to manage the same as the appellant's agent, and to render to the appellant all rents and profits therefrom, except a portion which he was to reserve as compensation for services and reimbursement for expenses, and that by the said trust agreement it was provided that the bank-

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rupt was to reconvey the property to the appellant at any time upon the latter's request, or on his own volition, if he desired to terminate the trust; that the appellant received no consideration for the transfer, and that the same was made solely for said trust purposes. The court below, upon the evidence, found that there was no agreement by which the property was impressed with a trust, and that the deed from the appellant to the bankrupt constituted a gift. The decree directed that the appellant execute a conveyance to the appellee.

James E. Murray, J. Bruce Kremer, L. P. Sanders, and Alf. C. Kremer, all of Butte, Mont., for appellant.

J. M. Stevens, of Pocatello, Idaho, for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The appeal presents the question whether the evidence is sufficient to sustain the finding and the decree of the court below. The trust agreement which was set forth in the appellant's answer herein is but feebly supported by testimony. The testimony of the appellant is thus reviewed in the opinion of the court below:

"After stating that he had no particular agreement with the bankrupt at the time the property was conveyed, and that there was nothing said about holding the title in trust, only some general understanding, he was asked by his counsel the question, 'At the time you conveyed it (the property) to him (the bankrupt), did you have any understanding that he was to convey it to you, or to any one else you might designate?' To which he replied, 'No; no agreement.' Then to the extremely leading question, 'You had an oral agreement, did you not?' he responded, 'Yes, sir; I did not think we needed anything more.' And upon cross-examination he stated that there was no distinct agreement, just a general understanding. He does not testify as to what, if anything, he said, or what, if anything, the bankrupt said, nor does he explain how or why he got such a general understanding, or attempt to give any reason for having the transfer made by the Monidah Trust Company."

There was no other testimony on the subject, except that of James E. Murray, a nephew of and attorney for the appellant, who testified that the appellant said:

"He would convey the property to him (the bankrupt), and it should stand in his name; but, at any time he wanted the property reconveyed, he would expect him to do so."

It was shown that in 1906 the appellant purchased the property in controversy at sheriff's sale, and caused the title to be taken in the name of E. L. Chapman, who was his employé; that Chapman thereafter conveyed the same to the Monidah Trust, a corporation, of which substantially all the stock was owned by the appellant; that on January 5, 1912, at the appellant's instance, the Monidah Trust conveyed the property to the bankrupt by a deed which was recorded on June 8, 1912; that on June 12, 1912, the bankrupt conveyed to George Winter an undivided one-half interest in the property, which interest Winter reconveyed to the bankrupt on December 29, 1914; and that on March 5, 1917, the bankrupt conveyed the property to the appellant. Prior to the first conveyance to the bankrupt the appellant, who owned the Pocatello waterworks, and conducted the same under the name of the Pocatello Water Company, was the defendant in a suit brought

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by the city of Pocatello to compel him to appoint two commissioners under the provisions of section 2839, Revised Codes of Idaho of 1909, to confer and act with two commissioners appointed by the city to fix and determine rates to be charged for water. City of Pocatello v. Murray, 21 Idaho, 180, 120 Pac. 812; Murray v. Pocatello, 226 U. S. 318, 33 Sup. Ct. 107, 57 L. Ed. 239; City of Pocatello v. Murray, 23 Idaho, 444, 130 Pac. 383, Ann. Cas. 1914C, 1050. To qualify one to act as a commissioner under the statute, it was necessary that he should be a taxpayer of the city. Winter and the bankrupt became taxpayers through the conveyance to them of the property in controversy. The appellant made them his commissioners to act with the commissioners appointed by the city. The fact that they were employés of the water company was held not to disqualify them. City of Pocatello v. Murray, 23 Idaho, 444, 130 Pac. 383, Ann. Cas. 1914C, 1050.

The case in which that was held was a proceeding brought to require the appellant herein to show cause why he should not be punished for contempt for his failure and neglect to appoint commissioners, as required by a prior peremptory writ. The appellant, in his answer to the order to show cause, alleged that Winter and the bankrupt were residents and taxpayers of the city of Pocatello, and that they were joint owners in fee simple of the property so conveyed, and his answer was accompanied by the affidavit of the bankrupt, in which the latter stated that he owned an undivided one-half interest in the Auditorium property in fee simple, and that he had paid the taxes thereon assessed for the year 1912. A similar affidavit, made by Winter, accompanied the answer. The court in that proceeding found that the facts so alleged in the answer were "clearly supported by the evidence."

The appellant points to the fact that the laws of Idaho contain no requirement that a taxpayer shall be the owner of a perfect, unincumbered title, or that he must be the owner of the equitable, as well as the legal, estate. Conceding this to be true, it does not meet the situation which the case presents. Here the appellant and the bankrupt have by answer and by affidavit deposed that the conveyance to the bankrupt was a grant of an estate in fee simple, an estate which is the highest known to the law, and which necessarily implies absolute dominion over the land. Coexistent with the fee-simple estate there could be no equitable estate. There was no evidence that the bankrupt ever agreed to convey the property to the appellant, or that he acknowledged that he was holding the same in trust for the appellant. Such a construction of the transaction is expressly negatived by the bankrupt's affidavit in the suit in the state court, and the appellant's answer to the contempt proceeding; and it is significant that the bankrupt was not called to testify in the present case, and that no reason or excuse was offered for the appellant's failure to call him as a witness.

[2] In view of all the evidence, we think the court below committed no error in finding that the conveyance to the bankrupt was a gift. As the court said:

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"It still remains true that he gave the property to the bankrupt without any reservations, conditions, or qualifications. It is immaterial that he hoped to get the property back. The giving of a gift, with the hope that the donee will at some time return it, or its value, does not operate to create a trust or charge the donee with a trusteeship. For his own purposes the defendant was under the necessity of making an absolute transfer. To have put the property in trust would have been futile."

The conveyance by the bankrupt to the appellant having been made without consideration and as a gift, it was voidable at the suit of the trustee in bankruptcy.

The decree is affirmed.

ALBERS COMMISSION CO. v. RICHTER et al.

(Circuit Court of Appeals, Eighth Circuit. July 24, 1918.)

No. 5056.

1. BANKRUPTCY ⟸95—RIGHT TO TRIAL.
Where the petitioning creditors alleged 11 acts of bankruptcy, among which was that the debtor admitted in writing his inability to pay, and one creditor denied such acts, demanding trial, and bankrupt later withdrew his denial of such acts, and his admission of inability to pay his debts was filed, the answering creditor had the right to a full and fair trial of every issue material to the adjudication of bankruptcy.

2. BANKRUPTCY ⟸95—RIGHT TO TRIAL—MATERIAL ISSUES.
The issue whether, as alleged, bankrupt had made admission in writing of his inability to pay his debts and his willingness to be adjudged a bankrupt, was a material one, as to which a contesting creditor had right to trial.

3. BANKRUPTCY ⟸91(1)—BURDEN OF PROOF.
Creditors, alleging that debtor has admitted in writing his inability to pay his debts and willingness to be adjudged a bankrupt, have the burden of proving such allegation.

4. BANKRUPTCY ⟸95—RIGHT TO TRIAL—CREDITORS.
Rule that, where alleged bankrupt admits in writing his inability to pay his debts and his willingness to be adjudged bankrupt, mere nonexistence of insolvency on filing petition is not a defense to claim for adjudication, under Bankr. Act, § 3a, cl. 5, does not prevent contesting creditor from raising issue whether bankrupt ever made such an admission.

Appeal from the District Court of the United States for the District of Nebraska; J. W. Woodrough, Judge.

Proceeding in the matter of William R. Richter, a bankrupt, wherein the Albers Commission Company, a creditor, appeals from adjudication of bankruptcy. Order of adjudication reversed, and cause remanded.

James C. Kinsler, of Omaha, Neb., for appellant.

Smith & Schall and Brogan & Ellick, all of Omaha, Neb., for appellees.

Before SANBORN and CARLAND, Circuit Judges, and BOOTH, District Judge.

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SANBORN, Circuit Judge. The Albers Commission Company, a corporation, and a creditor of William R. Richter, has appealed from an adjudication of Richter, a bankrupt, rendered on October 1, 1917, upon the ground that the court below denied it a trial of material issues pending under the pleadings between it and the petitioning creditors at the time of the adjudication. At that time the petitioning creditors had alleged in their original petition for the adjudication and in the amendments thereto 11 acts of bankruptcy committed by Richter, one of which was that he had admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt. The Albers Company had answered the original petition and the amendments, and had denied all the alleged acts of bankruptcy and the insolvency of Richter, which was alleged by the petitioners, and had stood upon its answer and demanded a trial of the issues between itself and the petitioning creditors. Richter, on September 12, 1917, had answered, and had denied all the acts of bankruptcy alleged in the original petition. On September 29, 1917, there was filed with the clerk of the court, but there is no evidence that it was ever offered in evidence, a written admission that Richter was unable to pay his debts and was willing to be adjudged a bankrupt, which on its face purported to be signed by him, dated August 23, 1917, about 20 days before the filing of his verified answer, by which he denied the acts of bankruptcy that had then been alleged, and averred that he should not be declared a bankrupt, and demanded a jury trial. On the same day, September 29, 1917, his attorneys, by leave of court, withdrew his answer. This was the status of the case and of the issues when the adjudication was made.

[1-3] There is no doubt that under these pleadings the Albers Company had the right to a full and fair trial of every issue between it and the petitioning creditors that was material to the adjudication of Richter, a bankrupt. In re L. Humbert Co. (D. C.) 100 Fed. 439, 440; B–R Electric & Tel. Co. v. Ætna Life Ins. Co., 206 Fed. 885, 889, 124 C. C. A. 545. Nor is there any doubt that the issue whether or not Richter had made the admission in writing of his inability to pay his debts and of his willingness to be adjudged a bankrupt was a material issue, nor that the burden of proving that Richter made such an admission was upon the petitioners who alleged it. The fact that Richter withdrew his answer, and thereby silently admitted the averment on this subject, did not deprive the contesting creditor of its right to a trial of that issue between itself and the petitioners according to the established practice and rules governing such trials.

[4] Counsel for the petitioners cite the conceded rule that, where an alleged bankrupt admits in writing his inability to pay his debts and his willingness to be adjudged a bankrupt, the mere nonexistence of insolvency at the time of the filing of the petition is not a defense to the claim for an adjudication. Section 3a, cl. 5, Bankruptcy Law (Act July 1, 1898, c. 541, 30 Stat. 546, 9 U. S. Comp. Stat. 1916, § 9587); In re C. Moench & Sons Co., 130 Fed. 685, 687, 66 C. C. A. 37; In re Duplex Radiator Co. (D. C.) 142 Fed. 906; West Co. v. Lea, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098. But this rule

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does not deprive the contesting creditor of its right to raise the issue whether or not the alleged bankrupt ever made such an admission, and to stay the attempted adjudication upon that ground until the petitioners fairly bear the burden of proving that he did.

Counsel for the contesting creditor avers that the court below held, over his objection, that the burden was on it to prove its defense in the first instance, that there was no burden on the petitioners to make any proof of the alleged admission, and that it made the adjudication on the pleadings, without any trial of the issue whether or not Richter made the written admission filed with the clerk. On the other hand, counsel for the petitioners assert that there was a trial, that evidence was received and considered, and that the court found that Richter made the admission, and that on that ground it rendered the adjudication. The record is spare and unsatisfactory; it contains no evidence, no statement that any witnesses were sworn or examined, or any evidence offered, nothing but the pleadings and orders of court and the adjudication. That order recites that, the petition and the answer of the Albers Company having been duly heard and considered, Richter's answer having been withdrawn, and it appearing that Richter on August 23, 1917, admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground, the court asked one of the counsel for the Albers Company what he would prove to sustain the issues on his part, and he replied that he considered the burden to be on the petitioning creditors, and thereupon the court declared that it held to the contrary, and again inquired what he would prove in defense, and he answered the solvency of the alleged bankrupt, and the court declined to hear such testimony and rendered the adjudication.

The assignment of errors was filed in this case on October 9, 1917, 20 days before the record was certified by the clerk. That assignment gave notice to counsel for the petitioners that the Albers Company claimed that there was error in the action of the court, in that it did not permit a trial, and in that it ruled that the burden was not upon the petitioners to prove the averments of their petition, and yet, so far as the record discloses, they never made any endeavor to get into the record any evidence that any testimony was taken, or that there was a trial of the issue that has been considered in this opinion. After a careful consideration of the order of adjudication and the recitals therein, in the light of the fact that there is no reference anywhere in the record to the introduction of any testimony or the examination of any witnesses, this court is unable to resist the conclusion that the court below fell into the error of making the adjudication without any trial of the issue whether or not Richter made the alleged admission of August 23, 1917, by reason of a ruling which it made that the burden was not on the petitioners to make any proof upon this subject, and in view of this fact the order of adjudication must be reversed, with costs against the appellees, and the case must be remanded to the court below for further proceedings in accordance with the views expressed in this opinion; and it is so ordered.

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REED v. CUSHMAN.

(Circuit Court of Appeals, First Circuit. May 24, 1918.)

No. 1344.

1. ARMY AND NAVY ⇐19—ENLISTMENT—MINORS.
National Defense Act, § 27, requiring written consent of parent for enlistment of one under 18 years into military service of the United States, if applicable to enlistment in National Guard, does not make enlistment without consent void, but only voidable by parent.

2. ARMY AND NAVY ⇐19—ENLISTMENT—MINORS—AVOIDANCE BY PARENT.
Any defect of enlistment in National Guard of one under 18 years, because without consent of father, becomes immaterial, and is not available to the father to secure his discharge, where not urged, though known, till after he was 18 and drafted into the service of the United States, as under National Defense Act, §§ 57, 58, 111, a member of the National Guard over 18 may be.

Appeal from the District Court of the United States for the District of Maine; Clarence Hale, Judge.

Habeas corpus by Joseph M. Cushman against Earle A. Reed. Decree for petitioner, and respondent appeals. Reversed and remanded.

John F. A. Merrill, U. S. Atty., of Portland, Me., for appellant.

John B. Kehoe, of Portland, Me., for appellee.

Before DODGE, BINGHAM, and JOHNSON, Circuit Judges.

PER CURIAM. Joseph H. Cushman, born June 26, 1899, enlisted March 8, 1917, in the Eleventh Company Coast Artillery, National Guard of Maine. He was in his eighteenth year, but at said date of enlistment was under the age of 18 by a little more than three months. He had a father entitled to his custody and control, whose written consent to his enlistment was never given.

Having been subsequently transferred to the Third Company Coast Artillery Corps, National Guard of Maine, that company was mustered into the military service of the United States on July 25, 1917. When so mustered into the United States service with said company he was very nearly one month over the age of 18 years.

On August 24, 1917, Joseph M. Cushman, his father, filed a petition for a writ of habeas corpus to the commanding officer of said Third Company, alleging that his son's enlistment on March 8, 1917, and subsequent mustering in as above, had been without his knowledge or consent. On the same day the writ prayed for was issued; the respondent made return thereto, producing Joseph H. Cushman in court as ordered; the cause was heard by the District Judge; and an order made discharging him and committing him to the petitioner's custody —he being, as the order recited, "under the age of 18 years at the date of enlistment and no consent of parents to said enlistment being shown." From this order the respondent appeals.

The petitioner relies on section 27 of the National Defense Act, passed June 3, 1916 (39 Stat. 166, 185, c. 134), wherein, among other things, it is provided:

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"That no person under the age of eighteen years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians, provided that such minor has such parents or guardians entitled to his custody and control."

Section 27 purports by its title, "Enlistments in the Regular Army," to regulate only enlistments in that branch of the military service of the United States. All the sections of the act from 2 to 55, inclusive, relate to the Regular Army and the various corps included therein. If the above provisions quoted from section 27 have any application to enlistments in the National Guard, it can only be because of the provision in section 69 that the qualifications for enlistment in the National Guard shall be the same as those prescribed for admission to the Regular Army. No express provisions are found in the act forbidding enlistments in the National Guard of minors under 18 without the written consent of parents or guardians.

[1] Assuming that the above provisions of section 27 were applicable to Cushman's enlistment in the National Guard on March 8, 1917, their effect was at most to make such enlistment voidable by the petitioner as his only surviving parent. They did not make the enlistment void as to him. In re Morrissey, 137 U. S. 157, 11 Sup. Ct. 57, 34 L. Ed. 644; Ex parte Dostal (D. C.) 243 Fed. 664; Ex parte Rush (D. C.) 246 Fed. 172. If the petitioner could have avoided it, he made no attempt whatever to do so while Cushman remained under the age of 18 years, although there can be no doubt from the evidence before us that he knew Cushman had enlisted as early as April 17, 1917, more than two months before his eighteenth birthday. The petitioner had during this period seen his son frequently at his house in Portland, and had twice visited him at Ft. Preble, in Portland Harbor, where he was stationed. The first notice given by the petitioner of any objection on his part to the enlistment was the filing of his petition for the writ now before us, two months after his son had reached the age of 18, and one month after his mustering into the military service of the United States on July 25, 1917.

[2] We are unable to agree with the petitioner's contention that his right to avoid his son's enlistment, whether in the National Guard or the Army of the United States, remained open to him from March 8, 1917, until his son should reach the age of 21. Congress has declared that the Militia of the United States shall consist of all able-bodied citizens between the ages of 18 and 45, and that the National Guard, being one of three classes into which such Militia is divided, shall consist of the regularly enlisted Militia between the ages before specified. See sections 57 and 58 of the National Defense Act. Members of the National Guard are subject to draft into the military service of the United States in time of war, and when so drafted, but not before, they become part of the Army of the United States and stand discharged from the Militia. Sections 1, 111, of the same act. The right of a father to the services of his minor son are subject to these provisions. In view of them it may be doubted whether enlistment in the National Guard, without mustering into the military service of the United States, can be regarded as an enlistment such as section

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27 of the act referred to. It would seem that such enlistment does no more than enroll the enlisted man in a class subject in time of war to be mustered into the military service of the United States, if over the age of 18 years at the time of such mustering in. After the father of a minor under 18 has knowingly permitted his son to remain a member of such class until after he has reached the prescribed age at which its members become subject to be mustered into the military service of the United States, and until after such mustering in has then taken place, we think that, even if he might have avoided the original enlistment in the National Guard, he had no right to avoid the different status later created after the age of eighteen had been reached. The defects, if any, in his original enlistment were thereby rendered immaterial. Blackington v. U. S., 248 Fed. 124, — C. C. A. —.

We hold, therefore, that the District Court erred in discharging Joseph H. Cushman by its order of August 27, 1917, and that it should have discharged the writ and remanded him to the custody of the respondent.

The decree of the District Court is reversed, and the case is remanded to that court for further proceedings in accordance with this opinion. The appellant recovers his costs of appeal.

JOHN A. SCHMITT'S SONS v. SHADRACH.

(Circuit Court of Appeals, Third Circuit. May 21, 1918. Rehearing Denied June 28, 1918.)

No. 2322.

1. Bills and Notes ⇐68—Acceptance—Statutes Applicable.
Where contractor, six months before his bankruptcy, gave order on owner, in favor of subcontractor, and the owner paid money to the contractor, who immediately paid it to the subcontractor within four months of the bankruptcy, and the trustee sued to recover it as a preference, Act Pa. May 10, 1881 (P. L. 17), providing that no person shall be charged as acceptor of order without written acceptance, was not applicable, in favor of the trustee, on the question of acceptance by the owner.

2. Appeal and Error ⇐1022(1)—Scope of Review—Findings of Referee.
Where the referee's finding is not a plain mistake, and has been affirmed by the District Court, it will not be disturbed.

3. Assignments ⇐58—Equitable Assignments—Assignments of Part of Claim.
An order by a contractor upon the owner to pay money to the subcontractor, which constituted only a part of the claim of the contractor, could not be enforced as an equitable assignment, in the absence of acceptance by the owner.

In Error to the District Court of the United States for the Middle District of Pennsylvania; Chas. B. Witmer, Judge.

Action by John Shadrach, trustee in bankruptcy of George Eckert, against John A. Schmitt's Sons. Judgment for plaintiff, and defendants bring error. Affirmed.

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John H. Dando and Edmund G. Butler, both of Wilkes-Barre, Pa., for plaintiffs in error.

W. Alfred Valentine and Edwin B. Morgan, both of Wilkes-Barre, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. This was an action of assumpsit, brought by the trustee of a bankrupt to recover a preferential payment. By agreement it was tried without a jury, and the special referee's report was adopted by the District Court, who entered judgment against the plaintiffs in error. The record is confused and disorderly; but, if we have succeeded in finding our way through it, the controversy turns on questions of fact that have been decided by the referee, whose findings (if supported by evidence) bind us as fully as the verdict of a jury. Briefly stated, what appears to have happened is this:

In April, 1911, the bankrupt, George Eckert, a builder in Wilkes-Barre, contracted with John M. Ward to erect a building for $25,000. The next day John A. Schmitt's Sons agreed with Eckert to take part of the construction off his hands, practically all except the interior finish, for $10,800. The Schmitts immediately began work, and from month to month furnished architect's estimates to Eckert, upon which he received the money from Ward. But, instead of using the money to pay the Schmitts what he owed them under the subcontract, Eckert applied a good deal of it to other objects, so that by November 1 (when the subcontract was nearly finished) he owed the Schmitts about $5,500. He had already received this money from Ward, and the Schmitts were dissatisfied with the situation and threatened to abandon their contract. This would have disarranged Ward's plans, and accordingly the three parties concerned tried to find some way to provide for the continuance of the work. Under the principal contract Ward was still bound to pay Eckert a considerable sum of money, so that without risk to himself he could assume Eckert's obligation to the Schmitts, if he chose to do so. The evidence establishes that he was willing to enter into some kind of an agreement, and on November 1 the Schmitts made an effort in this direction by assigning to him all the money due or to become due to them on their subcontract with Eckert. For some reason this assignment did not satisfy Ward, and he insisted that Eckert should draw an order on him in favor of the Schmitts. On November 6 this was done, and an order for $4,000 was delivered to him, and he retained it in his possession for several months. On February 1, 1912, Ward, in the presence of Eckert, the Schmitts, and McGlynn, his own architect, paid $3,500 in the form of a check to Eckert's order, which was immediately indorsed by Eckert and handed over to the Schmitts; this being the payment in dispute. As Eckert had been adjudged bankrupt on May 4, 1912, the transaction was within the four-months period, and if Ward (without having regard to the order) were really paying the money to Eckert

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on account of the principal contract, and if Eckert in turn were really paying it to the Schmitts, it may have been a preferential payment. On the other hand, if Ward had accepted the order and had thereby bound himself to pay $4,000 to the Schmitts, he may have been fulfilling in part his own obligation, with which the bankrupt was no longer concerned, and in that event the payment could not have been a preference.

[1, 2] The vital question of fact, therefore, relates to Ward's acceptance of the order, and upon this point the finding is that he did not accept. Concededly he did not accept in writing, and, if the Pennsylvania act of 1881 (P. L. 17) were controlling in this action, the absence of a writing would be decisive:

"No person within this state shall be charged as an acceptor on a bill of exchange, draft or order drawn for the payment of money, exceeding $20.00, unless his acceptance shall be in writing, signed by himself or his lawful agent."

But, as this action is not against Ward, we have laid the statute aside, and have examined the record to see whether it contains evidence tending to show that he had in fact accepted the order, whether by word of mouth, or by acts in pais. Unfortunately, Ward is dead; but upon this point we find competent and sufficient evidence upon both sides, and, as the referee's finding is not a plain mistake and has been affirmed by the District Court, it will not be disturbed. The referee might have found, as a jury might, that the payment on February 1 was made to the Schmitts on account of the order, or was made directly to Eckert, not at all on account of the order, but on account of work under the principal contract, for the architect testified positively that on that date $3,500 was due to Eckert, and that he himself had given a certificate for this amount.

[3] Neither can the order be treated as an equitable assignment by Eckert to the Schmitts; at the best, it affected only a part of the fund due by Ward to Eckert, and in the absence of acceptance by Ward cannot be enforced as an assignment. Mandeville v. Welch, 5 Wheat. 277, 5 L. Ed. 87; 1 Rose's Notes (Rev. Ed.) 1041; Sheatz v. Markley (C. C. A. 3) 249 Fed. 315, — C. C. A. —.

The judgment is affirmed.

ROGERS et al. v. MARION COUNTY LUMBER CORPORATION.

(Circuit Court of Appeals, Fourth Circuit. April 2, 1918.)

No. 1581.

1. APPEAL AND ERROR ⇐878(1)—NECESSITY OF APPEAL.
Where defendant did not appeal from the portion of the decree which was adverse to it, that matter will not be reviewed on plaintiff's appeal.

2. BOUNDARIES ⇐37(3)—DEEDS—CONSTRUCTION.
In a suit to enjoin the cutting of timber on a certain lot, which defendant claimed had been conveyed in plaintiff's timber deed, evidence *held* to show that the eastern line of tract, when properly located, included the lot.

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8. Logs and Logging ⇐3(7)—Timber Deeds—Construction.
Where a grant provided that timber was to be cut and removed in the ordinary way, the grantee was entitled to use skidders and other devices, so long as their use did not result in substantial injury to the unsold trees, etc.

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. Middleton Smith, Judge.

Suit by E. K. Rogers and others, against the Marion County Lumber Corporation. From a decree which denied most of the relief sought, plaintiffs appeal. Affirmed.

T. I. Rogers and W. M. Stevenson, both of Bennettsville, S. C., for appellants.

Henry E. Davis, of Florence, S. C. (Willcox & Willcox, of Florence, S. C., on the brief), for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. The above-named appellants, plaintiffs below, are the owners of a tract of land in Marlboro county, South Carolina, subject to a grant, executed in 1899 and afterwards acquired by defendant, of the right to cut and remove "all the short straw pine timber measuring 14 inches at the stump." In this grant the tract is thus described:

"All the land on the west side of a line beginning at the residence of George Harper and following the old pasture fence by the H. J. Rogers residence, and continuing on to the Levi Gibson line, being bounded by the lands of estate of R. G. W. Hodges on the north, on the east by the estate lands of H. J. Rogers and George Harper, on the south by lands of J. E. Napier and Emanuel lands, and on the west by lands of Mrs. Minnie S. Rogers, and Whittington lands; this being part of the estate lands of H. J. Rogers, deceased."

[1] The suit was brought to enjoin the cutting of any timber on a certain lot, known as the "Old Bay Field," on the ground that it is not included in the grant, to enjoin the construction of branch lines or spurs to the railroad authorized to be built on the tract, and to enjoin the use of "skidders" in carrying on the timber operations; and these were the three questions litigated at the trial. The decision rendered is to the effect that the grant includes the lot in dispute, that branch lines or spurs cannot be constructed under the permission to build "a railroad," and that skidders may be used to a limited extent under prescribed conditions. As defendant has not appealed, the second question is out of the case; the other two questions are here on plaintiffs' appeal.

[2] The principal controversy is whether the grant embraces the "Old Bay Field," so called, and this depends on the correct location of the east line of the described tract. In the grant this line is defined as:

"Beginning at the residence of George Harper and following the old pasture fence by the H. J. Rogers residence, and continuing on to the Levi Gibson line."

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As the Rogers residence is north of George Harper's, and the Gibson line still further north, the course apparently intended runs north from the starting point; and there was testimony that such a course would follow more or less of the way an old fence, or where at one time there had been a fence. It is enough to say that this north and south boundary, which takes in the disputed lot, answers the calls and harmonizes all the descriptive clauses of the timber deed. Moreover, it seems plainly the line that would be run by a practical surveyor in locating the land according to the language of the instrument.

The plaintiffs insist, however, and this appears to be the basis of their contention, that "the old pasture fence" referred to in the grant is a well-known fence on the westerly side of "Old Bay Field," and that consequently the lot in question is excluded. But the adoption of that fence as the eastern boundary of the tract involves many and serious difficulties. Its location is nowhere nearer than some 2,500 feet to the "residence of George Harper," which is the starting point named in the deed; and it would seem absurd to describe the place of beginning as "at" the residence of Harper, when it was in fact somewhere in an old fence half a mile away. If the designated starting point be taken, namely, at approximately the Harper residence, it would be necessary, in order to locate the boundary line as claimed by plaintiffs, to run south, instead of north, and thence westerly to "the old pasture fence," which would not at all answer the calls of the deed. Besides, a boundary so located would leave to the southeast a considerable area which is concededly covered by the grant; whereas, the entire tract conveyed is stated to be "on the west side of a line" which according to its description runs practically north and south through the place of beginning. In short, we are convinced that the learned District Judge, whose exhaustive review of the evidence leaves little to be said, was clearly right in holding that the grant in question includes the "Old Bay Field."

[3] The objection to the use of skidders needs but a word of comment, since upon that issue we are of opinion that the case is controlled by our decision in Vosburg v. Watts, 221 Fed. 402, 137 C. C. A. 272. True, in this case the grant provides that the timber is to be cut and removed "in the ordinary way," but that was plainly implied in the Vosburg grant, because it appeared that neither of the parties thereto contemplated the use of skidders when the grant was executed. And so we said:

> "But, even if this be assumed, it would not follow that the grantee should now be prevented from using modern and much more economical appliances to the extent that such use will not unreasonably impair the reserved rights of the grantors under their conveyance. The grantee should be allowed to use skidders and other suitable devices when they can be employed to advantage, provided their use does not result in substantial injury to the unsold trees which would otherwise be avoided. The grantee may not inflict general and widespread destruction upon the undersized trees by the use of steam skidders or other machines, and the grantors may not prohibit the use of economical methods and appliances which can be employed without unreasonable disregard of their property rights."

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The equitable rule thus stated applies to the facts of the instant case, and the contention of plaintiffs in this regard cannot be sustained.

The decree appealed from will be affirmed.

PHIPPS v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. April 2, 1918.)

No. 1568.

1. CONSPIRACY ⟸43(5)—SEDITIOUS CONSPIRACY—INDICTMENT—SUFFICIENCY.
An indictment for seditious conspiracy under Criminal Code, § 6, must charge force, which cannot be implied from the words "feloniously, unlawfully, willfully, and maliciously"; but where the overt act is alleged in charging defendants with intent to engage in armed hostility against the United States "by attacking with force and arms" defendant is so apprised of element of force that to sustain a demurrer on such ground would give effect to a mere defect of form, contrary to Rev. St. § 1025 (Comp. St. 1916, § 1691).

2. CONSPIRACY ⟸43(5)—SEDITIOUS CONSPIRACY—INDICTMENT—OVERT ACT.
In an indictment for seditious conspiracy against the United States, it is not necessary that the overt act charged should be the accomplishment of the design of the conspiracy.

3. CONSPIRACY ⟸47—SEDITIOUS CONSPIRACY—EVIDENCE—SUFFICIENCY.
In a trial for seditious conspiracy under Criminal Code, § 6, certain uncontradicted evidence *held* sufficient to warrant the finding that the defendant was a participant with another in organizing and forwarding the unlawful enterprise to seize by force certain property of the United States.

In Error to the District Court of the United States for the Western District of Virginia, at Big Stone Gap; Henry Clay McDowell, Judge.

John W. Phipps and another were convicted, under section 6 of the Criminal Code, for conspiracy to seize, take, and possess by force property of the United States, contrary to the authority thereof, and defendant Phipps brings error. Affirmed.

Randolph Henry, of Roanoke, Va., for plaintiff in error.

R. E. Byrd, U. S. Atty., of Richmond, Va.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. William V. McCoy and John W. Phipps were convicted under section 6 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1089 [Comp. St. 1916, § 10170]), which provides punishment for a conspiracy "by force to seize, take, or possess any property of the United States contrary to the authority thereof." The specific charge of the indictment was that the defendants "did feloniously, unlawfully, willfully, and maliciously conspire together to seize, take, and possess certain property of the United States, contrary to the authority thereof, which said property consisted of certain arms, ammunitions, and equipment under the control of certain military forces of the United States stationed in Wise county, Virginia, and other places."

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[1] The defendant Phipps brings the case here, assigning error in overruling his demurrer to the indictment, and in refusing an instruction to acquit him for failure of evidence. The charge of force is necessary to meet the requirement of the statute (Baldwin v. Franks, 120 U. S. 678, 693, 7 Sup. Ct. 656, 763, 30 L. Ed. 766), and force is not implied in the words "feloniously, unlawfully, willfully, and maliciously." In the same count, however, the overt act of recruiting soldiers is charged to have been done "with the intent of engaging in armed hostility against the United States of America by attacking with force and arms the duly enlisted and organized military forces of the said United States," etc.; and all the overt acts charged necessarily implied that the conspiracy was with the intent to use force. Looking at the entire count, the defendants could not fail to understand that they were charged with a conspiracy to enlist men, and take by violence the arms and ammunitions of the government in the hands of its soldiers. To sustain the demurrer on this ground, therefore, would be to give effect to a mere defect or imperfection in a matter of form only, not tending to the prejudice of the defendants, contrary to section 1025 of Revised Statutes (Comp. St. 1916, § 1691).

[2] It is not necessary, as contended by the defendant, that the overt act charged should be the accomplishment of the design of the conspiracy. The Supreme Court decided in Goldman v. United States, 245 U. S. 474, 38 Sup. Ct. 166, 62 L. Ed. 410, on January 14, 1918, that averment and proof of the conspiracy with any overt act in furtherance of it is sufficient, whether the result of the conspiracy was to accomplish the illegal end or not.

[3] The evidence was plenary that McCoy was listing and pledging men under oath for the enterprise of resisting the military authorities of the government by blowing up bridges and seizing arms in the possession of its soldiers. The witness Day, after testifying that McCoy told him of the designs above mentioned and introduced him to Phipps as "Gen. Phipps," made this statement as to Phipps' participation:

"I shook hands with him (Phipps) and taken a chair, and he taken one, and he commenced talking about being at work hard; said, 'I have been working pretty hard;' and he said 'Mr. Day, you understand the situation' (Mr. Phipps did); 'you know what you have come here for;' he said, 'I have got up a list here; you may not like it very well; there is a negro on it;' and I said, 'We don't like niggers very much in Buchanan;' and he said, 'He asked me to put his name down;' and he said, 'I haven't had time to pay any attention to it that I should have, I have been busy working.' He referred to the list I had been looking at when he said 'list'; subscribers; didn't say what, just the 'list.' Phipps did not go and state what they intended to do; more than he said, 'I will control some men here at the extract plant,' and said he could 'get about 150 men down at Dungannon.' I spoke to McCoy about a contract between Phipps—he was getting up—and he said, McCoy said to Phipps, 'Mr. Day thinks there ought to be a contract drawn between you and him;' and I said, 'Yes; there ought to be, to show what these men are to get;' that is, me and Phipps, to show what each man was to get. I had told McCoy before that, if I was going into it, I ought to have a contract with the general. Phipps said, 'We will give him one.' (Well, 'give him one?') McCoy did, after Phipps left. I turned the contract over to Mr. Devlin, as well as I recollect, at Roanoke. I think I have saw it since I come here. It is spelled at the heading of it 'Declaration of War by G. F. P,' as well as I

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recollect. McCoy drew the contract and signed it after Phipps left the room. I don't know that he said to McCoy to give me one, but he said he had to get back to work."

This evidence was not contradicted, and it was sufficient to warrant the finding that Phipps was a participant with McCoy in getting up the list and forwarding the unlawful enterprise of which McCoy had told Day.

Affirmed.

CHESBROUGH v. WOODWORTH et al.

(Circuit Court of Appeals, Sixth Circuit. June 29, 1918.)

No. 3179.

1. REMOVAL OF CAUSES ⟸107(10)—AMOUNT IN CONTROVERSY.

A cause removed from state court will not, eight years later on appeal, be remanded on the ground that the amount in controversy was less than $2,000, unless it is certain that the maximum limit of possible recovery at the date of commencing suit, and under any theory which plaintiff had fairly entertained, was less than the jurisdictional amount.

2. COURTS ⟸328(9)—AMOUNT IN CONTROVERSY—"INTEREST."

In an action for damages for fraudulent representations as to value of stock purchased by plaintiff, the jury might allow plaintiff an annual percentage, not as collateral interest, but as an element in giving her entire compensation for her loss, and such damages, although computed at a percentage rate, would not be that "interest" which the jurisdictional statute (Act March 3, 1887, § 1; Jud. Code, § 24 [Comp. St. 1916, § 991]) says must be excluded.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interest.]

In Error to the District Court of the United States for the Northern Division of the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Action by Eva A. Woodworth and others against Frank P. Chesbrough. Judgment for plaintiffs, and defendant brings error. Affirmed.

Thos. A. E. Weadock, of Detroit, Mich., for plaintiff in error.

Edw. S. Clark and John C. Weadock, both of Bay City, Mich., for defendants in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. Three cases, substantially similar to Woodworth v. Chesbrough (195 Fed. 875, 116 C. C. A. 465; 221 Fed. 912, 137 C. C. A. 482; 244 U. S. 72, 37 Sup. Ct. 579, 61 L. Ed. 1000), were consolidated in the court below, and it was stipulated that they should abide the event of Woodworth v. Chesbrough, and that in the event of the final success of plaintiff in that action, each of these three plaintiffs should have judgment for an amount equal to a specified fractional part of the final judgment therein. From a judgment entered in the con-

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solidated cause, in purported pursuance of this stipulation, this writ of error is brought.

Chesbrough's substantial contention is that the final judgment actually rendered in the test case was at variance with the principle announced by the Supreme Court, and that the stipulation in the consolidated cause should be interpreted by this principle without regard to the figures which erroneously entered into the judgment. This contention rests on a misapprehension. The Supreme Court said, in reciting the proceedings below, that the judgment was "for the amounts plaintiff had paid for his stock, less its then book value, after deducting its pro rata share of the actual loss," then existing and known to defendants, on account of certain worthless commercial paper. This mention of the book value of the stock credited against the amount of plaintiff's claim was an accurate reference to what was actually done by the jury on both trials, and approved by this court and the Supreme Court, in the course of reaching the verdict which was embodied in the final judgment. Plaintiff was thought entitled to recover what he had invested in reliance upon defendant's representations, less the value of what he got; and what he did get was to be fairly measured by the then book value of this stock, as corrected by deducting the loss which ought to have been written off the books before that time. It is clear that this credit for that book value of the stock to which the Supreme Court refers was given to Chesbrough in the judgment in the other case and in the judgment in this consolidated case; and his present effort is to get the same credit over again, including the additional book value that developed after the cause of action accrued and before plaintiffs sold their stock.

One question of jurisdiction exists: One of the plaintiffs in the consolidated cause, Miss Smalley, purchased 10 shares of stock for $1,450. She began suit in a state court, alleging this purchase, that the stock was worthless and that her damage was $3,000. The defendant, Chesbrough, in 1909, removed the case to the court below under a petition alleging that the amount in controversy was more than $2,000, exclusive of interest and costs. Thereafter, the case stood awaiting trial or awaiting judgment under the stipulation, until October, 1917, when the judgment now under review was entered. The suggestion is first made now and in this court that the pleadings at the time of removal demonstrated that the jurisdictional amount (then $2,000, exclusive of interest), was not in controversy.

[1, 2] We assume, without deciding, that the question is the same as if there had never been any consolidation, and that the defendant Chesbrough may somehow escape the effect of the facts that both parties by their respective pleadings agreed that the amount in controversy was more than $2,000, and that by this agreement, defendant has obtained eight years' delay. It at least must be true in that situation that the case will not now be remanded to the state court unless it is certain that the maximum limit of possible recovery at the date of commencing suit, and under any theory which plaintiff might have fairly entertained, was less than the jurisdictional amount. This is not certain. If the defendants' statements had been true, the stock might well

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have been worth considerably more than the apparent book value; and if it was in truth worthless as alleged, plaintiff might reasonably have believed herself entitled to recover this maximum worth. The action was one of tort, and the jury might have allowed her an annual percentage, not as collateral interest, but as an element in giving her entire compensation for her loss. Damages of that kind, although computed at a percentage rate and equivalent to contract interest, would not be that "interest" which the jurisdictional statute (then section 1 of Act of March 3, 1887; now section 24, Judicial Code [Act March 3, 1911, c. 231, 36 Stat. 1091 (Comp. St. 1916, § 991)]) says must be excluded. Brown v. Webster, 156 U. S. 328, 329, 15 Sup. Ct. 377, 39 L. Ed. 440. With "interest" thus defined and damages thus estimated, the damages might have exceeded $2,000 when the suit was commenced.

The judgment below must be affirmed.

CITY OF CHICAGO et al. v. FOX FILM CORPORATION.

(Circuit Court of Appeals, Seventh Circuit. March 8, 1918. Rehearing Denied June 4, 1918.)

No. 2542.

1. **APPEAL AND ERROR ⟸954(1)—ORDER PENDENTE LITE—REVERSAL.**
 A pendente lite injunctional order will not be reversed, unless there is an abuse of discretion, which can only appear from an obvious misunderstanding of the facts, or the palpable misapplication of well-settled rules of law by the trial judge.

2. **THEATERS AND SHOWS ⟸1—PERMIT TO EXHIBIT PICTURE—DISCRETION OF SUPERINTENDENT OF POLICE—ORDINANCE.**
 Harmful impression on minds of children of picture to which superintendent of police refuses permit for exhibition, pursuant to Chicago Code of Ordinances of 1911, § 1627, as amended July 2, 1914, must be an impression caused by obscenity or other forbidden characteristic, not an impression which superintendent, on nonlegislatively defined grounds, may deem harmful to children.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit in equity by the Fox Film Corporation against the City of Chicago and others. From an order refusing to dissolve a pendente lite injunction (247 Fed. 231), defendants appeal. Affirmed.

Chester E. Cleveland and Leon Hornstein, both of Chicago, Ill., for appellants.

Charles P. Schwartz, of Chicago, Ill., for appellee.

Before BAKER, KOHLSAAT, and EVANS, Circuit Judges.

BAKER, Circuit Judge. This appeal from an order refusing to dissolve a pendente lite injunction involves the construction and application of the following provisions of the ordinances of Chicago:

"Sec. 1627. If a picture or series of pictures for the showing or exhibition of which an application for a permit is made, is immoral or obscene, or por-

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trays any riotous, disorderly or other unlawful scene, or has a tendency to disturb the public peace, it shall be the duty of the general superintendent of police to refuse such permit; otherwise it shall be his duty to grant such permit."

Section 1 of amendatory ordinance of July 2, 1914: "That in all cases where a permit for the exhibition of a picture or series of pictures has been refused under the provisions of section 1627 of the Chicago Code of 1911, as amended, because the same tends towards creating a harmful impression on the minds of children where such tendency as to the minds of adults would not exist if exhibited to persons of mature age, the general superintendent of police may grant a special permit limiting the exhibition of such picture or series of pictures to persons over the age of twenty-one years: Provided, such picture or pictures are not of such character as to tend to create contempt or hatred for any class of law-abiding citizens."

Appellants refused to grant a permit under section 1627 for the exhibition of appellee's moving picture, "The Spy," but offered a permit "for adults only" under amendatory section 1.

From the pleadings and affidavits, the following may be accepted as the situation, pending final hearing: The photoplay depicts a young American's efforts to obtain in Germany the list of German spies in America, his capture, torture and death at the hands of a firing squad. There is nothing obscene or immoral; no portrayal of any riotous, disorderly, or other unlawful (noscitur a sociis) scene; nothing tending to disturb the public peace; but the action of the play, where great drops of sweat stand out on the face and chest of the hero as he endures torture and faces death, is too harrowing, in the honest judgment of the city's administrators, for the sensibilities of minors; and for that reason, and that alone, the permit under section 1627 was refused.

[1, 2] A pendente lite injunctional order will not be reversed unless there was an abuse of discretion; and this can only appear from an obvious misunderstanding of the facts or a palpable misapplication of well-settled rules of law on the part of the trial judge. The only misapprehension we find in the case is that of the city's administrator with respect to the discretion committed to him by the ordinances. Section 1627 sets up a standard, but allows no discretion. If a photoplay conforms to that standard, "it shall be his duty to grant such permit." If it does not, he must refuse the permit. In deciding the question of fact the trier must of course take the viewpoint of old and young, wise and foolish, learned and ignorant; but a picture either is or is not obscene, by the one standard, including all the public. Amendatory section 1 brings in the matter of discretion. If a permit under section 1627 is refused, the administrator nevertheless "may grant a special permit," limiting the exhibition to adults. The discretion goes only to permitting a nonconforming picture to be exhibited to adults on the administrator's belief that such exhibition would not undermine the settled moral and peaceful character of adults. The "harmful impression on the minds of children" must be an impression caused by the obscenity or other forbidden characteristic of the picture —not an impression which the administrator on nonlegislatively defined grounds may deem harmful to them. Since Euripides' time it has been mooted, in the dramatic and other arts, how far the depiction of terror and anguish may properly be employed for the purification

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of the passions of the observer. If the glycerine tears and beads of sweat of the moving picture art are too horrifying for children, it was not for the administrator of these ordinances to say so; it must first be declared by the lawmaking body—if constitutional restrictions permit.

The order is affirmed.

SUBORICH v. ALASKA UNITED GOLD MINING CO.

(Circuit Court of Appeals, Ninth Circuit. July 1, 1918. Rehearing Denied October 14, 1918.)

No. 3116.

1. MASTER AND SERVANT ⟸265(7)—INJURIES TO SERVANT—NEGLIGENCE.
 Mere proof by servant that his eye was injured by small bits of rock flying into it by reason of another servant breaking rock with a hammer in a mine, without any showing that the other servant was careless, or that breaking rock at such place was improper or unusual, was insufficient, under the doctrine of res ipsa loquitur, to show negligence.
2. MASTER AND SERVANT ⟸265(2)—INJURIES TO SERVANT—NEGLIGENCE—BURDEN OF PROOF.
 In an action by a servant, negligence on part of master is not to be inferred, but must be proved by servant.

Appeal from the District Court of the United States for Division No. 1 of the District of Alaska; Robert W. Jennings, Judge.

Action by Rodevan Suborich against the Alaska United Gold Mining Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Rodevan Suborich, John Rustgard, and A. H. Ziegler, all of Juneau, Alaska, and Charles L. Brown, of San Francisco, Cal., for appellant.

Hellenthal & Hellenthal, J. A. Hellenthal, and Simon Hellenthal, all of Juneau, Alaska (Curtis H. Lindley, of San Francisco, Cal., of counsel), for appellee.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge. The plaintiff, after alleging that he was an employé as a laborer in the mine of the defendant, charged that, while he was engaged in assisting in the extraction of ore, another employé was engaged in breaking ore in the mine with a large sledge-hammer about 10 feet away from plaintiff; that the employé struck ore and rocks with the hammer in a direction towards plaintiff, "and in a direction necessarily driving pieces of said rock or ore against this plaintiff, as said other employé then and there well knew; that nevertheless said employé negligently and wantonly, and with utter disregard for the safety of this plaintiff, then and there struck a piece of rock or ore in the direction aforesaid by said sledgehammer, and thereby and in that manner did drive a piece of said ore or rock onto the face and right eye of plaintiff, and thereby and in that manner inflicted serious wounds upon the face and right eye of plaintiff." After denying all negligence, the case was tried before a jury.

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The only testimony in support of the averments of negligence came from the plaintiff and the shift boss of the mining company. After testifying that he was a miner employed by the defendant company as a car dumper, plaintiff said:

"I was in the employ of defendant company as a car dumper, working underground on the 1,500-foot level of the defendant's mine on Douglas Island. For several years prior to the injury I had been in the employ of said company, and engaged in doing all kinds of laboring work inside the mine, except machine work. On the date mentioned there was working within 6 or 8 feet of me another employé of the defendant, by the name of 'Shortie,' whose work consisted in dumping ore cars over grizzlies into ore chutes. There was one large rock which 'Shortie' was endeavoring to break by striking it with a hammer, and while he was so engaged a piece of the rock flew from under the hammer so used by 'Shortie' and struck me in the right eye, so injuring me that in consequence thereof I have entirely lost the sight of that eye."

That was the whole of the testimony of plaintiff. Olson, the shift boss when the accident occurred, also an experienced miner, testified for plaintiff that:

"In breaking rock with a hammer, when the hammer is swung from right to left against a rock, pieces of the rock are likely to be driven from the right to the left."

Upon this evidence defendant moved for a nonsuit, on the ground that no evidence had been introduced showing or tending to show negligence on the part of defendant or its agents. The motion was granted, judgment went in favor of defendant, and plaintiff appealed.

The position of plaintiff is best stated by the following quotation from his brief:

"A close scrutiny of the record discloses the fact that the plaintiff has made substantial proof of his injury, and, adopting the theory that an employer is required to exercise reasonable care in providing an employé with a safe place to work, and must be held unreasonable in damages for neglect of this duty, brings us to the conclusion that from the evidence presented there was sufficient proof upon which the trial court should have sent the case to the jury for its conclusions."

[1] But there is no evidence of negligence on the part of defendant. There is nothing whatever tending to show that it was improper or careless for the mining company to use grizzlies in sorting the rock to fall into the ore chutes below. Obviously, in using a grizzly, it is often necessary to break larger rocks by use of a hammer. There is nothing at all tending to show that "Shortie" was careless in the manner in which he broke the rock, for in breaking any rock with a hammer pieces are likely to fly in various directions. Nor is there the slightest bit of evidence that the place in which the plaintiff was working was in itself unsafe, or that the work involved any hazard not usual or incidental to the risk of the employment plaintiff was engaged in.

[2] Negligence is not to be inferred, but must be proved by the party charging it. The doctrine of res ipsa loquitur is not applicable, for it is impossible to say that the accident and the circumstances under which it occurred naturally raise the presumption that the mining company violated any duty which the law imposed upon it. Shearman & Redfield on Negligence, §§ 58a, 58b.

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As the record fails to disclose evidence of omission by defendant to use that degree of care and diligence which it was its duty by law to use for the protection of plaintiff from injury, no action for damages lies against defendant.

The judgment is affirmed.

THE GASTON. THE JOHN W. DAVIDSON. THE ANNA.

(Circuit Court of Appeals, Fourth Circuit. April 19, 1918.)

No. 1594.

COLLISION ⊜153—APPEAL—FINDING OF TRIAL COURT ON CONFLICTING EVIDENCE.

Where it was undisputed that claimant's steamship did not keep a proper lookout, and was exceeding the speed permitted by the harbor regulations, at the time of collision, and the evidence was conflicting as to fault of the tug towing libelant's barge, the trial judge's finding for libelant against claimant will be affirmed.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge.

Libel for collision by Arthur Johnson, as master of the barge John W. Davidson and as bailee of the cargo, against James W. Edgar, master of the steamer Gaston, in which the Marshall Towing Company, Incorporated, as owner of the tug Anna, were impleaded. From a decree (244 Fed. 480) for libelant against the Gaston alone, the master thereof and the Baltimore Steam Packet Company, owner thereof, appeal. Affirmed.

Walter H. Taylor, of Norfolk, Va. (Loyall, Taylor & White, of Norfolk, Va., on the brief), for appellants.

Floyd Hughes, of Norfolk, Va. (Hughes & Vandeventer, of Norfolk, Va., on the brief), for appellee Johnson.

Henry H. Little, of Norfolk, Va. (Hughes, Little & Seawell, of Norfolk, Va., on the brief), for appellee Marshall Towing Co., Inc.

Before KNAPP and WOODS, Circuit Judges, and ROSE, District Judge.

ROSE, District Judge. At about half past 10 of the evening of January 17, 1917, the steamship Gaston came into collision with the barge John W. Davidson, the latter then in tow of the tug Anna. The master and owner of the Gaston appealed from the decree below, which held it solely in fault.

That it was to blame cannot be seriously questioned. It was not keeping a proper lookout. It did not see the towing lights on the Anna, which were lit and burning. The steamship was proceeding at a speed far greater than that permitted by the harbor regulations applicable to the portion of the harbor of Norfolk in which the collision occurred, and moreover it was the burdened vessel. It says that, even so, the tug Anna was in fault, because it changed its course and cut

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across the bow of the Gaston at a time when it was impossible for the latter, by any exercise of prudence, to have avoided the collision. That such was the fact is denied. There was conflicting evidence on the question. The learned District Judge, who saw and heard the witnesses, found the contention was not sustained. We see no reason to reach a different conclusion.

Affirmed.

SARPY COUNTY v. GALVIN.*

(Circuit Court of Appeals, Eighth Circuit. May 27, 1918.)

No. 5020.

1. COURTS ⇐366(23)—FEDERAL COURTS—FOLLOWING RULE OF STATE COURT.
Whether under the Nebraska Statutes the right of action for death from a defective county highway inures to personal representative, or the surviving spouse and next of kin, is peculiarly a question of local law upon which the decision of the highest state tribunal is controlling.

2. DEATH ⇐31(3)—ACTION FOR WRONGFUL DEATH—PARTY PLAINTIFF.
An action under Nebraska statute against a county for death caused by a defective highway must be brought in the name of the administrator.

In Error to the District Court of the United States for the District of Nebraska; Joseph W. Woodrough, Judge.

Action by John M. Galvin, administrator of the estate of May Swift, deceased, against the County of Sarpy. Judgment for plaintiff, and defendant brings error. Affirmed.

Matthew Gering, of Plattsmouth, Neb. (E. S. Nickerson, of Papillion, Neb., on the brief), for plaintiff in error.

Yale C. Holland, of Omaha, Neb. (J. A. C. Kennedy, of Omaha, Neb., on the brief), for defendant in error.

Before HOOK, CARLAND, and STONE, Circuit Judges.

HOOK, Circuit Judge. [1, 2] This is an action by an administrator for the death of his intestate caused by a defective highway in Sarpy county, Neb. The county, not having adopted the township organization act, was responsible for the condition of its highways. The plaintiff had judgment. The only question meriting notice is whether under the statutes of the state now in force the right of action in such a case inures to the personal representative of the deceased or to his surviving spouse and next of kin. The question is peculiarly one of local law upon which the decision of the highest tribunal of the state is controlling. Whatever doubt may have existed has been settled recently by the Supreme Court of Nebraska in Swift v. County of Sarpy, 167 N. W. 458. That was an action growing out of the same accident as the one involved here; the only difference being that it was brought by the widower and next of kin instead of by the administrator. It was there held that the right of action was in the latter.

The judgment is affirmed.

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*Rehearing denied October 28, 1918.

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BANKS v. UNITED STATES (two cases).

(Circuit Court of Appeals, Third Circuit. August 19, 1918.)

Nos. 2305, 2406.

CRIMINAL LAW ⊜1159(2)—REVIEW OF VERDICT.

There being direct and positive testimony connecting defendant with the charge, the verdict of guilty is not reviewable.

In Error to the District Court of the United States for the District of New Jersey; Thos. G. Haight, Judge.

Edward and Nellie Banks were convicted of furnishing liquor to soldiers in uniform, and bring error. Affirmed.

Robert S. Hudspeth, of Jersey City, N. J., for plaintiffs in error.

Charles F. Lynch, U. S. Atty., and Joseph L. Smith, Asst. U. S. Atty., both of Newark, N. J.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

PER CURIAM. The hearing of these writs of error was advanced, because we were given to understand that an important question was to be raised concerning the constitutional right of the President to make certain regulations under section 12 of the Act of May 18, 1917, c. 15, 40 Stat. 82. At the argument, however, the question was abandoned, and an examination of the record discloses no other point that needs discussion. Edward Banks and his wife were indicted and convicted for furnishing liquor to soldiers in uniform, and in each case there was direct and positive testimony connecting the defendant with the charge. The verdicts are therefore beyond our power.

Each judgment is affirmed.

UNITED STATES ex rel. KANTOR v. JOHNSON, Brigadier General, etc.

(Circuit Court of Appeals, Second Circuit. June 11, 1918.)

HABEAS CORPUS ⊜113—STAY—APPELLATE JUDGE—POWER TO ALLOW.

A single judge of the Circuit Court of Appeals is without power to grant a stay pending an appeal in a habeas corpus proceeding, where the District Judge, who remanded the relator and allowed the appeal, refused the stay.

Appeal from the District Court of the United States for the Eastern District of New York.

Habeas corpus by the United States, on the relation of Joseph Kantor, against Evan M. Johnson, Brigadier General, Commander of the 77th Division, U. S. A., at Camp Upton, N. Y. The writ was denied, and, pending appeal, relator was remanded. On motion to grant a stay. Motion denied.

Before WARD, Circuit Judge.

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WARD, Circuit Judge. This is a motion to grant a stay pending an appeal to the Circuit Court of Appeals in a habeas corpus proceeding. Judge Chattfield in the District Court, who remanded the relator, also allowed the appeal, and has refused a stay. If I had allowed the appeal, I would have had power to grant a stay; but the case is now in the Circuit Court of Appeals, and I do not think a single judge of the court has power to do so.

The motion is denied.

BONITA MFG. CO., Inc., v. BLACKBURN.

(Circuit Court of Appeals, Third Circuit. June 28, 1918.)

No. 2354.

PATENTS ⇐328—VALIDITY—INFRINGEMENT—CABLE HANGER.

The Blackburn patent, No. 1,144,318, claim 1, for a cable hanger by which to attach lead tube carrying electric wires to supporting steel cable, called a messenger, *held* valid, but not infringed by Brenizer patent No. 1,155,127.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Suit in equity by Jasper Blackburn against the Bonita Manufacturing Company, Incorporated. From a decree (248 Fed. 743) for complainant, defendant appeals. Reversed in part.

Howson & Howson, of Philadelphia, Pa. (C. H. Duell and F. P. Warfield, both of New York City, of counsel), for appellant.

Edward E. Longan, of St. Louis, Mo., and J. Bonsall Taylor and E. Hayward Fairbanks, both of Philadelphia, Pa., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This is an appeal from a decree holding the first claim of the plaintiff's patent No. 1,144,318, June 22, 1915, for Improvements in Cable Hangers, valid and infringed. 248 Fed. 743.

A cable hanger is a device by which lead covered electric cables are hung and suspended. These cables are very heavy, yet they possess so little tensile strength, that they cannot support themselves. Therefore, in running an electric line, a strong steel wire is first tightly stretched from pole to pole. Its function is to carry the entire weight of the cable. This wire is technically termed the "messenger wire" or the "messenger." On the messenger, cable hangers—small spring wires so bent as to hold the cable and grip the messenger—are placed at regular intervals, and through them the heavy lead covered electric cable is drawn and by them it is suspended.

To do satisfactorily the things required of it, a cable hanger must be capable of being readily affixed to the messenger without the use of tools, that is, by the lineman's hands alone, and must be as readily removed. When in place, the hanger must grip the messenger so that it

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will not slip or creep when the heavy cable is drawn through it. As cable hangers are used by the million and are put in position by hands that are not always expert, it is necessary that their construction be cheap and simple.

These being the demands of the art, every cable hanger consists, so far as we have been shown, of a single piece of elastic wire bent in a shape to do the several things required of it. The primary requirements being to grip the messenger and carry the cable, there have been developed in all hangers certain well defined parts. These are a loop, by which the cable is loosely suspended, and hooks, which firmly grip the messenger. All cable hangers have loops of different dimensions and hooks bent or twisted in varying shapes to effect different grips. There is not much variation of shape in the loops; there is considerable in the twist of the hooks. It is in the latter that invention in different hangers is to be found, for it is by the peculiar grip of the hanger hooks and their extensions that resistence to sliding or creeping is effected.

The simplest and perhaps the least effective grip is in the very early type where the hooks are positioned close together and immediately above the loop. All grips are variations of this elemental grip. Brown (No. 837,183) varied it in one form by spacing the hooks somewhat apart and extending their ends into arms which pass outwardly in opposite directions along the side of the messenger and beneath it; and in another form by spacing the hooks wide apart and by carrying spacing arms from the loop to the hooks along the top of the messenger. Hagerman (No. 795,910) had previously done very much the same thing, with a difference. He separated the hooks by even a wider space than in Brown's first form and extended from but one hook a messenger-encircling arm. Dissel (No. 950,148) likewise separated the hooks but carried the hooks over the messenger, then down below the messenger and up again, thus entwining the messenger as by the horns of a ram outstanding in opposite directions. Krips & Wright (No. 960,344) placed four hooks above the messenger and two below with no more spacing than is necessary to align the hooks. These hangers were representative of the art before Blackburn. It is really difficult to discover in them any distinguishing principle of gripping except such as is incidental to the peculiar mechanism of each, unless it be the distinction between the Krips & Wright hanger, which grips the messenger transversely and squeezes it, and Brown, which develops frictional resistance by extended arms on the messenger, and Hagerman and Dissel, which entwine the messenger and obtain somewhat the same resistance as in Brown.

In this state of the art Blackburn came along and invented what admittedly is an improvement on other hangers. His invention is disclosed by the claim of the patent quoted in the margin.[1]

Blackburn's hanger consists of the customary tempered steel wire

[1] "1. A cable hanger comprising a support for a cable, a pair of separated elements for suspending the hanger from a messenger, and an elastic element extending from one of the separated elements toward the other and disposed at an angle relative to a line drawn through the separated elements."

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bent and twisted in the form of a loop with spacing arms extending from the loop to the hooks, as in other hangers. The hooks, however, are spaced well apart. One hook performs no function other than that of a hook; while from the other hook an arm is extended, as in Hagerman, but differing from Hagerman, the arm is reversed and turned back toward the neck of the loop. This is a third arm, that is, it is an arm in addition to the customary two spacing arms, and is the "elastic element" mentioned in the claim. This arm is so bent that it must be sprung out of its normal position when placed by leverage on the messenger. When thus sprung into position, it presses by elastic contact on the underside of the messenger. In this arrangement, the spacing arm of the hanger, extending from the loop to the last named hook, is in a position below the reversed elastic arm, and its practical effect (though not its claimed function) is to give the hanger a grip very like the grip of a cinch. When the metal of the hanger is heavy, the spacing arm overlapping the extended elastic arm may not come in contact with the extended arm, but when the metal is light, the overlapping spacing arm is in contact with the extended arm. The result in either instance is that the elastic arm grips the messenger with a locking action and the greater the drag of the cable the tighter becomes the grip on the messenger.

There is merit in Blackburn's conception of a locking grip for which he is entitled to the reward of a patent. The Blackburn hanger is a mechanical and commercial success. Without discussing the various phases of validity of the Blackburn patent, we find ourselves in accord with the learned trial judge in holding its first claim valid. The remaining question is whether the claim is infringed.

The cable hanger of the defendant is made under a patent to Brenizer (No. 1,155,127). It is a very simple arrangement. It consists of the ever-present loop and hooks, a pair of spacing arms extending outwardly in opposite directions from the neck of the loop, passing obliquely underneath and along the sides of the messenger wire and ending in ordinary overhanging hooks. On first view it seems very like the primitive hanger with hooks above the loop, but on closer inspection it is apparent that the hooks are farther apart, and that they grip in a way the hooks of the early hanger did not.

The grip of the Brenizer hanger is found in the pressure exerted by the drag of a moving cable—according to the direction of its movement—on one or the other of the spacing arms, whereby it is locked against the bottom of the messenger and also along its side as it nestles between the strands of the messenger, if the messenger be a wire cable. (The latter action, though actual, is not claimed by the patent.) The result is that the grip develops into a lock, and, as in Blackburn, the harder the pull the tighter the grip becomes.

The Brenizer hanger contains no inwardly extending or underslung arm, and consequently the grip does not resemble a cinch. Its grip is gotten exclusively from the spacing arms and connecting hooks. The plaintiff says that this device infringes the patent, and for several reasons. The principal one, as he maintains, is, that its two arms extending outwardly from the loop to the hooks are the equivalent of the

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Blackburn one elastic arm extending inwardly from a hook. Of this opinion was the learned trial judge. We have difficulty in reaching this conclusion, assuming, as we do, that we are correct in our opinion on several points, which we shall mention very briefly.

The patentee lays emphasis on the underhold of the elastic arm of the patented device with its lock-like grip, and very properly, for this is the essence of the invention. But he did not discover the underside of the messenger and had no monopoly on a hold upon it. The grips of Hagerman, Brown, and Dissel, also went under the messenger as well as along its side. It is claimed for the patent that its grip makes a "kink" in the messenger which aids the locking. This is true, but there is nothing novel about a kink. It is always to be found in greater or less degree where an arm extends both above and below the messenger and pressure is exerted at all points of contact, as in Hagerman, Brown, and Dissel. The patentee further claims that the arms of the Brenizer hanger are elastic, and are practically the "elastic element" of the claim of the patent. It is true that they are elastic in the sense that they are a part of the single elastic wire out of which the whole device is constructed, but this elasticity performs no elastic function in the grip. Fundamentally, the arms of the Brenizer hanger are rigid. In the hanger of the patent, the extended arm is purposely given elasticity by bending it out of normal position so as to spring it on the messenger. It is from the spring thus given the arm that the particular gripping action of the claim is obtained. There is no such function from elasticity in the arms of the defendant's device.

While the device of the patent has the same pair of arms extending outwardly in opposite directions from the neck of the loop to the hooks, as in Brenizer's device, the patent gives no function to these arms other than to space the hooks and to carry the hooks at their extreme ends. These are termed "spacing arms," and in the hanger of the patent they perform no function other than to space and to hold the hooks. In the device of the defendant, substantially the same spacing arms are present, but they are positioned closer to the messenger wire and in such a relation to its bottom and side as to give them in addition to their normal spacing and hook-holding function a gripping function. The gripping function of the spacing arms of the Brenizer hanger is not present and is not even suggested by the same arms in the device of the patent. We think the defendant has done something with this pair of arms that is really useful and that was not thought of by Blackburn. He has given them a function, which, so far as we are informed, was not given them by any hanger in the art. This involves merit, to the benefit of which we think Brenizer is entitled. We feel that in thus giving the ordinary spacing arms of a hanger a new function—that is, in developing an entirely new function in an old means—it cannot be said that this old means is the equivalent of the very different new means of the patent.

We fail to find in the hanger of the patent any principle of a grip newly discovered or broadly developed that entitles the patent to a wide range of equivalents. Blackburn obtained a lock grip in one particular way. It has merit. Brenizer obtained a lock grip in another

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way. It too has merit. Both were rewarded by patents. The merit of each invention is found in its particular construction and in its peculiar lock grip. Neither was awarded a monopoly of a lock grip. As the construction of the two devices is structurally and functionally different, one cannot impose on the other the doctrine of equivalents, and, so long as the patents stand, each has a monopoly within its sphere. We are of opinion, therefore, that infringement is not present and that the decree below should to this extent be reversed.

FERD MESSMER MFG. CO. v. ALBERT PICK & CO. et al.

(Circuit Court of Appeals, Eighth Circuit. April 15, 1918.)

No. 5031.

1. PATENTS ⟸328—VALIDITY—INFRINGEMENT.
The Pick patent, No. 1,107,700, for an improvement in drinking glasses consisting of a shallow bulge below the rim, etc., *held* valid, the invention not having been anticipated or in prior use, and also *held* infringed.

2. PATENTS ⟸312(3)—VALIDITY—PRIOR USE—EVIDENCE.
To sustain the defense of prior use in a suit for patent infringement, the proof thereof must be clear, satisfactory, and beyond a reasonable doubt.

3. PATENTS ⟸15, 328—DESIGN—VALIDITY.
The Pick design patent, No. 44,616, for a drinking glass made with a bulge to protect the rim, *held* invalid, the bulge not being ornamental within Rev. St. § 4929 (Comp. St. 1916, § 9475).

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Suit by Albert Pick & Co. and another against the Ferd Messmer Manufacturing Company, a corporation. From a decree for complainants, defendant appeals. Affirmed in part, and in part reversed.

William K. Small, of St. Louis, Mo. (William F. Small, of St. Louis, Mo., on the brief), for appellant.

Fred Gerlach, of Chicago, Ill. (Douglas W. Robert, of St. Louis, Mo., on the brief), for appellees.

Before HOOK, CARLAND, and STONE, Circuit Judges.

CARLAND, Circuit Judge. This is an action to enjoin appellant from infringing letters patent No. 1,107,700, issued to Hugo Pick August 18, 1914, for an improvement in drinking glasses, and letters patent No. 44,616, issued to said Pick September 2, 1913, for a design for a drinking glass. Albert Pick & Co. are exclusive licensees. Appellant denied the validity of the patents, and pleaded anticipation, prior use, noninfringement, and double patenting. In his application for the structural patent Pick stated his claim as follows:

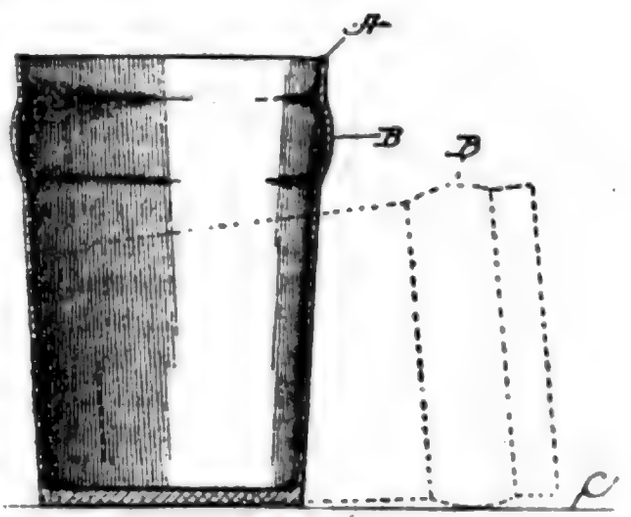
"As an article of manufacture, a drinking glass having a suitable wall projecting upwardly from a base portion and terminating in an integral fragile

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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rim of the same general contour and constituting a continuation of said wall, the wall being formed with a shallow bulge arranged below the rim to leave the usual mouth-engaging portion, but contiguous thereto, and projecting beyond the normal plane of the wall, the bulge being of relatively narrow width and being curved outwardly to present concavo-convex portions terminating in opposite directions vertically in gradual, reverse curvatures, merging into adjoining portions of the wall above and below the bulge to present uninterrupted smooth exterior and interior surfaces devoid of sharp lines or angles, and said bulge being arranged with reference to the mouth of the glass to insure separation of its fragile rim from similar rims of other glasses when grasped in group, to preserve said rim against fracture, substantially as described."

The following figure illustrates the patented article:



The drinking glass is sold under the trade-name of "Nonik." Their sale has been commercially successful in competition with the regular straight thin blown drinking glass, and also the same character of drinking glass made of heavy pressed glass, although the price of the "Nonik" is 20 per cent. higher than the others. Pick stated in his specifications that the object of the invention was to provide a drinking glass of any of the numerous forms generally used, which would be rendered less readily breakable when accidentally tipped over upon a supporting surface, such as a table, bar, or the like, and in which the rim would be protected against chipping when a number of the glasses were collected in the hand; also to provide means whereby a better grip might be obtained upon the interior of the glass, when a plurality of the same are gathered in the hand by insertion of the fingers therein, whereby slippage would be obviated.

"Another important feature is the fact that the bulge *B*, while presenting its exterior convex surface, is not abruptly joined to the upper end lower straight portions of the cylindrical wall of the tumbler, but are connected therewith through the medium of reverse curves, and merging in a general gradual curvature into said upper and lower straight portions. Thus clear lines of demarcation or angles adapted to crack or break upon pressure being applied to the bulge are entirely eliminated, and vertically of the tumbler, three arches, so to speak, provided, through which the forces of impact are distributed throughout the body of the glass, co-operating, of course, with the arch circumferentially of the glass. This arrangement also avoids shoulders or underlying crevices into which particles may accumulate and interfere with quick and easy cleaning of the interior of the tumbler so often required."

[1, 2] The evidence is undisputed that the creation of the bulge in the glass in the manner specified adds 40 per cent. in crushing strength to the straight-sided drinking glass. The evidence also shows that the object of the invention, as stated in the specifications, has been accomplished. We are of the opinion that the bulge in the drinking

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glass, as described in the claim of Pick, was new and useful, and that the structural patent is valid, so far as invention and novelty are concerned. The evidence shows that appellant sold drinking glasses which could not be distinguished from the patented glass, and thereby infringed. We do not think the Pick patent was anticipated by the design patent to W. Buttler, No. 29,813, December 20, 1898, the design patent to F. R. Cornwall, No. 23,871, December 11, 1894, the design patent to J. Matthews, No. 2,440, September 25, 1866, nor the patents to Williams, No. 237,150, February 1, 1881, to Caldwell, No. 370,681, September 27, 1887, and to W. Helmer, No. 38,248, September, 25, 1906.

In all the drinking glasses or jars prior to the Pick patent the bulge in the wall of the glass is severe. In some cases the bulge is used as a stop for a cover to the jar. In other glasses the swell of the glass starts from near the bottom of the glass, gradually swelling outwardly until the top is reached. According to the evidence these glasses were formed in this way for the purpose of being placed in a holder as soda glasses are, and the evidence shows that these glasses are not considered as containing anything similar to the bulge in the patented glass. The trial court found in reference to the alleged Anderson glass that the defense of prior use had not been established. We concur in this finding. As to this defense the law requires that the proof shall be clear, satisfactory, and beyond a reasonable doubt. The Barbed Wire Patent, 143 U. S. 275, 12 Sup. Ct. 443, 450, 36 L. Ed. 154. It was said in Adamson v. Gilliland, 242 U. S. 350, 37 Sup. Ct. 169, 61 L. Ed. 356, that a patent case is pre-eminently one for the application of the practical rule that so far as the finding of the master or judge who saw the witnesses depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.

[3] So far as the question of double patenting is concerned, we do not think it can arise in this case, for the reason that we are of the opinion that the design patent is not valid. The bulge in the patented glass cannot be said to be ornamental within the meaning of section 4929 of the Revised Statutes (Comp. St. 1916, § 9475). There is nothing in the bulge of the patented glass which would appeal to the esthetic emotions or to our idea of the beautiful. While the bulge may be new and useful, we cannot say that it has added anything to decorative art.

The decree below is affirmed so far as the structural patent is concerned, and reversed in so far as it relates to the design patent.

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PARAMOUNT HOSIERY FORM DRYING CO. v. MOORHEAD KNITTING CO.

(District Court, M. D. Pennsylvania. July 16, 1918.)

No. 236a.

1. PATENTS ⟸328—VALIDITY—APPARATUS FOR DRYING AND SHAPING HOSIERY.

The Collis patent, No. 1,114,966, covering an apparatus for drying and shaping hosiery and the like, *held* invalid for anticipation and public use.

2. PATENTS ⟸328—VALIDITY—FINISHING AND SHAPING HOSIERY—USE OF APPARATUS.

The Collis patent, No. 1,204,945, for improvements in the art of finishing and shaping hosiery, in connection with the use of apparatus patented, and as disclosed in the application for such patent, *held* invalid, as anticipated by prior use of similar apparatus.

3. PATENTS ⟸120—SUBSEQUENT PATENT—FUNCTION OF INVENTION.

To sustain a subsequent patent, there must be something distinctively different from that covered by the first patent, and the mere function of a patented invention cannot be made the subject of a separate and subsequent patent.

4. PATENTS ⟸129—ATTACKING VALIDITY—ESTOPPEL OF LESSEE.

A provision in a contract for the use of patented apparatus that, in any suit by lessor against lessee, the latter shall not attack the validity of the patents, must be limited to a preceding condition for the payment of rent, and does not estop lessee, sued by lessor, solely on account of lessee purchasing and using other apparatus regarded by lessor as an infringement.

5. PATENTS ⟸216—SUIT BY LESSOR AGAINST LESSEE—COUNTERCLAIM—CONDITION PRECEDENT.

In a suit by lessor against lessee of patented apparatus, tender or return thereof is a condition precedent to a counterclaim for rental paid, based on the ground that the contract was obtained through misrepresentation.

In Equity. Suit by the Paramount Hosiery Form Drying Company against the Moorhead Knitting Company. Decree rendered.

Snodgrass & Smith, of Harrisburg, Pa., Edmund H. Parry, of Washington, D. C., Howson & Howson, of Philadelphia, Pa., and R. F. Rogers, of New York City, for plaintiff.

Fraley & Paul, of Philadelphia, Pa., for defendant.

WITMER, District Judge. The defendant is charged with infringement of two patents granted to George Collis—the one, No. 1,114,966, dated October 27, 1914; the other, an alleged divisional thereof, No. 1,204,945, dated November 14, 1916. The first patent covers an apparatus for drying and shaping hosiery and the like, consisting of an internally steam-heated metal hosiery form, being narrow relatively to its width, and having its opposite narrow edges substantially sharpened. The second patent is for improvements in the art of finishing and shaping hosiery, in connection with the use of the apparatus patented and as disclosed in the application for such patent.

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The plaintiff asserts infringement of the following claims of the apparatus patent:

12. An apparatus for drying and shaping textile hosiery articles, including in combination a support, a hollow article, holding and shaping member, mounted on said support and being narrow in cross-section relatively to its width, and having its opposite edges substantially sharpened to effect the formation of a crease in and a shaping of the article, and means for supplying a heating medium to the interior of said shaping member for heating the same from within, and thereby effecting evaporation of moisture from the article sustained thereby.

39. A device for drying and finishing moistened hosiery, comprising a steam-heated metallic form having a substantially sharpened edge to shape, crease, and finish the article mounted thereon simultaneously with its drying, when heated from within, and provided with a passage for a heating medium.

40. A stocking mold for simultaneously drying, shaping, and finishing moistened hosiery, comprising a hollow, metallic form, having its sides converging and its edges substantially sharpened to crease and finish the article mounted thereon simultaneously with its drying, when the form is heated from within.

43. In hosiery finishing apparatus, a metallic device having its sides converging to form-sharpened edges, and functioning simultaneously to dry, crease, and finish the article mounted on the exterior thereof, when the form is heated from within, and means for maintaining heat within the device.

And infringement of the method patent, as follows:

3. The method of treating a moistened hosiery article, which consists in subjecting the internal surface of its sides to a flattening action and effecting a single creaselike formation at each of its edges, whereby the articles will be caused to assume a flattened shape, and simultaneously drying and fixing the fabric of the article by the application of heat to the internal surface thereof, so that it will retain its flattened shape.

4. The art of finishing hosiery, which consists in applying heat to the internal surface of a moistened hosiery article, to evaporate its moisture, and at the same time subjecting the same to a flattening and smoothing action on its internal surface, whereby the finished article will be substantially flattened into one plane at and between its edges.

5. The method of shaping hosiery, which consists in stretching the fabric thereof in one direction to the dimensions of the ultimate flattened product, applying heat to the internal surface thereof, to evaporate the moisture therefrom, and to set the fabric as stretched, and simultaneously ironing the same internally into a form which is flattened at and between its extreme front and rear edges.

The defendant does not seriously deny the charge of using an apparatus or form and practicing the method covered by the patents to Collis, but it does insist that both patents are invalid by reason of anticipation and public use. The issue between the parties involves the validity of both patents. True, the plaintiff now only insists on a decree upon the charge involving his method patent, but the case as presented requires and involves the consideration of both patents.

These patents relate, as already noted, to the manufacture of hosiery, and especially to that class or type of hosiery known as seamless hosiery, which is knit in tubular form, and also to full-fashioned hosiery, which is knit to shape in a flat sheet and then sewed to produce a stocking with a seam, having as a primary purpose the function of drying the hosiery simultaneously with the shaping and finishing thereof.

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The conception to which Collis lays claim, covered by his patents, consists in drying hosiery made of unset knitted fabric, and while yet wet and in process of drying shape, crease, and finish the same by one and the same operation, and by use of one and the same device, the apparatus or form patented. That the device is useful and an advance in the art of manufacturing and preparing ready for the market hosiery of the kind cannot be denied. The defendant is using the same in preference to the old means formerly employed to the same end, that of wooden boards, dry boxes, and presses, which have thereby been largely displaced; but was Collis the first to conceive and reduce to practical use this idea or means?

[1] Taking up the apparatus patent, we find that the plaintiff's predecessor and those acting on its behalf, during the year 1912, purchased from one W. H. Ermentrout, of Reading, Pa., some internally heated metal hosiery forms having shape and crease producing edges like the Collis or Paramount forms. After satisfying itself of the utility of these forms for drying and shaping stockings, the business, including a patent for details in the operation of the forms, was purchased, and the company went into the manufacture and sale of them. Some months after buying out Ermentrout, and while negotiating with a knitting mill in Rockford, Ill., for the sale of the forms, it was discovered that a man named George Collis, of Clinton, Iowa, had produced and employed similar forms, for which he then had a patent application pending in the Patent Office. The same parties, owners of the Ermentrout forms and business, then purchased the Collis patent application and also his forms, and, prosecuting such application, obtained the original patent in suit, three days after filing application for divisional patent afterward allowed.

Regarding the purchase of the Collis application, Mr. Pope, president of the defendant company, explains that, after offering the Ermentrout forms to some of the mills in the neighborhood around their territory:

"We had the Paramount Knitting Company fairly well equipped, and on a trip to Rockford I showed them; and the foreman there told me that probably they knew more—some things about this drying business—than we did, and it led to the disclosure of the Collis invention. Of course, it was a disturbing proposition. We had equipped our mill and had sold some forms. An investigation was made, and we concluded that Collis had the apparatus and outdated the Ermentrout form, and for security to ourselves and to the people we had sold we thought the thing to do, if possible, was to secure the Collis application, and it led to our making arrangements and buying it."

Collis filed his application June 27, 1911, while the evidence produced proves that he exhibited sketches of his forms during the spring or summer previous. The earliest date claimed for the completion and use of some of his forms is about the middle of September, 1910. Accepting this as the date to which the patentee can lay claim to his invention, what was the state of the art at this time?

The prior patented art was shown in the British patents, Webster, No. 13,854, of 1751, Berridge & Blunt, No. 19,283, of 1890, Watson, No. 12,941, of 1895, and American patent, Pease, No. 568,874, of 1898. It may be true, as said on behalf of applicants in a letter addressed to the Patent Office that:

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It was "common practice to dry hosiery on hollow metallic support, or so-called board; but it is entirely new in hosiery drying to shape the article simultaneously with drying it. * * * By shaping is meant the creasing of the article at opposite points, namely, at the front and rear portions."

Presumably the patent to Collis was allowed upon this narrow distinction, that of form with sharp crease-producing edge. Whether the patent could be distinguished from the Berridge patent, producing four distinct folds or creases, instead of two, as admitted by plaintiffs' expert, Dr. Knealy, need not be attempted; the fact being that the actual working prior art, as distinguished by the patented art, shows that as a matter of fact the single feature of distinction relied on to obtain a patent for Collis had been employed upon forms in every respect identical with those shown and described in the Collis patent. Turning back to Ermentrout, we find him in the fall of 1911 manufacturing and installing his forms in hosiery mills in and about Reading. These forms were like those sold to the Paramount Company, and were used to dry, shape, and crease hosiery as it came from the dye house. Ermentrout had seen and copied the form manufactured and sold by him from a circular, with picture of the original Anthony sharp-edge hosiery form. This circular was gotten out early in 1911, and Ermentrout began his work in September.

To Hiram J. Anthony, of Gloversville, N. Y., may easily be traced the origin of the product advertised in the circulars that fell into the hands of Ermentrout. He produced his first stocking form in October, 1904. This original form, unchanged, has been produced, and in it are embodied all that can be claimed by the plaintiff. It is practically a complete duplicate of plaintiff's forms. In the year 1908 Anthony's business was consolidated with the Curtin-Heubert Company and organized into a corporation called the Curtin-Heubert-Anthony Company. Anthony's old shop was in continued use, and the stocking form remained there until 1910. It was hanging on the wall, and seen and examined by many persons. Soon after Anthony produced it, an effort was made to install it in a hosiery mill in Brooklyn, but without success. The Curtin-Heubert-Anthony Company manufactured, upon order left, dated February 5, 1910, for the Niagara Silk Mills, at North Tonowanda, N. Y., two of the Anthony forms, which were shipped March 28, 1910, and set up at one of their mills at Dunkirk, N. Y. Like hosiery forms were also made by the Curtin-Heubert-Anthony Company for Paul Guenther of Dover, N. J. The shipment was on December 13, 1910. During the latter part of the year 1909, Webb and Hildreth, at their machine shop in the town of Gloversville, N. Y., near to the Curtin-Heubert-Anthony Company's place of business, in whose shop the men in the employ of the former company saw the Anthony form, manufactured for and delivered to the Gloversville Silk Mill, as appears by charge upon their books under date of December 11, 1909, "four (4) stocking boards complete." These boards were set up and put in commercial use, and are in place, as appears by photograph offered in evidence. Similar boards or forms were also manufactured and installed by the Merrill Silk Mills, at Hornell, N. Y., during the latter part of the year 1909 and early in 1910. They

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were installed about the 25th of January, 1910, and used thereafter in the drying, creasing, and finishing of the hosiery output of the mill.

[2] Turning, now, to the art or method patent, it must be conceded that all that can be claimed for the Collis form or apparatus, as providing a distinctive method or art for drying and shaping hosiery, passing for the time being the feature of imparting thereto a distinctive creasing, may be claimed for the forms patented to which reference has already been made. Watson in his specification says:

"It has hitherto been the practice to finish stockings, socks, and half hose, and similar articles of hosiery, by the use of boards and presses and the application of heat to the outside of the fabric."

The object of his invention, he says, "is to dry and finish such articles of hosiery, stockings, socks, and half hose, etc., from the inside." Now, how does he propose to do this? By using substantially the same means or method, excepting as to the characteristic forms, as were and are now employed by plaintiff and defendant in the use of their forms. He says:

"A series of hollow molds of suitable shapes, made of brass or other suitable substance, is supplied with steam, hot air, or hot water, at a suitable pressure. Over these molds the articles to be dried or finished are drawn and allowed to remain till the process of drying and finishing is complete."

True enough, the finish imparted by the use of the Watson patent would possibly not compare with the Collis, in that the article finished, the stocking, for instance, would be wanting the sharp crease imparted by the latter.

Mr. Livermoore, defendant's expert, in distinguishing the Collis method or Collis forms from the prior art forms and use of them in drying stockings, says that "the difference is what comes and results from the shape of the form itself and its action on the material," independent of the manner of moistening. This expresses the conclusion of the court, but, should such result, the finishing or creasing resulting from the character of the instrumentality used be imputed to the use of the method rather than to particular characteristic of the apparatus; the form being narrow relatively to its width, and having its opposite narrow edges substantially sharpened, constituting the very distinction of the apparatus first patented by Collis.

As it was so well stated on behalf of the applicant in a letter supporting the apparatus application:

"The particular form of structure effects a superior function and gives to the device a new property, namely, that of simultaneously drying and shaping the article, so that when dry, it will lie flat and without wrinkles. In other words, the change in form has changed the function of the device, and has given to it a property that no one before applicant contemplated, wherefore the device accomplished a new result."

[3] The end to be obtained through the art or method claimed, that of finishing stockings with a sharp crease, is, it appears, natural, and follows necessarily from the use of the patented apparatus or device. The result is consequential and functional, and embodied in the patented object producing it. To sustain a subsequent patent, there must be something distinctively different from that covered by the first patent.

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The mere function of a patented invention cannot be made the subject of a separate and subsequent patent. Miller v. Eagle Mfg. Co., 151 U. S. 186–201, 14 Sup. Ct. 310, 38 L. Ed. 121; Busch v. Jones, 184 U. S. 598, 22 Sup. Ct. 511, 46 L. Ed. 707; Risdon Locomotive Works v. Medart, 158 U. S. 77, 15 Sup. Ct. 745, 39 L. Ed. 899.

"No doubt it is competent, when the circumstances permit it, for an inventor, in describing a machine or apparatus which he has devised, to make a claim for a process which his patented device is capable of carrying out. But to entitle him to do this the process must be one capable of being carried out by other means than by the operation of his patented machine, and, unless such other means are known or within the reach of ordinary skill and judgment, the patentee is bound to point them out; for, unless the public are informed by what other means the process can be carried on, the process is to them nothing else than the operation of the machine—in other words, the exercise of its functions." American Lava Co. v. Steward et al., 155 Fed. 738, 84 C. C. A. 157.

No other means of practice is pointed out in the method or art patent than the use of the device on which the claims for the apparatus patent rest. Should there be any doubt about the functions of the device, such are entirely expelled by the patentee, wherein he claims:

43. "In hosiery finishing apparatus, a metallic device having its sides converging to form sharpened edges and functioning simultaneously to dry, crease and finish the article mounted on the exterior thereof when the form is heated from within."

Taking from the claims of the method patent the functions here claimed for the apparatus nothing remains to be patented. Having already found that the Collis form patent was anticipated by prior use of similar forms the use of such forms necessarily resulting in the practice of the art, that of simultaneously drying, creasing, and finishing hosiery by means of a metallic device having its sides converging to form-sharpened edges, also anticipated the application for a divisional art patent.

[4] Plaintiff has, however, objected to the consideration of the validity of these patents upon the ground that the defendant, by reason of his relation with the plaintiff, is estopped. The defendant rents from the plaintiff a number of the Paramount forms under a writing, agreeing to pay for the use thereof a rental, or so-styled royalty. It is indeed not royalty that defendant has agreed to pay for he is not a manufacturer of the forms, but a borrower or lessee for a consideration, with the implied license to use. While a licensee, in the sense of a person permitted to use a patented article he buys, he is not such licensee as the term implies, where permission is given by a patentee to manufacture and sell his patented device on royalty or otherwise. But it is argued that the defendant has in his contract with the plaintiff consented and agreed that:

"In any suit or suits which the lessor may institute against the lessee, the said lessee shall be stopped from infringing or attacking the validity of said patents, or any of them."

This estoppel provision, considered in connection with the preceding portion of the paragraph, must be restricted and limited to the condition therein covered as to payment of royalty or rental, etc. Then,

also, it will be noted that the provision applies to the parties in their relation as lessor and lessee, or, in other words, in a suit between them upon the contract. In the case here presented, and now under consideration, the plaintiff elected to treat the defendant as an infringer, not by reason of anything growing out of their relations under the agreement between them, but on account of purchasing and using the Walter Snyder forms which are regarded by plaintiff as an infringement of its monopoly. The action here is one in tort, and not upon the contract, and is therefore not embarrassed by the estoppel here advanced.

[5] The defendant by way of counterclaim asks to be relieved from its contract with the plaintiff, relative to the leased forms, on the ground that such contract was obtained through misrepresentation, and that plaintiff account to defendant for rental paid in consideration thereof. Whether the defendant's assent to the contract for the leasing of the forms was obtained through misrepresentation need not be here decided, it being conceded that defendant has used these forms and is continuing to do so to this time; and that he has not surrendered or restored them to the plaintiff, nor offered to do so. By the weight of authority such return or tender is a condition precedent to the filing of a bill in equity for rescission, or its equivalent, the filing of a counterclaim, as in this case. Reeves v. Corning (C. C.) 51 Fed. 774; Bird's Appeal, 91 Pa. 68.

The defendant being benefited by the use of plaintiff's forms, it would, it seems, be inequitable and unconscionable to deprive the plaintiff of his contract, without an effort at least on the part of defendant to restore to plaintiff his property, except on defendant's own terms, which the court will not recognize.

A decree may be submitted in accordance herewith.

E. W. BLISS CO. v. SOUTHERN CAN CO.

(District Court, D. Maryland. July 8, 1918.)

1. PATENTS ⟸26(2)—DEVICES FUNCTIONING SEPARATELY—TRUE COMBINATION.
 Two devices in a machine, each doing its work precisely as it would if the other was altogether absent, do not form a true combination.

2. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—CAN-MAKING MACHINE.
 Conradi patent, No. 1,129,456, claim 11, relating to machine consisting of a peculiar construction of shelves supporting the supply of tin blanks to be fed into the machine, for making tin cans, *held* valid, but not infringed.

3. PATENTS ⟸328—VALIDITY—TIN CAN MACHINE.
 Kruse patent, No. 1,081,050, claims 4 and 5, relating to a machine consisting of plates supporting tin blanks to be fed into the can-making machine, adjustable so as to regulate the amount of sag of the blanks, *held* invalid, as not limited as to adjusting means.

4. PATENTS ⟸62—ANTICIPATING DEVICE—MEASURE OF PROOF.
 One relying on an anticipating device is held to produce a strict measure of proof.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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5. PATENTS ⊂=83—FORFEITURE OF RIGHT.

An inventor, who makes up his mind not to patent his invention, or not to patent it until he thinks some one else is about to invade his monopoly, forfeits all right to a patent.

6. PATENTS ⊂=55—ANTICIPATION—EXCEPTION TO RULE.

If there is such an exception to the rule that no patent may validly issue for anything known or used in the country before its invention by the patentee, that, if an inventor conceals or suppresses knowledge of the invention, his claim is subordinate to that of a subsequent bona fide inventor of the same device, such exception must be confined within narrow bounds. The first inventor must have determined to practice his invention secretly, and his efforts to keep the invention secret must have been successful.

7. PATENTS ⊂=328—VALIDITY—ANTICIPATION.

Kruse patent, No. 1,081,050, claims 2 and 3, relating to a machine consisting of plates supporting tin blanks to be fed into the can-making machine, and Kruse patent, No. 1,244,056, claims 2 and 4, *held* invalid as for something previously known and used in the country.

In Equity. Suit by the E. W. Bliss Company against the Southern Can Company. Bill dismissed.

Edwin F. Samuels, of Baltimore, Md., and Arthur C. Fraser, of New York City, for plaintiff.

George Weems Williams, of Baltimore, Md., and Ira J. Wilson and Robert H. Parkinson, both of Chicago, Ill., for defendant.

ROSE, District Judge. The plaintiff is the owner of three patents, one to Conradi, No. 1,129,456, February 23, 1915, and two to Kruse, namely, No. 1,081,050, December 9, 1913, and No. 1,244,056, October 23, 1917. It charges infringement of the eleventh claim of Conradi, of the second, third, fourth, and fifth of the earlier Kruse, and the second and fourth of the later. The defendant has purchased and has used the machine alleged to infringe. The case was defended by the manufacturer, the Torres Wold Company of Illinois.

The machine has at one end a hopper, into which a pile of tin blanks, cut to a proper size for making a can body, are put. Out of the other end comes the completed can. In the course of its travels, the blank is subjected to a number of processes. The pending controversy involves two of these.

[1] The eleventh claim of the Conradi patent, and the fourth and fifth of the earlier Kruse, relate to the construction of the hopper from which the machine takes the blanks. The second and third of the first Kruse patent, and the second and fourth of the other to the same inventor, concern themselves with the means for accurately positioning the blanks at the moment at which they are to be notched. The hopper and the positioning devices are found in the same machine, but each successively does its work precisely as it would if the other was altogether absent. They do not form a true combination. Grinnell Washing Machine Co. v. Johnson Co. (Supreme Court, June 10, 1918) 247 U. S. 426, 38 Sup. Ct. 547, 62 L. Ed. ——. The claims relating to the hopper will therefore be considered apart from those dealing with the positioning devices.

Hopper Claims.

[2] *Conradi's Ledges.*—Conradi's patent was issued subsequent to the first of the two to Kruse, but in an interference proceeding he was awarded priority for the claim here in suit. A self-feeding machine must take up one blank at a time, out of a bundle or pile in a hopper or other initial receptacle, and only one. The blanks must be so held or supported that they will not fall out of the hopper, and the support must not obstruct the access of the feeding device to the blanks. Obviously both these ends will be attained, if the hopper be fitted with shelves or plates projecting from its walls or sides inwardly towards each other, and towards its center, but which, because they do not meet, will leave, between their innermost edges, space in which the engaging element of the feeding device may operate. Any article, not absolutely rigid, if placed in a position intended to be substantially horizontal, will, although held up at its ends, sag down in its middle, if that be unsupported. Means of increasing this central sag or downward bend of the lowermost blank are provided in many machines, including those of the plaintiff and of the defendant. For the purpose of facilitating the engagement of that blank by the feeding device, Conradi thought that, if he could counteract the tendency of the pile as a whole to sag down, there would be much less danger of carrying forward two or more blanks at one time. He believed he could achieve this purpose if he put raised ledges on or near the inner extremity of his shelves or plates. In such a hopper, these portions of the ends of the blanks which did not rest upon these ledges would not, throughout their whole extent, be in contact with the supporting plates, but would, on each side, bend or sag down from the ledges towards the hopper walls. In this way a cantilever effect would be produced, the result of which would diminish, if not eliminate, the downward sag of the altogether unsupported middle portion of the pile of blanks. It is in the light of this construction that the claim in suit must be read. Its vital element is:

"Means within the hopper for supporting the blanks at points spaced inwardly of the periphery of the blanks."

These means are the raised ledges which he placed at the ends of his plates or shelves, or some fair equivalent for them. The defendant's machine has nothing but flat shelves. There is neither a raised ledge nor a substitute for it. The plaintiff, however, contends that the edges of the plates fulfill the same function as Conradi's ledges, although less perfectly. Conradi did not think so. The claim, if it means what plaintiff now says it does, would be invalid. It did not take the genius of an inventor to discover that a pile of blanks may be supported upon shelves. Conradi's invention consisted, as he himself plainly declared, in giving to such shelves a peculiar construction, which he thought accomplished a useful purpose. For that he was entitled to a patent, but such construction is not found in defendant's machine. It follows that the eleventh claim of the Conradi patent is valid, but that it is not infringed.

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[3] *Kruse's Adjustable Plates.*—The essential element of the fourth and fifth claims of the first Kruse patent are for:

"Supporting plates in the hopper adjustable on the hopper transversely towards and away from one another, whereby the amount of the sag of the sheets between their supported ends may be regulated."

The plates so described differ from those of the prior art, with Conradi's ledges or without them, only in that their inner edges may be moved towards or away from one another, so as to regulate the extent to which the nonsupported middle portion of the blanks will sag. The year of our Lord 1913 was rather late in date to discover for the first time that, the shorter the length of an unsupported center, the less sag there will be. There might have been difficulty in introducing into the self-feeder means for making such adjustments. If so, invention might conceivably have been exercised in overcoming it, although, in view of the innumerable adjusting devices then known to the art, it seems improbable that it would have called for anything more than the aptness of the skilled mechanic. Into that question, however, it is unnecessary to go, for the claims in suit are not limited to any special character of adjusting means, and are for that reason invalid.

Positioning Devices.

[4-7] The machines put each blank through a number of operations. They must have within themselves such co-ordinating devices as will insure that, at the moment they are ready to perform each one of these tasks, the blanks shall be at the right spot. The difficulty of making certain that it will be increases with the speed and accuracy required. The call is always for faster machines, and of late years there has been a rapidly growing demand for "sanitary," as distinguished from the older "hole and cap," cans. In making the former, each blank must be notched at precisely the same relative position. If the notches are out of place even a few thousandths of an inch, the blank must be thrown aside. In his patents, Kruse provided means by which the blanks, just before they are notched, are moved back against fixed stops. Absolute accuracy is thus secured, provided that the blanks have been cut true, as in practice they usually are.

In his earlier patent, Kruse describes a machine in which gripping fingers with a reciprocating action carry the blank forward, and on their return bring it back against stops. The second and third claims of that patent cover such a device. In his later patent he substituted, for a backward pull of the fingers, a push in the same direction, to be given by a cam-faced bar or blade, so adjusted and shaped that at the proper moment it rises up and forces the blank back against the stops. The idea common to both is ingenious. To embody it in a working machine called for a number of adjustments, not necessarily obvious. To hit upon it and to reduce it to practice may well have been invention, always provided it was then new in the art. The defendant says that it was not, and that it was embodied in two machines built for the American Can Company, one in 1909 and the other in 1911. The filing date of the earlier Kruse patent was February, 1913. These machines are still in use. If they were originally built as they now are, they

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did in fact anticipate everything in this respect done by Kruse. The difference between the construction and operation of their positioning devices and those shown in the Kruse patents are no greater than between the latter and those found in defendant's machine, if indeed they are as great. The plaintiff has properly stressed the strict measure of proof required of the setter-up of an anticipating device. It still remains true that a patent will be defeated by a prior use, proved beyond a reasonable doubt; that is to say, if the evidence leaves the trier of fact without doubt on the subject. The machines in question were built at the American Can Company's shops at Maywood, Ill., in the years mentioned. So soon as they were completed, they were, in accordance with that company's custom, photographed. The negatives and copies of the photographs were preserved in the company's files, and they have been here produced. The machines themselves were promptly sent to the company's Richmond factory, and there they have ever since been continuously employed in the daily making of thousands of tobacco cans. I have no doubt that in point of fact the devices used in these machines anticipated the conception described in the Kruse patent.

The plaintiff argues that, even if so much be found against it, the claims in suit are not thereby invalidated. It says that the American Can Company deliberately concealed or suppressed the knowledge of its invention, and thereby subordinated its claim, in accordance with the general policy of the law, in the protection of the public interest, to that of another and bona fide inventor, who, during the period of inaction and concealment, gave the benefit of the discovery to the public. It cites the declaration of the Court of Appeals of the District of Columbia, that, viewed in the light of the true policy of the patent laws, the later inventor is in reality the first to invent, and is therefore entitled to the reward. Dieckman v. Brune, 37 App. D. C. 399. There is no doubt that an inventor who makes up his mind not to patent his invention at all, or not to patent it until he thinks some one else is about to invade his monopoly, forfeits all right to a patent. Macbeth-Evans Glass Co. v. General Electric Co., 246 Fed. 695, 158 C. C. A. 651. To whom does the benefit of the forfeiture inure—the public or a subsequent inventor? The question cannot arise unless the earlier inventor has kept his invention absolutely concealed until after the conception of it by the later; otherwise, the second man would not be the inventor of something not before known or used in this country. We are not in this case concerned with an invention once made, and, even if to a limited extent reduced to practice, afterwards thrown aside, and its use altogether abandoned. In such cases, the Supreme Court has likened the reinvention to a rediscovery of an old art. Gayler v. Wilder, 10 How. 477, 13 L. Ed. 504. In many cases, in which are to be found expressions relied upon by the plaintiff, there was more or less doubt whether the invention in controversy therein had ever been perfected by him who was said to be the first to make it. The evidence left it doubtful whether it had ever amounted to anything more than an unsatisfactory and abandoned experiment. The fact that it was used but for a short time, if at all,

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and was then relegated to the scrap heap or lumber room, was suggestive, if not persuasive, that it lacked something found in the second comer's creation. It may not have been possible from the testimony to discover precisely what was missing, but it was not improbable that it was something which made all the difference between failure and success.

In the case at bar, the anticipating machines have, ever since they were built, been in daily extensive and successful commercial operation. Were they so designedly hidden from the public knowledge that they cannot be held to have anticipated the subsequent invention of Kruse? If there is such exception as plaintiff claims to the rule that no patent may validly issue for anything known or used in this country before its invention by the patentee, it is one which must be confined within narrow bounds. It will not be usually easy to make sure that the first inventor or user had been successful in keeping that which he was doing or using an absolute secret. In spite of all his precautions, some hint, suggestion, or rumor of it may have come indirectly, if not directly, to the second Richmond. In the instant case, the testimony shows that the very draftsman who had prepared the designs for the anticipating machine subsequently left the can company's employ and went into that of the plaintiff, and that, too, at a time prior to the filing of the earlier of the Kruse applications. There is no evidence that he or anybody else ever told Kruse anything about the can company's machine. Nevertheless, if he had, there would have been slight chance of the testimony developing the fact. To find out the real truth in such matters is well-nigh impossible. The second inventor may have himself forgotten, or never clearly appreciated, what originally put the inventive idea into his head, and yet it may well have been something said or suggested by one who, all unknown to him, had some information as to the earlier device. Into such inquiries it will seldom be profitable to go. They will be unnecessary, if we hold fast to the letter of the statute, which forbids the patenting of anything before known or used by others in this country, admitting such exceptions to it only as are clearly recognized and precisely defined by decisions of courts of controlling authority. It is believed that, if any such exception as that contended for by the plaintiff has been so established (and it is not intended to intimate that it has been), it is limited, so far as concerns inventions which are clearly anticipations and have been in continuous use, to cases in which (a) the first inventor had deliberately made up his mind to practice his invention secretly, because he thought he could thereby make out of a monopoly in fact more than he could obtain from one legally given by the patent laws, and (b) in which there was proved to demonstration that his efforts to keep the invention secret had been absolutely successful.

In this case there is no evidence that the American Can Company made any special effort to hide this particular invention. It is abundantly shown that it was its practice to exclude the public from its factory, but none at all that this policy was dictated by a wish to keep the construction and operation of these particular machines hid-

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den. It did not pledge its employés to secrecy. In the course of nine years, many must have left its service, and have gone into that of others, as one of them, as already stated, went into that of the plaintiff. The American Can Company is not a party to this litigation. No burden of proof is upon it. The issue as to this phase of the case is between the plaintiff and the public. If the former would succeed, it must establish every element necessary to bring its case within the limits of the exceptions to the statutory rule, if indeed that rule is subject to exception at all. This it has not done.

The second and third claims of the earlier Kruse patent, and the second and fourth of the later, must accordingly be held invalid, because they are for something before known and used in this country. Six of the seven claims in suit having been held invalid, and the remaining one not infringed, the bill must be dismissed.

F. N. BURT CO., Limited, v. W. C. RITCHIE & CO.

(District Court, E. D. New York. July 6, 1918.)

1. PATENTS ⟸165—CLAIMS—CONSTRUCTION.
 Broad claims will not be held invalid, if they are plainly intended to include by reference such specific limitations as would make the invention patentable.

2. PATENTS ⟸112(3)—VALIDITY—PRESUMPTION.
 A patent is prima facie valid, and an inventor is presumed to be claiming a valid patent.

3. PATENTS ⟸234—INFRINGEMENT—WHAT CONSTITUTES.
 Devices not described, but plainly within the concept in so far as it is patentable and is defined in the claims, infringe the patent.

4. PATENTS ⟸177—CLAIMS—VALIDITY.
 A patentee cannot claim as invention a combination that has nothing whatever to do with the purposes of the device, unless the patentee uses some clear language making the extraneous combination applicable.

5. PATENTS ⟸26(1)—VALIDITY—SCOPE.
 A patentee cannot patent a combination of device and material upon which the device works, nor limit other persons from using similar material by claiming a device patent.

6. PATENTS ⟸173—"PIONEER PATENTS"—WHAT ARE.
 A "pioneer patent" is one which meets an old or plainly recognized want by an entirely new method of approach.

 [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Pioneer.]

7. PATENTS ⟸173—CONSTRUCTION—SCOPE.
 A machine patent, to be broad enough to cover every method of approaching a desired result, must be basic or pioneer, in such a way as to monopolize, not only the particular method, but any method making use of equivalents.

8. PATENTS ⟸227—INFRINGEMENT—INTENT.
 Where defendant's machine did not infringe plaintiff's patent, it is immaterial whether defendant's machines were built deliberately to avoid infringement, or whether by accident a machine was developed along lines which did not infringe.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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9. PATENTS ⟸328—CONSTRUCTION—INFRINGEMENT.

Holly patent, No. 1,158,211, for a machine for making boxes of paper, or other material, in which the head and flange are connected by a binder which is adhesively connected with these parts, *held* not infringed by defendant's machine for making such boxes, the claims of the Holly machine as construed in view of the prior art, not extending to defendant's device, and the products of the two machines not being interchangeable, so as to demonstrate infringement.

In Equity. Suit by the F. N. Burt Company, Limited, against W. C. Ritchie & Co. Decree for defendant.

Duell, Warfield & Duell, of New York City (C. H. Duell, F. P. Warfield, and J. W. Anderson, all of New York City, of counsel), for plaintiff.

Walter M. Fuller, of Chicago, Ill. (Livingston Gifford, of New York City, of counsel), for defendant.

CHATFIELD, District Judge. Action is brought for infringement of the patent issued to Carlos Holly, No. 1,158,211, of October 26, 1915, on application filed April 24, 1909. The invention covered by this patent "relates to a machine for making boxes of paper or similar material in which the head and flange are connected by a binder which is adhesively connected with these parts."

The object of the invention is stated to be "the production of a machine for making boxes of this character more expeditiously, at less cost, and more perfectly" than with the machines of the prior art. The issue as tried depends to a large extent upon the limitation suggested by the statement that the machine in question is to make boxes with a "head" or bottom and a "flange"; that is, the four sides. In other words, the patent describes what is called throughout the testimony a "tray," while the defendant's infringement consists in using a machine for the making of "necks" or "collars" corresponding roughly to the flange portion of the box described in the Holly patent.

The Holly patent consists of 59 printed pages and 26 pages of drawings. The claims of the patent are 282 in number, and of these 17 are relied on in this suit. These claims are Nos. 224, 225, 250, 252, 254, 256, 257, 258, 259, 260, 261, 262, 264, 265, 266, 268, and 269. It is shown by the testimony that the demand for quantities of small pasteboard boxes increased enormously in the first few years of the twentieth century, and particularly because the use of millions of such boxes followed the introduction and consumption of Turkish tobacco cigarettes. The prior art included hat or band boxes, pill boxes, match boxes, and similar containers for small articles, but the cigarette box is now, and has been since the date referred to, the most numerous example of this form of manufacture.

No serious issue is raised over the charge of infringement, when the patent is considered solely from the language of the claims; that is, when viewed apart from the alleged limitations ascribed by the defense to the specifications and drawings in connection with the state of the prior art. There is also no question raised that the patent in

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suit describes a meritorious and novel invention. The issue is sharply drawn upon direct comparison of the mechanical processes of the plaintiff's and defendant's machines, and the proof is directed to an attempt on the part of the plaintiff to show that both forms of machine are but embodiments of a basic or pioneer patent, described in the Holly specifications and stated in the Holly claims; while the defendant contends that the plaintiff's invention must be limited to the specific or exact complete device presented by the patentee and shown in the machine used by the plaintiff, with those mechanical equivalents suggested thereby, and by the specifications and claims of the patent, when construed strictly with reference to that particular form of machine.

The defendant charges, generally, that in order to obtain the benefits of a method patent, or the benefits of a machine patent so broad as to include all devices which would carry out the method of operation, the plaintiff omits from the several claims those words which specify and define, by reference, the particular machine or arrangement of operative devices which the plaintiff had in mind and disclosed as his invention. Broadly stated, the defendant contends that the plaintiff was patenting the exact machine described in the words which have been quoted; that is, a machine which would make boxes, or rather, that part of a box, consisting of a flange and a head, connected with an adhesive binder.

But the defendant does not rest here; it also contends that the plaintiff was limited by the prior art to a particular combination, which narrowed the scope of the invention and the possible meaning of the claims, even though the language of the claims, when viewed apart from the prior art, and apart from the drawings and specifications, would include any such machine as that of the defendant. It goes without saying that the particular claims in suit can be read upon the defendant's machine without difficulty, if the reference to the specifications and to the particular type of machine there described be treated as illustrative only; that is, as descriptive of a preferential use or a typical instance. These claims also can plainly be read on the defendant's machine, if the invention is not limited by the prior art to the narrower application or embodiment which the defendant claims was approved by the Patent Office, when allowing the language of the claims as issued.

The claims have been divided by the experts into four classes, which are illustrated by the first claim of each class. These are as follows:

"224. In an apparatus of the character described, in combination, an angular former, means adapted to apply a combined body and cover blank to said former, said blank comprising spaced grooves in the body portion spanned by the cover portion, and means co-operating with said former to fold said blank at the groove portions and around said former, and cause portions of said cover to enter said grooves."

"250. In an apparatus of the character described, in combination, a plurality of web-feeding mechanisms, a plurality of mechanisms adapted to sever blanks from said webs, web-folding mechanism, means whereby the aforesaid mechanisms automatically co-operate to form a composite blank, composed of a section of one web disposed on the opposite faces of a section of another web and across one edge thereof, and mechanism adapted to fold said composite blank on lines transverse to said edge into a tubular element."

"259. In an apparatus of the character described, in combination, body web-feeding means, cover web-feeding means adapted to operate separately from the body web-feeding means, gluing means, body-web severing means, cover web-severing means adapted to operate separately from the body web-severing means, cover web-folding means, means whereby the aforesaid means automatically co-operate to form a composite blank comprising an adhesively attached superposed body blank and cover blank, with a portion of the cover blank disposed on opposite faces of the body blank and around one of the edges thereof, an angular former, and means adapted to co-operate with said former to fold said composite blank in a plane parallel to said edge, around which said portion of the cover blank is disposed, into a tubular element."

"266. In an apparatus of the character described, in combination, feeding mechanism comprising devices adapted to separately feed a pair of webs, blank folding mechanism comprising a former, severing mechanisms, one for each web, and means whereby said feeding and severing mechanisms operate to successively produce pairs of superposed blanks from said respective webs; the blanks of a pair being of different length in that dimension corresponding to the length of the webs from which they were produced, respectively, and one of said feeding mechanisms comprising means operative intermediate said severing mechanism and said folding mechanism adapted to successively transfer the blank pairs into co-operative relation with said folding mechanism."

Another feature of the defense is that the patent in the prior art which is most strongly relied upon, viz., the Keunen et al. (British) patent, No. 15,063 of 1895, is designed (like the Holly patent in suit) to make "trays" (that is, the part of boxes having a bottom or head), and not the flange or collar, which the defendant is manufacturing, and which is claimed by the plaintiff infringes its patent. This Keunen et al. (British) patent was not planned exclusively to make pasteboard boxes, but described also the small, thin veneer boxes familiarly known by their use for containing Swedish matches; and the defendant contends that this machine is the basis of the defendant's plan of device for the making of "collars" (or bottomless trays), called also "flanges" and "necks" in the art.

It will be noted that, if the defendant can closely ally its machine with the box-making machines of the Keunen patent, and if the Keunen (British) patent is the nearest prior art from which the plaintiff proceeded by certain improvements to successfully make pasteboard cigarette boxes, then the defendant must show that the various improvements and changes made by the plaintiff over the Keunen (British) patent, were but adaptations of well-known ideas, and must thereby limit the plaintiff's invention to the mere assemblage or combination of these ideas in a particular machine, or the defendant must show that the devices used by it, in accomplishing substantially the same results or operations, are not mechanical equivalents for those described by the plaintiff. The practical application of this last proposition is that the defendant cannot escape the charge of infringement by a showing that the improvements which *it* has made over the Keunen (British) machine are in fact used in making a collar, and that the defendant does not go so far as to insert a bottom in the collar. Nor can the defendant escape the charge of infringement by finding each of these improvements, and each of the plaintiff's improvements, in some device of the prior art, where its use was merely similar in function, but from which the idea of its utilization for the purpose would require

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more than a mere mechanical application. It is evident, therefore, from a consideration of the machines and of the prior art, that the defendant must admit the charge of infringement, unless the features of the machines entering into this appearance of infringement can be shown to be open to the defendant, and unless, by going to the roots of the scope of the invention, the meaning of the claims in so far as they can be held valid can be limited.

[1] It is unnecessary to do more than refer to the proposition that the claims must be so interpreted as to give them a valid meaning, if possible, and that, if they would be rendered invalid by an interpretation so broad as to cover the defendant's structure, it is to be presumed that the plaintiff, in using the language which he put in the claims and which was allowed by the Patent Office, was describing that which can be held patentable; in other words, that the claims must be limited to the patentable invention, even though reference to the specifications, drawings, and prior art is had, in order to learn the limitations referred to. The courts have settled the proposition that broad claims will not be held invalid, if they are plainly intended to include by reference such specific limitations as would make the invention patentable. Hobbs v. Beach, 180 U. S. 400, 21 Sup. Ct. 409, 45 L. Ed. 586; Outlook Env. Co. et al. v. General Paper Goods Mfg. Co. et al., 239 Fed. 877, 153 C. C. A. 5.

[2, 3] A patent is prima facie valid, and an inventor is presumed by the courts to be claiming a valid patent, rather than to be endeavoring to do wrong by claiming what does not belong to him, under the guise of general language. The inventor is seeking to include all that can legally be covered by that which he describes as his invention, and is limited only by the prior art, within the boundaries of that which can be said to have reasonably been intended, and to have been set forth or disclosed by the words of description which the inventor has chosen.

[4-9] Thus devices, not described, but plainly within the concept, in so far as it is patentable and is defined in the claims, infringe the patent, and, for that very reason, if earlier, would have taught the same principle with a similar application, and would thus have constituted an anticipation if properly claimed. In deciding this case, therefore, we must proceed to the consideration of the prior art, in order to understand what the plaintiff was inventing, and what the defendant was using in its own device.

Cigarette boxes had been made by so-called pony machines, or hand machines, in which a revolving holder was turned by hand in order to cover the collar or flange with the adhesive strip of glazed paper, desired to furnish a smooth surface, to join the ends of the flange together, and to hold the box in shape. The prior art shows, in the making of boxes, the use of a cut partially through a pasteboard surface in order to bend it into a square corner. Beecher, No. 186,978, February 6, 1877; Newton & Beecher, No. 322,470, July 21, 1885; Gay, No. 645,950, March 27, 1900. The prior art shows, also, the use of glazed adhesive paper bindings to hold the bottom of a box

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in place and to hold the parts when assembled to the precise dimensions and angles desired.

The prior art showed in many patents the application of what is admittedly, in the general sense, an equivalent idea for a supply of paper or pasteboard or wooden veneer parts. These may be furnished by hand, having been severed or prepared in advance, fed from a source of supply by individual feeding device, or from a hopper by gravity, or cut from a strip fed in the direction of its length or unrolled. See Gay, No. 645,950, March 27, 1900; Oesterreich, No. 815,626, March 20, 1906. The prior art shows as equivalents the idea of feeding such blanks, so as to advance them sidewise or endwise after severing from a roll, and it is evidently old in the art to make the width of the roll equal to the length of blank desired, or to cut off the roll at the required place, whether the length or the width is the measure of the blank desired.

The patent in suit involves so many mechanical parts that it is impossible to refer to them in detail, but no separable unit or combination of parts, which performs one specific movement or operation, is new, nor is any one of these applications difficult of conception, from the standpoint of providing the next step in a mechanical construction, after the general idea has been presented, and after the end desired has been plainly understood. The machines involved in this case are intricate in detail and almost intelligently operative in their movements; but this is because of the association of many parts, so adjusted and arranged as to carry on, one after the other, the succession of steps which the inventor knew was necessary, and which would be obvious to any one undertaking to produce the same result.

Cigarette boxes were not a new product. None of the features of the cigarette box were new in design, and the completed box was the same as a box made by hand, so far as the arrangement and relations of the parts are concerned. The invention, therefore, of the plaintiff, lies in the combination of ordinary and old ideas, in one machine, which shall exactly and uniformly repeat the same steps automatically at the precise time when those steps would be needed to make the next following box, and to do this rapidly and without waste of material or likelihood of stoppage for mechanical adjustment or cleaning.

But the problem was understood by Keunen who says (Keunen patent, No. 15,063, p. 1, lines 9 to 23, inclusive):

"The said invention comprises an improved machine wherein the boxes are formed by means of a stationary pattern block, or former, around which the material whereof the boxes are to be made is placed and fixed in the required shape by means of paste. In the machines hitherto employed for making boxes of the kind or class referred to, it has been usual to cause the strip of wood or other material, of which the boxes are to be constructed, to travel around a disc or plate; and in the successive stages of the operation, the strip of wood or paper was first bent, so as to form the sides and corners of the box; then the bottom piece was applied to the side walls; these were next pasted at the joint or seam; and lastly the bottom was fixed to the body of the case or box—all of which operations were performed whilst the disc was rotating. Moreover, in some of the old machines, blocks or formers have been made to

reciprocate and revolve at the same time; the several operations above mentioned being performed during such movements of the block or former."

The first step in which the plaintiff departed from the usual method was to furnish his blank pasteboard with plowed-out scores or grooves, in the place of cuts partly through the substance. The advantage from this was not in the mere mechanical superiority of a groove over a cut in bending the corner into form, but the plaintiff thereby secured room for the insertion of the covering paper into the corner, in such a way as to hold the corner at a right angle, and to affix the paper smoothly, although the part folded over into the inner side was as long as the paper upon the outer side of the corner. This evidently allowed the use of a continuous strip, to be folded and pasted on the inside and the outside of the edge, without cutting the inner surface. He thus avoided a bulging or folded corner when pasted down.

Several patents show the use of cuts called "scores," but Holly separated the knives making the cut, and planed out the material between the cuts, thus making a groove, which has been treated as an essential element throughout the case. But he did not attempt to patent the use of such a groove, nor of the device for making it. Nor did he attempt to patent a box-making machine with such grooves, but merely one with "means for scoring, scarfing, and trimming said web" (claims 176 to 181).

The next step in which the inventor departed from the prior art was to bevel or "scarf" the ends at the place of junction, and to make this joint in the middle—that is, away from the corner—of one of the sides. This of itself was well known in many arts, particularly in any application of the ideas of woodworking or box making. By combining this kind of a joint with a paper binder shorter than the pasteboard strip, and so placed that the ends of the paper binder fell on each side of the joint, the plaintiff made it possible to fold the paper binder over the edge, and down the inside and outside surface of the flange, and then to continue this folding around onto the bottom of the box, in a manner which would be impossible by one series of rotations, if the paper-binding strip were applied in the old hand method of following the perimeter of the box as it revolved about an axis vertical to the bottom at its center. In this way the plaintiff was able to use the turret construction which was old in the art (Loyens & Paulson, No. 556,997, March 24, 1896), and to revolve a series of boxes around an axis parallel to the plane of the bottom of the box, and thus also to allow the insertion of the bottom into the flange at the proper point in the rotation of the turret, without interfering with the use of that rotation to complete the folding over of the adhesive paper strip.

Holly folded one edge of his paper strip over the pasteboard strip before cutting off the pasteboard web, and thus formed a composite blank, which he advanced in rotation in a sidewise direction: whereas, in the prior art, or in the hand machine, these strips advanced in rotation, in an endwise direction. The Hallock patent, No. 569,496, has a composite blank; but this is rotated endwise, and is not folded. To feed the paper strip and the pasteboard strip from two rolls running

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on parallel axes is evidently equivalent to feeding them from axes vertical to each other. If these axes are parallel to each other, the strips can be brought in contact in a position where they can immediately proceed into revolution around the turret, as soon as severed, and the axis of rotation of the turret may also be parallel to the axle of the rolls from which the paper and pasteboard are fed. If the axis or axle of the roll of the paper web is perpendicular to that of the axis or axle of the pasteboard web, then, after severance, the rotation of the composite blank would be parallel to one or the other of the axles of these rolls, but would be perpendicular or vertical to the axle of the other roll.

But the plaintiff made use of this in order to save the use of mechanical parts. He feeds these two webs sidewise from parallel axles, and obtains a strip of adhesive paper wider than the strip of pasteboard web, by severing the pasteboard web first, then, through the use of grippers, drawing the paper web and the pasteboard web away from the pasteboard roll, so as to sever the paper in the space thus created. He then continues the movement sidewise without the use of a mechanism to change its direction of progression; in other words, the composite blank can then proceed to rotate, without a longitudinal shifting to another part of the machine.

The defendant, on the other hand, makes use of a longitudinal shifting of the two blanks (adhering to each other, but with no part of the binder folded over) by the insertion of a finger, which comes in contact with the pasteboard web alone. This is made possible by so placing the paper web and so adjusting its width that it does not entirely cover the outside of the flange; that is, after being severed, the pasteboard strip is wider than the paper strip and extends beyond the surface covered by the glazed paper. This uncovered portion is inserted in the tray or half box, and the uncovered portion is concealed from sight by the sides of the box itself.

The plaintiff thus simplified his machine, in order to meet the requirement of entirely covering the side of the box with paper, and to have this paper serve an additional function by being folded over the bottom, as was well known in the prior art, in order to hold the bottom in place and to make the entire box rigid. If this additional feature of fastening in the bottom was not necessary, as if the structure was intended to be a mere collar or neck without a bottom, some change in the device for severing the paper web must necessarily have been made, so that the paper web, when pulled by the grippers beyond the width of the pasteboard flange, could be severed at such a point as to leave no extending or protruding rim or surface to be folded around the bottom, or the bottom edge of the flange.

During the trial the plaintiff's mechanical expert succeeded in making an arrangement of the plaintiff's machine by which this severance could be obtained, and through this means succeeded in making necks upon one of the plaintiff's machines. From this it was argued that the invention of the plaintiff included, as a mere mechanical equivalent, the use of the plaintiff's device for this purpose. Whether or not this change, of itself, involved invention, is aside from the issue in the

case, inasmuch as the plaintiff was not seeking to construct a machine for the making of necks alone, and was describing an invention, as he expressly stated in his claims, which would make possible the complete formation of a box (that is, the sides and bottom of a box, or the sides and cover of a box, as the case may be) in which the adhesive paper strip could be used for securing the bottom blank to the flange.

The defendant's machine cannot be used for the application of the paper adhesive strip, so as to completely cover the outer surface of the flange, without the addition of some other method of advancing the composite blank, for the finger used by the defendant for this purpose must either perforate the paper blank, or must depend upon frictional contact alone in order to move the composite blank, unless that finger can be brought into contact with the pasteboard blank itself.

This brings in the method of joining the ends of the pasteboard and paper blanks made use of by the defendant. Instead of making the joint of the flange intermediate between two corners, he forms a butt joint at the corner and bends around that corner a tab of the adhesive paper blank, which thus requires the paper blank to be longer than the pasteboard blank. He severs the paper blank, so as to produce this necessary length, by feeding it longitudinally into contact with the pasteboard blank and by severing it after the finger has moved the pasteboard blank away from the roll. He hems over the paper on a part of one side during this motion, and by using a narrow strip of paper fed lengthwise avoids the necessity of cutting the paper blank when in contact with the pasteboard blank, as would be necessary if the paper blank were fed sidewise upon the pasteboard blank, and if the composite blank were moved sidewise as in the plaintiff's machine, so as to leave the paper blank, after cutting, narrower than the pasteboard blank, after cutting.

The problem is therefore to determine whether the plaintiff expressly limited himself to a feeding of the paper roll and the pasteboard roll in the same direction, that is, so that both blanks would be presented sidewise, with a differential feed to give the requisite width of paper, and whether he thus intentionally deprived himself of claiming a structure in which one blank should be fed lengthwise, whether or no the composite blank should thereafter be moved sidewise, to proceed into the rotation for the necessary folding. There are many minor details involved in this general question, but it must be held upon the entire case that the plaintiff did have in mind the form of device in which he might use the advantages derived from feeding both blanks so as to present them sidewise, and that he required in so doing the forming of a composite blank before severing the paper blank.

The state of the prior art, particularly of the Keunen type of machines, bears out this contention. In fact, the defendant's machine follows much more closely the ideas of the Keunen patents than those worked out in the particular claims of the plaintiff's patent as to which infringement is charged. It will be noted that this patent was over six years in the Patent Office, and that the defendant's machine was in use and its general design known to the plaintiff long before the plaintiff's claims were finally allowed. It is argued from this that the plaintiff

has sought to so word the claims that they would cover the defendant's construction, and that they do not properly describe the plaintiff's invention. It is pointed out that claims 261 to 265 state the severing of a blank from the body web and the adhesion of this blank to the covering web, whereas in the machine of the patent in suit the two blanks are made into one strip and then each blank is severed at a different point. But in the Keunen and in the defendant's machine the body blank, after being severed, is applied to the covering web, and then the covering web is drawn to the place where it in turn is to be severed.

Claim 265 describes a blank pressing means. In this sense, also, the word "blank" more aptly fits the defendant's appliance, while the plaintiff's machine presses the web before the blanks are severed. These examples show the breadth of the claims which the plaintiff seeks to support by the invention disclosed in his patent. If the plaintiff's machine be taken as the complete expotheosis of his invention, then these claims would be plainly invalid in so far as they are expressed in broad language, covering devices and ideas shown in the prior art, and not merely mechanical equivalents of some element in the plaintiff's machine. Whether or not the defendant has a patentable combination makes no difference, if his combination is made up entirely of elements from the prior art, which do not infringe the plaintiff's invention as set forth in a valid reading of the plaintiff's claims. The plaintiff's claims should be so read as to render the invention valid, and not invalid; but the claims must not be rendered invalid by broadening them unduly.

The patentee cannot claim as invention a combination that has nothing whatever to do with the purposes of the device, unless the patentee uses some clear language making the extraneous combination applicable. For instance, claim 99 says:

"99. In a device of the character described, in combination, a rotary shaft carrying a blank support and a mutilated gear, a second mutilated gear meshing with the first, and a pawl operatively connected with the second gear and adapted to engage and disengage the first gear to lock the same in its periods of rest."

The description of the shaft, gears, and pawl obviously could refer to any machine. The patentee has no right to claim an invention of such a device, except as he shows patentable combination of these old elements with other elements making up a novel box-making machine.

Again, the patentee in claim 225 describes a device making use of a blank "comprising spaced grooves in the body portion, said grooves being produced by the removal of the material of the body portion of the blank." But the machine described has nothing to accomplish the removal of this material, and in fact the grooves are prepared by an entirely different mechanism. The patentee cannot patent a combination of device and material upon which the device works, nor limit other persons from the use of similar material by claiming a device patent. Morgan Env. Co. v. Albany Paper Co., 152 U. S. 425, 14 Sup. Ct. 627, 38 L. Ed. 500; American Tob. Co. v. Streat, 83 Fed. 700, 28 C. C. A. 18; Union Paper Bag Mach. Co. v. Advance Bag Co., 194 Fed. 126, 114 C. C. A. 204.

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In fact, the patentee states in claim 252 that his folding mechanism is so designed as to enter "into the grooves of the folded blank"; but it does not in fact do so, and, on the contrary, merely squeezes or forces the cover paper into the grooves, and there is nothing in the device itself which shows patentable invention because of larger or smaller grooves. The advantage of the large grooves, in presenting a smoother surface, is a matter of commercial competition rather than of invention, and certainly cannot be one of the mechanical parts of the machine itself.

Thus many claims of this patent might be attacked successfully, unless the patent is limited to the actual mechanical combination of the plaintiff's machine and its equivalents. But it is not a pioneer or basic patent. It was successful because it met a new demand by improving on old lines. A pioneer patent is one which meets an old or plainly recognized want by an entirely new method of approach. Morley Machine Co. v. Lancaster, 129 U. S. 286, 9 Sup. Ct. 299, 32 L. Ed. 715.

The defendant's machine follows so plainly the Keunen machine that mention must be made of the many objections raised by the plaintiff's expert to support his contention that the Keunen (British) patent is invalid. It appears that the Keunen machine was patented in Germany, No. 90,155 of 1895, to Jagenberg, in France, No. 249,402 of August 5, 1895, in England, No. 15,063 of 1895, in the United States, No. 608,201 of August 2, 1898, and in Belgium, No. 116,951 of 1895.

The patent describing the English machine was taken by the defendant's expert as best illustrating the particular points on which defendant relied. All of these patents have been published in this country, and a catalogue was introduced showing the manufacture and sale of a machine identified by one of the witnesses as corresponding to the Keunen-Jagenberg German patent, and also testified by one of the machinists to be an illustration of machines imported into this country and used here in the manufacture of cigarette boxes, for a considerable period before the date of the Holly invention.

Objection was made to this catalogue on the ground that it was not sufficiently proven as a publication of the prior art, and that it did not show in detail the machine of the Keunen invention. In connection with the oral testimony of the witnesses, it will be held that this catalogue is competent to the extent of showing what it does show, and the picture and text are certainly corroboration of the oral testimony of the witnesses that a machine of this general type, built along the lines of the Keunen patents, was in practical use and not unworkable.

The plaintiff's expert has enumerated a number of defects in the Keunen (British) patent which he says would prevent successful working of the machine as described in the patent. A model which was introduced in evidence in the case has overcome some of the defects, others could be corrected by ordinary mechanical skill, and the most serious objection, viz., that the machine would become gummed up and not work successfully, is answered by the testimony of the witnesses and the evidence of the catalogue that such machines have operated and manufactured boxes in commercial quantities.

But, even considering that the Keunen machine, as described in the

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paper patent, may have such defects and be so different from the machine which is practically workable as placed on the market, it must be held that sufficient evidence has been shown of the existence in the prior art of machines built upon the ideas presented in the Keunen patents, and modified or improved so as to avoid the defects pointed out by the plaintiff, that the defendant would have the right to rely upon the practical application of these ideas, in interpreting and seeking to avoid infringement, when constructing a machine with knowledge of the specifications, drawings and claims of the Holly patent.

Paper boxes were, of course, old in the art, and cigarette boxes, with necks or flanges, covered with glazed paper, and having the strips of glazed paper so folded and pasted as to bind together the sides and bottoms (or the flange) and also to make a smooth edge and surface, were unpatentable. Folding machines, to simplify the hand operations, and to take the place of hand operators, were known. The defendant and the tobacco companies had so-called "pony" box machines in use. The machine claimed to be an infringement in the present case was manufactured from suggestions by Mr. Stock, the mechanical superintendent of the defendant's factory, after making a so-called Traver necking machine at the factory. One Telfair, who later patented the Telfair machine, No. 1,054,473, on an application filed March 7, 1910, had been building a box machine for the defendant. All were trying to extend the operations by machine to the point where the process could fairly be called automatic; that is, where blank material, in quantity, could be fed into the machine, and, by merely seeing that the machine pursued its functions properly, completed articles would be ejected from the machine when the process was complete.

In this sense, the defendant's machine is automatic, as is also that of the plaintiff. It is unnecessary to describe, more than by comment, the evident ways in which, for instance, a supply of blanks could be introduced in place of a roll of web, or in which the scoring or scarfing of the web may be done as the pasteboard is supplied, or before that time in some other place, to avoid the collection of dust. Such substitutions or changes do not affect the automatic character of the machines in question. But the Holly machine, as described in the patent, is an automatic machine, planned to make, simply, rapidly, and carefully, boxes with bottoms. The modified Holly machine, as described upon the trial, is an automatic machine for the making of necks or flanges. This may be within the language of some claims, when separated from the specifications as a whole, and this modification may be protected by the Holly patent, without the necessity of filing an improvement patent. But that is outside of the issue.

The defendant's machine is an automatic machine for the making of necks or flanges. Because all of the parties were seeking to devise a machine which could properly be called "automatic" does not mean that the plaintiff has obtained a patent which includes all automatic machines, which will successfully avoid the necessity of hand operation or feeding, at some point in the process. This automatic feature is the ultimate purpose of the Holly invention and of the defendant's device. But if the Holly machine is limited to a successful combina-

tion of parts, performing the functions automatically by one patentable form of device, and if the same desired end is obtained by a dissimilar device, comprising different combination of ideas from the prior art, we must conclude that the claims of the Holly patent would be rendered invalid, as has been previously stated, if they were interpreted so broadly as to be equivalent to a method patent for automatically making boxes of the type or style desired. Fuller v. Yentzer, 94 U. S. 299, 24 L. Ed. 107; Corning v. Burden, 56 U. S. (15 How.) 252, 14 L. Ed. 683; Wicke v. Ostrum, 103 U. S. 461, 26 L. Ed. 409.

In fact, a machine patent, to be broad enough to cover every method of producing the desired result, must be basic or pioneer, in such a way as to monopolize, not only the particular method, but any method making use of equivalents, in particular steps and also in results, before the machine patent can be held broad enough to render all machines, which perform similar steps and produce similar results, infringements of the machine patent. Westinghouse v. Boyden Power Brake Co., 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136.

This is illustrated in this case by the testimony relating to the way in which the defendant reached the construction of its machine. According to the testimony, the president of the defendant company, a year or so before the application for the Holly patent, was at the plaintiff's factory by invitation. This was at a time when the demand for cigarette boxes began to make competition important. The plaintiff was beginning the use of the Holly machines. The defendant was a competitor, making boxes in large quantities by hand, or by the so-called pony hand machines. The plaintiff sought to discourage the defendant in its ordinary competition, and the defendant was interested in ways of successful competition. The president of the defendant, who is not a mechanic, viewed some 50 machines at the plaintiff's factory in the space of about half an hour. According to his testimony the one thing outstanding in his recollection was that the plaintiff used scoring or scarfing machines, which created a large amount of dust in preparing its rolls of blank web. But this idea of itself was not patentable. The president of the defendant company also gathered from the plaintiff's operation the idea that some automatic machine would be the only successful way of competing with the plaintiff.

Some time thereafter, by deliberate investigation according to the plaintiff's contention, or by coincidence according to the defendant's testimony, a Mr. Telfair, who must have had some knowedge of the Holly devices, undertook to build machines for the defendant, out of which the defendant's present form of machine has grown. As was ruled by the court during the course of the trial, this placed upon the defendant the responsibility of avoiding the use of the Holly ideas in any way which would infringe the Holly patents, even if the defendant had precise knowledge of the form of machines which the plaintiff was using. If the result of this knowledge on the part of the defendant had been an infringing machine, no amount of protestation by the defendant that this exact knowledge was lacking would save it from the charge of infringement. On the other hand, if the defendant's machines do not infringe, it makes no difference whether these

machines were built deliberately to avoid infringing the Holly patent, or whether by accident a machine was developed along other lines which did not infringe the Holly patent.

The issue in the case, therefore, comes down to the same proposition which has been previously considered, viz., whether the claims of the Holly patent must be necessarily so limited as to differentiate the Holly machines from the development of the prior art, in the way in which the defendant has constructed its device. As will be observed from a reading of the claims, most of these claims begin with the words, "In an apparatus of the character described, in combination." If these words mean merely, "In any machine designed to automatically construct pasteboard boxes, or the flanges for pasteboard boxes, from supplies of cardboard and a supply of covering paper, with the use of adhesive material as a means of fastening," then the language of the claims is sufficiently broad to give the plaintiff a basic or pioneer patent covering all machines having means or devices for performing the various steps described generally in the several claims. But such a broad construction is impossible, when the prior art and the specifications of the patent, as illustrated by the drawings, are taken into account. The Holly patent must be limited to that form of automatic machine which embodies and is dependent upon those general ideas of construction which have been particularly referred to previously in this opinion.

Thus limited, the Holly patent does not include the defendant's machine, in which the flange or neck portion of the cigarette box is folded up by the lengthwise movement of a strip which has the covering paper applied to a part only of the outside surface. In this view of the Holly patent, those portions of the defendant's device which would otherwise fall within the language of some of the Holly claims do not constitute infringements of the combinations described. But, going further than this, no one of the Holly claims so distinctly and broadly gives to Holly the right to monopolize any particular feature of the Holly machine as to make it patentable apart from its combination in the automatic whole of which it is an integral part. It is the application of this device to the particular need of the Holly automatic machine that is patented, rather than the use of the particular device on any automatic machine, for the general making of pasteboard boxes.

Claim 252, describing the use of the scores in the pasteboard web as recesses or chambers into which the covering paper may be actually inserted by the former, in order to make a smooth and rigid right-angled corner, presents the only feature of these Holly claims which is not dependent upon the general design of the Holly structure. The defendant's machine has a score at three corners of the neck, while the fourth corner, where a butt joint exists, necessarily allows the covering paper to be folded into the space of the joint, and thus in this respect the defendant's structure is like that of the Holly patent, both in design and in application.

If this claim of the Holly patent could be divided and held valid, in the broad sense of securing to Holly the sole right to make clean and smooth corners in this manner, the plaintiff would be entitled to a

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decree upon this claim, without reference to the other claims of the patent in suit. But Holly cannot monopolize the right to form a corner by the use of the covering paper, nor can he monopolize the right to manufacture an improved corner by the use of these scorings or grooves where material has been removed, in the formation of a box or in the securing of space for the smooth and tight application of the covering paper.

The same idea is shown in the Swedish patent to Svenson, No. 255 of July 16, 1885, for the making of match boxes, and in other devices of the prior art, where wood veneer is employed. The claims of the Holly patent are in these respects valid only in so far as they utilize these ideas in the construction of the automatic combination which Holly describes, and in so far as Holly thus prevented the possibility of improvement by the addition of this feature to the other portions of his automatic machine. In so far as the defendant uses the same ideas in a different automatic machine, he is using ideas from the prior art, which he had the right to employ, if he did not thereby copy the combination of Holly in producing a machine in which these particular features were present.

With such an interpretation of the Holly claims as a whole, it becomes necessary to hold that the products of the two machines are not interchangeable; that is, that the product of the Holly machine, even if that machine be so adapted that it could make necks or flanges, is not a product which of itself proves that the machine making the product of the plaintiff is the same in patentable novelty as the machine making the product of the defendant. Hildreth v. Lauer & Suter Co. (D. C.) 204 Fed. 792. Nor are the various elements of the machines interchangeable, for they cannot be taken away from the particular combination or setting in which they are used in making up the complete automatic whole. Each particular portion or integral part of the device must be viewed from its relation with and bearing upon the other integral parts of the device, in passing upon the validity and also the scope of the claims.

From these standpoints it must be held that the Holly claims are, as substantially conceded by the defendant, valid when viewed from the standpoint of the Holly patent as a whole, and when limited to the description of an integral or separable combination, entering into the general scheme of the Holly design. But from this it must necessarily also be held that the defendant's device as a whole is not an infringement, and that the separable or integral parts of the defendant's machine, which correspond to those parts of the Holly machine which perform similar functions and which construct similar portions of the pasteboard box, are not infringements of those particular claims describing the form of device in the Holly machine by which that particular result is effected.

A decree may be entered, giving judgment to the defendant because of lack of infringement of the claims of the Holly patent in suit, when so construed as to describe patentable invention in the several parts of the Holly machine, and because of lack of infringement of those claims, when considered with reference to the validity of the Holly patent as a whole, viewed in the light of a patentable combination.

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INFLEXIBLE CO. v. MEGIBOW.

(District Court, D. New Jersey. August 1, 1918.)

1. PATENTS ⟸328—INFRINGEMENT—EMBROIDERED LACE DESIGN.
Design letters patent No. 50,080, a clover leaf design for embroidered lace, *held* infringed by defendant's design.

2. PATENTS ⟸252—INFRINGEMENT—IDENTITY OF DESIGN.
Sameness of appearance to the eye of an ordinary observer, not mere difference of lines or slight variation in configuration, is the test that determines identity of design on the question of infringement.

3. PATENTS ⟸13—NOVELTY—DESIGNS.
That three-leaf clover designs were used in making laces for a number of years prior to the advent of plaintiff's design letters patent No. 50,080, a clover leaf design for embroidered laces would not negative novelty, where the earlier patterns were not substantially identical in appearance.

4. PATENTS ⟸328—PATENTABILITY—NEW, ORIGINAL, AND ORNAMENTAL.
In suit charging infringement of design letters patent No. 50,080, a clover leaf design for embroidered laces, *held*, plaintiff's design showed invention, under Rev. St. § 4929 (Comp. St. 1916, § 9475), providing that design must be "new, original, and ornamental," to be patentable.

5. PATENTS ⟸328—PRIOR USE—EVIDENCE.
In suit charging infringement of plaintiff's design letters patent No. 50,080, a clover leaf design for embroidered laces, *held*, plaintiff's patent was prior as to use.

6. PATENTS ⟸312(3)—PRIOR USE—EVIDENCE.
Where, in infringement suit, prior use is sought to be established by oral testimony only, the proof sustaining it must be clear, satisfactory, and beyond a reasonable doubt.

In Equity. Suit by the Inflexible Company against Abraham Megibow. Decree for plaintiff for injunction and accounting.

Erwin & Erwin, of Jersey City, N. J. (Ramsey Hoguet, of New York City, of counsel), for plaintiff.

Bilder & Bilder (David C. Myers, of New York City, of counsel), for defendant.

RELLSTAB, District Judge. The Inflexible Company is the owner, by an assignment from Henry Schwarber, of design letters patent No. 50,080, issued to it December 19, 1916. The bill charges infringement by Abraham Megibow, and seeks permanent injunction, accounting, and damages. Both parties to this suit are manufacturers of laces and embroideries. The defenses are noninfringement, lack of patentable novelty, and prior use.

The patent contains no written description of the design, but the specifications refer to the accompanying drawings. The design thus shown is for embroidered lace, and may be referred to here, as it was by witnesses for both parties, as a clover leaf design.

[1, 2] Does the defendant's design infringe? While there are marked differences between the laces here drawn into question, readily perceived when placed side by side, they are unnoticed when the laces are viewed separate and apart from each other. Under Gorham Mfg. Co. v. White, 14 Wall. (81 U. S.) 511, 20 L. Ed. 731, and Smith

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v. Whitman Saddle Co., 148 U. S. 674, 13 Sup. Ct. 768, 37 L. Ed. 606, sameness of appearance to the eye of an ordinary observer, not mere difference of lines or slight variations in configuration, is the test that determines identity of design on the question of infringement. In Ashley v. Weeks-Numan Co. (C. C. A. 2) 220 Fed. 899, 136 C. C. A. 465, with reference to the test to be applied, Circuit Judge Rogers said:

"The appellant states the question of infringement is ordinarily to be determined by a mere inspection of the complainant's and defendant's stands, and that the impression of substantial identity of appearance must exist, if infringement is to be found. In this the appellant is in error. It is not a proper test to place the two inkstands side by side, to determine whether or not there are certain differences. On the contrary, the correct test is whether the ordinary observer, giving such attention as a purchaser usually gives, would purchase the defendant's inkstand, believing it to be that of complainant's; and in applying that test it is necessary to observe that the subject-matter relates to form and configuration, of which no one had ever seen the like prior to the patent in suit." 220 Fed. p. 902, 136 C. C. A. 465.

The defendant's design, thus tested, possesses substantial identity of appearance with that of the plaintiff's.

[3] Does the plaintiff's design lack novelty? The evidence shows that three-leaf clover designs were used in making laces for a number of years prior to the advent of the plaintiff's design. However, this does not in itself negative novelty. Such earlier clover leaf patterns would have to be substantially identical in appearance to that of the plaintiff's, in order to anticipate or forestall it. None of those exhibited or testified to shows such identity.

[4] Does the plaintiff's design show invention? Under the statute (R. S. § 4929 [Comp. St. 1916, § 9475]) the design must be inventively "new, original and ornamental" to be patentable. In Phœnix Knitting Works v. Bradley Knitting Co. (C. C. E. D. Wis.) 181 Fed. 163, it was held:

"A design is patentable, if it presents to the eye of the ordinary observer a different effect from anything that preceded it, and renders the article to which it is applied pleasing, attractive, and popular, even if it is simple, and does not show a wide departure from other designs, or if it is a combination of old forms."

The plaintiff's design fully meets this test. The presumption of invention that arises from the grant of the plaintiff's letters patent is not overcome by the evidence in this case, and there is nothing on the face of the design that would justify this court in declaring that it was not the product of the inventive faculty.

[5] As to prior use: The plaintiff's patent was applied for October 23, 1916. The defendant purchased the infringing design from a Mr. Wolf on July 24th of that year. The latter testified that he designed that pattern about a year previous. He produced a sketchbook containing a "rubbing" of defendant's design, which "rubbing" he said was made in July or August, 1915. The position and appearance of the "rubbing" of defendant's design in Wolf's sketchbook excites the suspicion that it was made at a time subsequent to the entering of the

"rubbings" of other designs that immediately follow. There is nothing in the book itself that shows that the "rubbing" was entered in the order in which it appears, and whether this particular "rubbing" was made at the time alleged depends solely upon the oral testimony of Wolf.

In dealing with that character of evidence, Mr. Justice Brown, in the Barbed Wire Patent, 143 U. S. 275, 12 Sup. Ct. 443, 450, 36 L. Ed. 154, said:

"In view of the unsatisfactory character of such testimony, arising from the forgetfulness of witnesses, their liability to mistakes, their proneness to recollect things as the party calling them would have them recollect them, aside from the temptation to actual perjury, courts have not only imposed upon defendants the burden of proving such devices, but have required that the proof shall be clear, satisfactory and beyond a reasonable doubt. Witnesses whose memories are prodded by the eagerness of interested parties to elicit testimony favorable to themselves are not usually to be depended upon for accurate information. * * * Indeed, the frequency with which testimony is tortured, or fabricated outright, to build up the defense of a prior use of the thing patented, goes far to justify the popular impression that the inventor may be treated as the lawful prey of the infringer." 143 U. S. pp. 284, 285, 12 Sup. Ct. 443, 447 (36 L. Ed. 154).

[6] The doctrine that, where prior use is sought to be established by oral testimony only, "the proof sustaining it must be clear, satisfactory, and beyond a reasonable doubt," has been repeatedly followed in the Supreme and other federal courts. See Deering v. Winona Harvester Works, 155 U. S. 286, 15 Sup. Ct. 118, 39 L. Ed. 153; Adamson v. Gilliland, 242 U. S. 351, 37 Sup. Ct. 169, 61 L. Ed. 356; American Roll-Paper Co. v. Weston (C. C. A. 6) 59 Fed. 147, 8 C. C. A. 56; Mast, Foos & Co. v. Dempster Mill Mfg. Co. (C. C. A. 8) 82 Fed. 327, 27 C. C. A. 191; H. Mueller Mfg. Co. v. Glauber (C. C. A. 7) 184 Fed. 609, 106 C. C. A. 613; Drum v. Turner (C. C. A. 8) 219 Fed. 189, 135 C. C. A. 74; Peelle Co. v. Rashkin (C. C. A. 2) 222 Fed. 293, 138 C. C. A. 19; Guy v. Stein (C. C. A. 7) 239 Fed. 729, 152 C. C. A. 563; Twentieth Century Machinery Co. v. Loew Mfg. Co. (C. C. A. 6) 243 Fed. 373, 156 C. C. A. 153; Converse v. Matthews (C. C. D. Mass.) 58 Fed. 247; Electric Storage B. Co. v. Philadelphia Storage B. Co. (D. C. E. D. Pa.) 211 Fed. 154; Friedley-Voshardt Co. v. Reliance Metal Spinning Co. (D. C. S. D. N. Y.) 238 Fed. 800.

In the instant case it is to be noted that Wolf, in his affidavit used with others in resisting the granting of a preliminary injunction, which preceded by several weeks the giving of the testimony referred to, made no reference to such sketchbook, or to the fact that he had made the defendant's design in 1915. On the contrary, he then said "that a short time before the 24th of July, 1916," he designed and made a sketch of that design. The testimony of Wolf, which would carry the making of the defendant's design back of July, 1916, on the 24th of which it was sold to the defendant, lacks corroboration, and, while it may be true, does not furnish that character of proof demanded by the cases. The testimony on behalf of the plaintiff as to the time when its design was perfected does not depend upon a single witness, or upon oral testimony alone. It satisfies the test referred to and estab-

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lishes that as early as June 5, 1916, such design was in the form patented.

The plaintiff may enter a decree for injunction and accounting.

In re CAPITAL SECURITY CO.

(District Court, M. D. Tennessee, Nashville Division. January 7, 1918.)

No. 4799.

1. BANKRUPTCY ⟸223—REFEREE'S EXPENSES—ALLOWANCE.

Bankruptcy Act July 1, 1898, c. 541, § 39(3), 30 Stat. 555 (Comp. St. 1916, § 9623), declares that referees shall furnish such information concerning the estates in process of administration before them as may be requested by the parties interested; while General Order in Bankruptcy No. 35, cl. 2 (89 Fed. xiii, 32 C. C. A. xiii), declares that the compensation of referees shall not include expenses necessarily incurred in the performance of their duties under the act and allowed by special order of the judge. *Held*, that a referee, who, pursuant to inquiries of creditors, incurred expenses for stationery in writing letters to such creditors, is entitled to an allowance for the expense so incurred, provided it is reported as required.

2. BANKRUPTCY ⟸223—REFEREE'S EXPENSES—ALLOWANCE.

Though it is the duty of a referee, under Bankruptcy Act, § 39(3), to furnish parties interested with information, and the compensation provided for in section 40 (Comp. St. 1916, § 9624) cannot be increased in any form or guise, yet as General Order in Bankruptcy No. 35 recognizes, impliedly, at least, that it may sometimes be necessary for a referee to employ a clerk to assist him in the performance of his duties, a referee is entitled to an allowance for stenographic hire, where the volume of correspondence with those interested in a case referred was so large that the referee could not personally answer the inquiries.

3. BANKRUPTCY ⟸223—REFEREE'S EXPENSES—REPORT.

Under Bankruptcy Act July 1, 1898, c. 541, § 62, 30 Stat. 562 (Comp. St. 1916, § 9646), declaring that the actual and necessary expenses incurred by officers in administration of estates shall be reported in detail under oath, and General Order in Bankruptcy No. 26 (89 Fed. xi, 32 C. C. A. xi), declaring that every referee shall keep an accurate account of his traveling and incidental expenses and those of any clerk, or any other officer attending him in the performance of his duty, and make return of the same under oath to the judge, with proper vouchers when vouchers can be procured, a referee, claiming an allowance for stationery used and stenographic assistance needed in answering inquiries of creditors, should report the facts showing the necessity of incurring such expenditures, which report should be accompanied by vouchers, if they can be procured.

In Bankruptcy. In the matter of the bankruptcy of the Capital Security Company. On referee's certificate as to expenses. Referee's request for the allowance of expenses denied, without prejudice to his right to seasonably report in detail under oath certain specified expenses.

SANFORD, District Judge. The referee has filed a certificate, stating that, in the administration of this estate, it became necessary

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for him to write 1040 letters to creditors, entailing an expense of $8.80 for letterheads and envelopes and the employment of the services of a stenographer at the rate of three cents per letter, making a total of $40.-00, which sum he has paid; and requesting that authority be given for the payment of such expense out of the funds of the bankrupt estate. He states in this certificate that there were 570 creditors in this case, located in more than twenty states, that the claims filed aggregated $150,000 and that the information sought by creditors was such that he was unable to have a circular letter printed that could be mailed to them; and that, being unable to write the letters personally, he was compelled to secure stenographic assistance.

[1] 1. Sec. 39 (3) of the Bankruptcy Act provides that referees shall "furnish such information concerning the estates in process of administration before them as may be requested by the parties in interest." Sec. 62 of the Act provides that the "actual and necessary expenses incurred by officers in the administration of estates" shall be reported in detail, under oath, and, upon examination, if approved, shall be paid or allowed "out of the estates in which they were incurred." The 26th General Order in Bankruptcy (89 Fed. xi, 32 C. C. A. xi) provides that every referee "shall keep an accurate account of his traveling and incidental expenses, and of those of any clerk or other officer attending him in the performance of his duties in any case which may be referred to him," and "make return of the same under oath to the judge, with proper vouchers when vouchers can be procured, on the first Tuesday in each month." Cl. 2 of the 35th General Order (89 Fed. xiii, 32 C. C. A. xiii) provides that the compensation of referees prescribed by the Act "shall be in full compensation for all services performed by them under the act, or under these general orders"; but shall not include "expenses necessarily incurred by them * * * in the performance of their duties under the act and allowed by special order of the judge."

2. Under these provisions of the Act and General Orders, which are evidently intended to secure economy in the administration of bankrupt estates, I think it clear that the referee can only be reimbursed for such specific expenses as are actually and necessarily incurred in the administration of the particular estate in which they are allowed; and upon due report of such specific expenses, under oath, as provided in Sec. 62 of the Act and the 26th General Order.

3. The cost of stationery used by the referee in the performance of his duties in a particular case, as in sending to creditors prescribed notices of the bankrupt's application for discharge, is such a necessary expense. Re Dixon (D. C.) 114 Fed. 674, 676. And so, where information is requested of the referee by creditors, requiring answers by mail, the cost of the stationery used in replying to such inquiries is an "actual and necessary expense" in the administration of such estate, for which the referee is entitled to reimbursement.

[2] 4. The duty of furnishing such information, however, rests upon the referee, under the specific provisions of the Act. His compensation, prescribed by Sec. 40 of the Act, is in full for all services

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performed by him under the Act and General Orders. This compensation cannot be increased in any guise or form. Re Sweeney (6th Circ.) 168 Fed. 612, 614, 94 C. C. A. 90. Clerical assistance aiding him in the discharge of the duties devolved upon him in a particular case does not, in general, constitute a necessary expense for which he may be reimbursed. Re Carolina Cooperage Co. (D. C.) 96 Fed. 950, 953; Re Elk Valley Mining Co. (D. C.) 213 Fed. 383, 387; Re Daniels (D. C.) 130 Fed. 597; Matter of McCubbin Co. (Sup. Ct. Dist. Col.) 33 Am. Bankr. Rep. 277, 279. And if the referee, without any necessity therefor, and as matter merely of personal convenience, instead of answering the inquiries of creditors himself, employs stenographic assistance to aid him in the discharge of such duty, this is manifestly not a necessary expense for which he is entitled to reimbursement.

The 35th General Order (89 Fed. xiii, 32 C. C. A. xiii) however, recognizes, impliedly at least, that it may sometimes be necessary for a referee to employ a "clerk" to assist him in the performance of his duties in a particular case which has been referred to him. And I think it clear that if, in the administration of a particular case, the exigency is such, due either to the volume or urgency of the duties to be performed by the referee, as to render it necessary for him to employ stenographic or other clerical assistance in order that he may adequately and efficiently perform such duties, as where the volume of correspondence with creditors is such as to render it impossible for him to personally answer their letters, the expense so incurred should be allowed as an actual and necessary expense in the administration of such estate. Re Dixon (D. C.) 114 Fed. 676; Re Daniels (D. C.) 130 Fed. 600; Matter of McCubbin Co. (Sup. Ct. Dist. Col.) 33 Am. Bankr. Rep. 279. And see Re Elk Valley Mining Co. (D. C.) 213 Fed. 387, in which the referee's claim for clerk and stenographer hire was disallowed on the specific ground that "the record shows no state of fact which would support" such claim.

This conclusion, however, I should add, is limited to cases in which the necessity appears for the employment of stenographic or other clerical assistance in the administration of the particular estate involved; it not being intended to suggest any concurrence in the view expressed in Re Pierce (D. C.) 111 Fed. 516, 517, and apparently approved, obiter, in Matter of McCubbin Co. (Sup. Ct. Dist. Col.) 33 Am. Bankr. Rep. 281, that a bankruptcy court may, by the adoption of a general rule, authorize the allowance to referees as part of the expense of administration in every estate, of a fixed sum for clerical assistance, regardless of the character or amount of the work involved in the particular case, and in the nature of a general commutation charge for such expenses; or in the doctrine of Re Tebo (D. C.) 101 Fed. 419, 421, in which a general allowance for clerk hire of the referee was made, without, apparently, any showing of the necessity therefor in the particular case.

[3] 5. Since, however, the referee's expenses in the instant case have not been reported under oath, as required by Sec. 62 of the Bankruptcy Act and the 26th General Order, his request for their

allowance must hence be, and now is, denied; but without prejudice to his right seasonably to report, in detail, under oath, his actual and necessary expenses for stationery and stenographic assistance, and to request the allowance thereof as expenses incurred in the administration of the estate. Such report should state, in a succinct manner, the facts showing the necessity of incurring such expenses in the discharge of his official duties, and should, as required by the 26th General Order, be accompanied with proper vouchers, if they can be procured. Re Daniels (D. C.) 130 Fed. 600.

In re TROUTMAN & JESSE et al.

(District Court, W. D. Kentucky. October, 1917.)

1. BANKRUPTCY ⟸413(3)—DISCHARGE—SPECIFICATION OF OBJECTIONS.
A specification of objections to discharge, asserting that the bankrupts obtained property on credit from the objecting creditor on a materially false statement in writing, made for the purpose of obtaining property on credit, is objectionable, where there is no specification or statement of what property was thus obtained.

2. BANKRUPTCY ⟸415(2)—OBJECTIONS TO DISCHARGE—REPORT OF REFEREE.
Where the referee, who heard objections to the bankrupts' petitions for discharge, merely reported the testimony, but failed to find any conclusion, the court may either find the ultimate facts or refer the matter back to the referee, with instructions to find and report the same; that being the more approved practice.

3. BANKRUPTCY ⟸407(5)—DISCHARGE—OBTAINING GOODS ON MATERIALLY FALSE FINANCIAL STATEMENT.
To deny discharge on the ground that the bankrupts obtained credit by false financial statement, it must appear that the bankrupts obtained property from the objecting creditor on credit, upon a materially false statement in writing to such creditor, for the purpose of obtaining such property on credit, and that the writing so made was that set forth in the specifications.

4. BANKRUPTCY ⟸414(1)—DISCHARGE—BURDEN OF PROOF.
A creditor, objecting to discharge on the ground that the bankrupts obtained credit on a false financial statement, has the burden of establishing that fact by clear and convincing evidence, and, unless the burden is met, discharge should not be denied.

In Bankruptcy. In the matter of the bankruptcy of Troutman & Jesse and others. The Ahlbrand Carriage Company, a creditor corporation, specified objections to the bankrupts' petitions for discharge. On referee's report on objections. Matter referred to referee for supplemental or amended report.

E. B. Anderson, of Owensboro, Ky., for creditors.
James J. Sweeney, of Owensboro, Ky., for bankrupts.

WALTER EVANS, District Judge. The bankrupts have filed petitions for discharge and the Ahlbrand Carriage Company, a creditor corporation, has specified objections thereto in this language:

"That said bankrupts obtained property on credit from said Ahlbrand Carriage Company upon a materially false statement in writing made to the

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said Ahlbrand Carriage Company for the purpose of obtaining such property on credit. Said statements so made in writing to obtain further credit are as follows:

"March 10, 1914.

"Assets	$41,000	Stock on hand	$20,000
Liabilities	8,000	Notes and %	21,000
		Total	$41,000

"Owensboro, Ky., July 14, 1914.

"Ahlbrand Carriage Co., Seymour, Indiana:

"With a view of you extending us credit to the extent of a carload of buggies specified for by your Mr. Tunley, we are pleased to herewith enclose statement of our assets and liabilities:

"Assets.		Liabilities.	
Cash in bank	$184.00	On notes given for merchandise past due	$2,631.11
Merchandise at cost	22,500.00	On notes given for merchandise not due	8,183.06
Notes receivable	11,531.45	Open accounts due	1,477.72
Accounts receivable	4,847.53	Accounts not due	5,223.61
Homestead R. S. Jesse and Troutman	9,000.00		
Other real estate	3,500.00		
		Net balance	$33,947.49"

The applicable statutory provisions contained in section 14b (3) are as follows:

"Obtained money or property on credit upon a materially false statement in writing made by him to any person or his representative for the purpose of obtaining credit from such person."

[1, 2] While the creditor asserts that the "bankrupts obtained property on credit" from the objecting creditor "upon a materially false statement in writing made to" it "for the purpose of obtaining such property on credit," there is no specification or statement of what the property thus obtained, was. Upon this ground the specifications might have been open to serious objection or criticism as to their sufficiency; but no objection was made by the bankrupts upon that ground, and the matter, in the ordinary way, was, under General Order No. 12, clause 3, referred to the referee "to ascertain and report the facts." Though the referee made a report, which is now before us for confirmation, he only reported the testimony, and his failure to reach any definite conclusion thereon. In this situation two courses are open, namely, either, first, to refer the matter back to the referee with instructions to find and report the ultimate facts upon the testimony and the applicable rules of law; or, second, to find them ourselves. There are excellent reasons for pursuing the former course, so that the report of the referee (whose work, in this respect, is analogous to that of a master) may be given its due and usual weight. This, we think, is the better practice.

[3, 4] The statutory elements of the grounds for opposing the discharges in this case, and which elements must all be shown to exist and to coexist, are: (1) That the bankrupts obtained the property from the objecting creditor; (2) on credit; (3) upon a materially false statement; (4) in writing; (5) to said creditor; (6) for the purpose of obtaining such property on credit; and (7) that the writing so made by

the bankrupts was that which is set forth in the specifications. The rules of law in such cases are plain enough and may be stated thus:

"The burden of proof is on the objecting creditor to establish by clear and convincing evidence, his objection." 2 Loveland on Bankruptcy (4th Ed.) § 736.

This rule has always been applied in this district, and our views were expressed in the case of Brockman (D. C. Ky.) 21 Am. Bankr. Rep. 251, 253, 168 Fed. 1015, 1017, where we said:

"Having otherwise complied with the act, * * * the bankrupt must be discharged unless some one or more of the objections thereto (if they come within the statute) has been sustained by the evidence. The objecting creditors allege certain facts to exist. The law plainly puts upon them the burden of proving the truth of what they assert, and, whether or not they should prove those assertions to the exclusion of a reasonable doubt, they must certainly prove them to the satisfaction of the court. Insignificant amounts are involved in some of the objections, and the vague and conjectural character of others of them is noticeable: but I agree with the referee in his conclusion that no one of the objections has been shown to be true or well founded."

Bearing in mind these rules, and the statutory basis of the objection in connection with the testimony, the referee should report what he has ascertained to be the facts. If the objecting creditor has met the burden upon it, the referee should find the facts that way; but manifestly his report should be otherwise, if that burden has not been adequately and fairly met. In other words, the referee should find that the objections have not been established, unless the evidence satisfies him to the contrary.

An order will be made referring the matter back to the referee for a report as to what he has, upon the testimony, ascertained to be the facts. If he cannot ascertain the facts to be as stated by the objecting creditor, the objection is not sustainable.

The question of discharge will be determined upon the coming in of the supplemental or amended report.

UNITED STATES v. JOSEPH FLEMING & SON CO. et al.

(District Court, W. D. Pennsylvania. January, 1918.)

No. 90.

1. CRIMINAL LAW ⇐972—ARREST OF JUDGMENT.
 The count legally charging an offense, and the evidence not being a part of the record, the judgment cannot legally be arrested.

2. POISONS ⇐1—ACQUISITION BY DEALER—"LAWFUL BUSINESS"—STATUTES.
 Under Harrison Anti-Narcotic Law, § 2 (Comp. St. 1916, § 6287h), declaring the offense of selling certain drugs, except under certain conditions, and the offense of obtaining them by a dealer for any purpose other than sale "in the conduct of a lawful business" therein, his business, under exception (b), is lawful if he sells only on proper prescription, however much is prescribed; there being no limitation therein or in exception (a) as to amount physician may prescribe.

 [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Lawful Business.]

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3. Poisons ⇐4—Lawful Business—Statutes and Rules.
Harrison Anti-Narcotic Law, § 1 (Comp. St. 1916, § 6287g), authorizing designated government officers to make rules and regulations for carrying the provisions of the act into effect, does not empower them to make unlawful a druggist's business in the drugs, if under section 2 (Comp. St. 1916, § 6287h) it is not so.

4. Poisons ⇐9—Lawful Business—Statutes—Evidence.
What is a lawful business in the sale of narcotics being defined by Harrison Anti-Narcotic Law, § 2 (Comp. St. 1916, § 6287h), it is error, on prosecution for violation thereof, to admit evidence of what constitutes a lawful business therein, varying from the statutory definition.

Joseph Fleming & Son Company and others were convicted of violation of the Harrison Anti-Narcotic Law, and move for new trial and in arrest of judgment. New trial granted.

John M. Henry, Asst. U. S. Atty., and John Dunkle, both of Pittsburgh, Pa., for the United States.

R. P. Marshall and Joseph Stadtfeld, both of Pittsburgh, Pa., for defendants.

THOMSON, District Judge. We have for consideration a motion by defendants for a new trial, and also a motion in arrest of judgment. The indictment, charging certain violations of the Harrison Anti-Narcotic Act (Act Dec. 17, 1914, c. 1, 38 Stat. 785 [Comp. St. 1916, §§ 6287g–6287q]), contains 16 counts. The first count is drawn under the latter portion of section 2 of the act, and charges that narcotic drugs were obtained for an unlawful purpose. Counts 2 to 15, both inclusive, charge the defendants with the unlawful sale of drugs to the parties named in the several counts, not in pursuance of a written order from the purchaser, in violation of section 2. John C. Larkin was acquitted generally. The corporation, Arnold A. Staley, and John Staley were convicted on the first count and acquitted on all the remaining counts.

This leaves the case in an anomalous situation. The government contended that the defendants, by filling prescriptions for large amounts of morphine sulphate, often as much as 16 drams in one prescription, were guilty of making illegal sales under section 2 of the Harrison Act, and were thus conducting an unlawful business in such drugs. The testimony as to the amount thus sold in two years was certainly astounding. But in all those counts charging unlawful sales the defendants were found not guilty by the jury. Now, the difficulty of the case arises here. The first count, upon which a conviction was had, charges the defendants with *obtaining* such drugs by means of order forms for purposes other than the use, sale, and distribution thereof in the conduct of a lawful business in such drugs. There was not the slightest evidence that the drugs in question were procured for any purpose except the sale thereof in the conduct of their business as dealers in drugs. But the government contended that the sale of large quantities of drugs on prescription was unlawful, and that the purchase and keeping on hand of a large stock of narcotics to supply these unlawful sales was itself unlawful; in other words, in the lan-

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guage of the act, that such drugs were obtained for purposes other than the use, sale, and distribution thereof in the conduct of a lawful business in such drugs. This conclusion would have been justified, and would almost necessarily have followed, if the jury had found the sales as made by the defendants to have been illegal; but it has no foundation on which to rest in the face of their finding that the sales as made were legal; in other words, that they were conducting a lawful business in the sale of such drugs.

[1] However unfavorably the court may regard the business of the defendants as they conducted it, and having in mind the public welfare it was certainly censurable, it is still the court's bounden duty in the administration of the criminal law to see that verdicts involving the liberty of citizens have a sure foundation on which to rest. Such foundation I do not find to support the jury's verdict under the first count of the indictment. But as this count legally charges an offense, and the evidence is not a part of the record, the judgment cannot be legally arrested.

[2] But there is a more serious question as to the true interpretation of the second exception to section 2, relating to the sale of narcotics by druggists. It is undoubtedly true that Congress contemplated and intended that such drugs should be sold and dispensed for medicinal purposes only. Throughout the act they are spoken of as drugs, and the only legitimate use of drugs is medicinal. This is in harmony with the act of 1909 (Act Feb. 9, 1909, c. 100, 35 Stat. 614 [Comp. St. 1916, §§ 8800, 8801]), whereby the importation or use of opium, except for medicinal purposes, is prohibited. It is necessary to examine critically what limitations Congress has actually imposed on the sale or distribution of narcotics under the Harrison Act. This matter is dealt with in section 2 alone. This section makes it unlawful for any person to sell, barter, exchange, or give away any of such drugs, except in pursuance of a written order from the purchaser on a form issued by the Commissioner of Internal Revenue, with a provision for preserving such orders for the period of two years. I have used the word "purchaser," as we are here concerned only with sales. It will be observed that in this enactment Congress set no limitation on the amount of drugs which could thus be sold on the written order of the purchaser. The limitation near the end of the section, to be considered later, relates to the *acquisition* and not to the *sale* of narcotic drugs. This general enactment made all sales by all persons unlawful, except on written orders of the purchaser. Then follow certain exceptions. The first two, which are material here, are in these words:

"Nothing in this section shall apply—

"(a) To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this act, in the course of his professional practice only," with a proviso that the physician, etc., shall keep a record of the drugs dispensed, showing the amount, the date, and name and address of the patient; the record to be kept for a period of two years.

"(b) To the sale, dispensing, or distribution of any of the aforesaid drugs by a dealer to a consumer and in pursuance of a written prescription issued by a physician, dentist or veterinary surgeon registered under this act: Provided, however, that such prescription shall be dated as of the day on which

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signed and shall be signed by the physician, dentist or veterinary surgeon who shall have issued the same: And provided further, that such dealer shall preserve such prescription for a period of two years from the day on which such prescription is filled in such a way as to be readily accessible to inspection by the officers, agents, employés, and officials hereinbefore mentioned."

Examining the first exception, it is perfectly apparent that the physician, in order to bring himself within the exception, must comply with the conditions attached thereto, namely: First, he must be registered under the act; second, he can dispense such drugs only to a patient in the course of his professional practice; third, he must make and keep a record of the drugs dispensed as therein provided, and preserve the same for two years. If the physician fails to observe any of these conditions attached to the exception, he takes himself out of the exception and becomes liable under the general provisions of section 2, making all sales, except on an order from the purchaser, unlawful. Failure to observe the clear distinction between the violation of the general enactment and the violation of the conditions annexed to the exception has led to great confusion in the drawing of indictments and in judicial decisions in the various federal jurisdictions.

Turning to exception (b), we find also certain conditions attached thereto, namely, the provisions of section 2 shall not apply to the sale, dispensing, or distribution of the drugs by a dealer to a consumer, if made (1) under and in pursuance of a written prescription issued by a physician registered under the act; (2) provided such prescription shall be dated as of the day on which signed, and shall be signed by the physician issuing the same; (3) such prescription shall be preserved for two years, for the purpose of official inspection.

These are the sole conditions which Congress has prescribed as governing the sale and distribution of narcotics by the registered dealers. It appears Congress undertook to regulate the amount of such sales by putting the limitations on the physician who prescribes the drug, and not on the druggist who fills it. The former is supposed to know the needs of his patient and to prescribe accordingly. And if he distributes the drugs to others than his patients, or in amounts not warranted in the legitimate practice of his profession, for the purpose of alleviating suffering or effecting a cure, he is not protected by the exception, and becomes criminally liable for the violations of the general provisions of section 2. Wisely or unwisely, Congress appears to have placed no other limitation whatever on the amount of the sale. It made the prescription of the registered physician the sole and sufficient warrant for the sale by the druggist of the drugs therein prescribed. Evidently it was intended that, if the druggist keeps within the limitations of the prescription, he is protected thereby. In an act prescribing severe penalties for its violation, courts dare not become wiser than the lawmakers and attempt to read into the act something which the lawmakers have omitted. If a physician issues prescriptions in bad faith, and a druggist acts in collusion with him to violate the law, they may well be guilty of conspiracy; but that is not the charge in this indictment.

The provision near the end of section 2 makes it unlawful to obtain by means of order forms any of said drugs for any purpose other

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than the use, sale, or distribution thereof (if a dealer) in the conduct of a lawful business in said drugs, or (if a physician) in the legitimate practice of his profession. A careful scrutiny of the act makes it reasonably apparent that the meaning of the words "in the legitimate practice of his profession" and "in the conduct of a lawful business in said drugs" are defined and fixed by the limitations on the action of physicians and druggists prescribed in exceptions (a) and (b). In other words, if the physician prescribes the drugs to patients in the course of his professional practice only, this constitutes the use, sale, or distribution of such drugs in the legitimate practice of his profession; and if the dealer sells or dispenses the drugs only in pursuance of a written prescription, issued by a registered physician and dated as of the day it is signed, then such drugs are distributed by him in the conduct of a lawful business in such drugs. These provisions, embraced in the same section, one relating to the acquisition of the drugs and the other to their sale and distribution, when thus read, are in complete harmony.

[3] While under the first section of the act the Commissioner of Internal Revenue is authorized, with the approval of the Secretary of the Treasury, to make all needful rules and regulations for carrying the provisions of the act into effect, I find no rule or regulation affecting the interpretation which I have put upon the exceptions to section 2. Treasury Department Regulation No. 2172, relating to fraudulent or forged prescriptions, has no application to the question in hand. Treasury Department Circular No. 220 provides as follows:

"Where a physician, dentist or veterinarian prescribes any of the aforesaid drugs in a quantity more than is apparently necessary to meet the immediate needs of a patient in the ordinary case, or where it is for the treatment of an addict or habitué to effect a cure, or for a patient suffering from an incurable or chronic disease, such physician, dentist or veterinary surgeon should indicate on the prescription the purpose for which the unusual quantity of the drug so prescribed is to be used. In cases of treatment of addicts these prescriptions should show the good faith of the physician in the legitimate practice of his profession by a decreasing dosage or reduction of the quantity prescribed from time to time; while, on the other hand, in cases of chronic or incurable diseases such prescriptions might show an ascending dosage or increased quantity. Registered dealers filling such prescriptions should assure themselves that the drugs are prescribed in good faith for the purpose indicated thereon, and, if there is reason to suspect that the prescriptions are written for the purpose of evading the intentions of the law, such dealers should refuse to fill same."

This instruction is in line with the general purpose of the act, and is properly and wisely intended to aid in restricting as far as possible the distribution of narcotics to medicinal purposes only. But the designated officers of the government have not been given, and do not possess, the power to place limitations on an act differing from, and inconsistent with, those which Congress has definitely prescribed. There was no question of fact as to the exact manner in which the defendants dispensed the drugs, and it is clear under the evidence that they at least complied with the letter of the law. But in my charge to the jury, among other things, I said:

"Therefore, if a druggist knows, or has reason to believe, that the prescription which he is asked to fill has not been issued by the physician to a pa-

tient in the course of his professional practice, and in the legitimate practice of his profession, then it is his duty to refuse to fill it; and, if he does not so refuse, he violates the law."

[4] I also admitted evidence bearing on the question as to what constitutes a lawful business in the sale and distribution of narcotic drugs. In this I think I was in error. In United States v. Reese, 92 U. S. 214, 23 L. Ed. 563, the court said:

"If the Legislature undertakes to define by statute a new offense, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime."

If I am right in my construction of the law, Congress has defined what is a lawful business in the sale of narcotics by a dealer; and it is not a question of good faith on his part, but of strict compliance with the conditions, which Congress has imposed upon him.

From the foregoing considerations, it follows that a new trial must be granted; and it is so ordered.

DU PONT et al. v. DU PONT et al.

(District Court, D. Delaware. March 19, 1918.)

No. 340.

1. CORPORATIONS ⊂=376—ACQUISITION OF STOCK—DETERMINATION.
 Though stock of a manufacturing corporation was bought of a stockholders by officers thereof under such conditions that it has the right to take over the trade, whether it shall do so is a question of business policy, to be determined by it through its directors or stockholders, and not by the court, though because of dividends since the purchase it can do so without any payment of money.

2. CORPORATIONS ⊂=197—STOCKHOLDERS' MEETING—RIGHT TO VOTE—PERSONAL INTEREST.
 Stockholders, though interested in not having the corporation exercise its right of taking over a purchase by them from another of stock in it, made while they were its officers, may vote at a stockholders' meeting to determine whether it shall do so.

3. CORPORATIONS ⊂=201—STOCKHOLDERS' MEETING—MOTIVES IN VOTE—INQUIRY BY COURT.
 The court cannot inquire into the motives of stockholders in voting against exercise by the corporation of its right to take over a purchase of its stock made by other stockholders from another, as having been influenced by the purchasing stockholders.

4. CORPORATIONS ⊂=201—STOCKHOLDERS' MEETING—GROUND FOR AVOIDING ACTION—MISUSE OF DECREE.
 Improper use of court's opinion and decree, while it might have been restrained, cannot be urged as ground for avoiding action of stockholders at meeting under interlocutory decree, having been known of before meeting, but not then brought to court's attention.

In Equity. Suit by Philip F. Du Pont and others against Pierre S. Du Pont and others. Heard on various motions and exceptions. Or-

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

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der vacated, petition struck off, exceptions overruled, and bill dismissed.

See, also, 246 Fed. 332.

John G. Johnson, William A. Glasgow, Jr., Henry P. Brown, Frank P. Pritchard, all of Philadelphia, Pa., and Robert Penington, of Wilmington, Del., for plaintiffs.

George S. Graham and George Wharton Pepper, both of Philadelphia, Pa., William H. Button, of New York City, and John P. Laffey and William S. Hilles, both of Wilmington, Del., for defendants.

THOMPSON, District Judge. Under the interlocutory decree of August 17, 1917, a special master was appointed to conduct a special meeting of the stockholders of the E. I. Du Pont De Nemours & Co. for the purpose of determining by their votes whether the company should avail itself of the opportunity to acquire the stock purchased by Pierre S. Du Pont and his associates from T. Coleman Du Pont, together with the proceeds thereof and dividends and income thereon. The question was to be submitted to the stockholders in the form of an affirmative resolution that the company exercise its right to acquire the stock.

On November 7, 1917, the special master filed his report, showing, inter alia, that the result of the special meeting was "that there had been 157,959 shares of stock cast 'for' the resolution, and 312,587 shares 'against' the resolution, and that, the resolution not having received a majority of the votes cast, the same had been lost." The result of the failure to carry the resolution was that the stockholders whose votes were cast at the meeting rejected for the company the opportunity for the acquisition of the stock with its increment.

On November 8th the petition of Pierre S. Du Pont was filed, praying for an order and decree dismissing the bill. On November 14, 1917, the complainants filed a petition, praying that, notwithstanding the result of the stockholders' meeting, a decree be entered in their favor, ordering that the stock and its proceeds, dividends and interest, subject to an accounting, be turned over to the E. I. Du Pont De Nemours & Co.

On November 15th the complainants filed exceptions to the report of the special master, and on November 19th filed an answer to Pierre S. Du Pont's petition to dismiss the bill. On December 6th, on the order of the defendants' solicitors, the case was set down for hearing upon the complainants' exceptions to the master's report. On December 11th, on the complainants' application, an order was entered upon the defendants to file, within 20 days, an answer to the complainants' petition of November 14th. On December 27th the defendants moved to vacate the order requiring them to file an answer and to strike off the complainants' petition of November 14th.

On January 12th hearing was had upon the defendants' motion to vacate the order requiring them to answer and to strike off the complainants' petition, upon the complainants' exceptions to the master's report, and upon the defendants' petition to dismiss the bill. The primary question to be determined is whether the facts set out in the

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complainants' petition are sufficient to require an answer by the defendants. If so, it must be because the allegations of the petition, if taken as true, would require the entry of a decree in favor of the complainants. This would be in effect the vacating of the interlocutory decree directing the determination of the question whether the company should acquire the stock by a vote of the stockholders, and a reversal of the decision in the former opinions of the court that the question was one of business policy for the corporation to decide in view of the facts of the case.

The petition sets out certain facts of which evidence was before the court before the interlocutory decree was entered. They relate to a resolution of the board of directors of December 8, 1915, directing the officers of the company to assist in the defense of the suit; the action of Pierre S. Du Pont, as president of the company, on January 8, 1916, in recommending the removal of Alfred I. Du Pont from office as vice president and member of the finance committee; the action of the board of directors on January 10, 1916, in removing Alfred I. Du Pont; the action at the stockholders' meeting on March 13, 1916, in passing a resolution undertaking to condone the action of Pierre S. Du Pont and his associates in the purchase of the stock; the defeat of Alfred I. Du Pont, William Du Pont, and Francis I. Du Pont for reelection to the board of directors.

The petition contains further allegations, through domination and control by the defendants of all the officers of the company, board of directors, finance committee, and executive committee, of the establishing of a publicity bureau in charge of paid employés of the company and its use to disseminate in the press reports, suggestions, and arguments favorable to the retention by the defendants of the profits upon the purchase of the stock, and, after the entry of the decree, reports, suggestions, and arguments calculated to make the stockholders believe that the decision of the court was erroneous, and that the defendants would resign or the management be changed, and results disastrous to the company ensue, if the defendants were forced to relinquish the stock.

It is further alleged that the board of directors, through the domination of the defendants, on October 25, 1916, amended the bonus plan of the company under which stock was purchased by the company for the reward of faithful employés, so as to confer upon the holders of bonus stock, amounting to 26,148 shares, the right to vote, although the stock had not yet been paid for in full. It is alleged the defendants have and exercised domination and control over the holders of the shares of bonus stock so held, resulting in its being almost entirely voted against the resolution. It is alleged that after the date of the decree, and before the stockholders' meeting conducted by the special master, the defendants procured officers and employés of the company as the company's representatives to visit stockholders and induce them to vote against the acquisition of the stock by the company; that through their control of the company they caused the heads of departments, superintendents of plants, and other influential officials to influence the employés in their various departments or under their con-

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trol to vote against the resolution, and, as the result thereof, 1,129 officers and employés of the company, holding 138,683 shares, voted at the meeting, and all except 3, holding 452 shares, voted against the resolution.

It is alleged that the defendants induced stockholders to vote against the resolution by suggesting or stating that, if the company required the defendants to account to it, they would resign their positions with the company; that large blocks of their stock might be put upon the market, and thus a greater loss might accrue to the company than would be compensated for by the profits, which defendants might be required to pay to the company. It is further alleged that, after the decree and before the meeting, the defendants induced stockholders to vote against the resolution by showing to the larger stockholders what was claimed to be the opinion of eminent New York counsel, a former Justice of the Supreme Court of the United States, given to the defendants, to the effect that the decision of this court that the stock of T. Coleman Du Pont had been obtained by the defendants in fraud of the rights of the company was erroneous.

It is alleged that on August 30, 1917, after the decree was entered, a letter was addressed to the stockholders, signed by H. M. Barksdale, J. A. Haskell, and C. L. Patterson, directors and vice presidents of the company, urging the stockholders to vote against the resolution and soliciting their proxies. The letter set out at length opinions of the writers and arguments to the effect that it would be unwise for the company to acquire the stock. It stated that Coleman Du Pont had never offered to sell to the company more than 20,700 shares of common stock, and that solely for the purpose of resale at cost to important employés of the company. It stated that, when Coleman Du Pont's offer came before the finance committee, Pierre S. Du Pont urged its acceptance, but it was declined, because the members of the finance committee considered the price too high, and about one month later the offer was withdrawn, and that subsequently Pierre S. Du Pont purchased the whole amount of T. Coleman Du Pont's stock. The letter stated the increase of value of the stock between the time of its purchase up to the following December, when the suit was brought; the important connection in the company's management of the defendants; the vast increase in the capacity and output of the company; and it concluded with the explanation that the statements in the letter were "in order that stockholders may realize the lack of wisdom and foresight involved in voting in favor of a proposition that has, we believe, for its primary purpose a great weakening of, and if possible a change in, the present control and management."

The complainants in their petition contend that certain stockholders' votes should not have been received for the purpose of enabling the defendants to withhold from the corporation the stock and its profits. The stock which it is urged should not have been counted against the resolution consisted of (1) 96,171 shares owned by and voted by the defendants; (2) 63,312 other shares voted by officers and employés not defendants, but who held as part of their shares of stock the bonus stock above referred to amounting to 26,148 shares; (3) 7,452 shares

voted by stockholders who were wives, sisters, brothers, children, or mothers of defendants; (4) 8,805 shares voted by stockholders who were brothers-in-law, sisters-in-law, or fathers-in-law of defendants; (5) 8,932 shares voted by wives and mothers of officers and employés holding bonus stock; (6) 6,360 shares voted by sisters-in-law and brothers-in-law of officers and employés holding bonus stock; (7) 3,069 shares held by officers and employés who had no bonus stock; (8) 32,051 other shares voted by directors of the company, who are not employés; (9) 9,865 shares voted by stockholders closely identified with the company, including 1,807 shares which had been given to William G. Ramsay, now deceased, by Pierre S. Du Pont and others, and including also 7,746 shares voted by Alexis I. Du Pont and Eugene Du Pont as trustees for Amelia E. Du Pont, Julia S. Du Pont, and Annie Du Pont Peyton. They contend that 17,116 shares voted by Francis I. Du Pont and Ernest Du Pont, as two of three trustees for the estate of Francis G. Du Pont, and which the special master included in computing the vote cast at the meeting in the 157,959 shares voted for the resolution, but reported that the ballot should not have been counted, because the third trustee, A. Felix Du Pont, refused to vote with them, should be counted in favor of the resolution.

It is alleged in the petition that, because the court found "that it is a foregone conclusion that its acquisition would be of enormous profit to the company," there is no reasonable and fair explanation of the voting of the above classes of stock against requiring the defendants to account, other than that the stockholders voting said stock were under the direct domination and control of the defendants, or that the voting of the stock was to subserve some interest or purpose outside of and regardless of the consequences to the company and inconsistent with its interests.

Two propositions are presented on behalf of the complainants, upon either of which their counsel contend they are entitled to a decree in their favor:

First. Inasmuch as the record shows that the defendants had, prior to the entry of the interlocutory decree, received in dividends, interest, and proceeds from the sale of bonds received as dividends, sums more than sufficient to reimburse them for their outlay in the purchase of the stock from T. Coleman Du Pont, and therefore the company could acquire the stock without the payment of any money out of its treasury, there was at the time of the stockholders' meeting no question of business policy for the determination of the corporation through its stockholders; that the question before the stockholders' meeting, therefore, was no longer whether the company should acquire the stock, but the "opportunity" to make profit by the purchase of stock, which belonged in equity to the corporation, having been consummated and turned into actual profits, the defendants, as trustees ex maleficio, are bound to restore the trust estate, not the "opportunity" which has passed, but the profits which it has produced.

Second. That the votes of the defendants because of their interest, and, in view of the allegations of domination and control by the defendants over the corporation, its board of directors, its officers and

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employés, and their use of their domination and control in obtaining through the influence exerted by officials of the company over stockholders and through the alleged improper impressions concerning the opinion and decree of the court given by those officials to the stockholders, the votes of the directors, officers, and employés, of their relatives by blood and marriage, and of the stockholders who voted against the resolution cannot avail, to the prejudice of the minority stockholders, to reject the opportunity to take the profits.

[1] It is not now for the first time brought to the attention of the court that the profits in dividends upon the stock and the proceeds of sales of bonds were more than sufficient to repay the defendants what they paid Coleman Du Pont, with interest, and therefore no payment of money out of the treasury of the company was required if the company should determine to acquire the stock. It is a situation which existed and was considered by the court prior to entering the interlocutory decree and is in effect set out in the decree. It was a fact which the special master was directed to present to the stockholders for their information in the form of notice set out in the decree. The paragraph in the notice to the stockholders is as follows:

"For the information of the stockholders, it is proper to state that, from the statements filed in this cause by the defendants, it appears that, if the stockholders desire to exercise the right to acquire said stock, and to require the defendants to account for the excess in cash, and the Anglo-French bonds not converted into cash, received by them as aforesaid, it will not be necessary for the company to pay anything to the defendants, for they have been repaid in cash more than the amount paid by them, with interest, for said stock purchased from T. Coleman Du Pont."

The fact was urged prior to the entry of the interlocutory decree as a reason why a decree should be entered for the complainants, without referring the question to the stockholders' meeting, upon the ground that a question of business policy no longer existed. It may be desirable to restate some of the circumstances surrounding the purchase of the stock in their application to the rights of the company. The Powder Company was not engaged in buying and selling its own stock. It had under its charter the right, through its board of directors, to purchase its own stock, and it had, at the time when Pierre S. Du Pont purchased the stock, sufficient available funds to pay for it. So far as the evidence shows, however, the only transaction involving the purchase of its own stock, which had ever come before the finance committee or the board of directors, with the exception of small purchases for bonus purposes, was in relation to the purchase of the 20,700 shares from T. Coleman Du Pont for the purpose of distributing it among employés at cost. If T. Coleman Du Pont had never made the offer, or if the offer had been finally rejected, Pierre S. Du Pont would have had the right to purchase all of Coleman's shares of stock, or those of any other stockholder, in whatever amount and at whatever price he saw fit, and the company could not have claimed the right to take the stock from him, or to make him accountable for profits upon it. The offer of Coleman Du Pont and the negotiations committed to Pierre S. Du Pont had no purpose of profit to the company through increase in value, and no

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other purpose excepting obtaining the stock for distribution among the more important employés of the company. The company had never had under consideration the purchase of more than the 20,700 shares, nor a price per share in excess of $160.

If Pierre S. Du Pont and his associates had taken for themselves, while acting as officers and directors of the company, a contract with a foreign government for the manufacture and sale of a large quantity of explosives, that contract, being of the same character and with the same parties as the contracts carried on in the ordinary business of the company, without any necessity for action by the board of directors or the stockholders, would probably have been held in equity an asset of the company, and a minority stockholder would have been entitled to a decree for the transfer of the contract to the company, or, in case the contract had been carried out, for an accounting of the profits for the benefit of the company. Unless special circumstances existed, such as the inability of the company to carry out such a contract because of inadequate capital, inadequacy of plant, or some such reason, no question of business policy would have required a vote of the board of directors or stockholders, and no vote of directors interested in preventing the company obtaining the contract, and no vote of the majority stockholders would have been permitted to interfere with the right of the minority in that asset of the company.

The acquisition of this large block of stock, without any definite purpose as to its disposition, would have been an innovation in the business policy of the company, and other questions are involved than that of the immediate enrichment of the corporation's treasury and the probable immediate increase in the value of the holdings of the individual stockholders. An individual stockholder, whose only interest was the ultimate value of his stock as a dividend-paying investment, might well have paused to consider, at the time the purchase was made in March, 1915, whether it would be a wise policy for the company, in the circumstances that then existed, to invest its funds in such a large number of its own shares, without any definite purpose as to their future disposition; and in August, 1917, when it had appeared that the company could acquire the stock without paying any money out of its treasury, he might reasonably consider various phases of that same question. He might as a matter of policy reasonably desire that the control in the management under which he had during the continuance of the war seen an immense growth in the business of the company and large profits in the shape of dividends paid to the stockholders be made more firm by permitting the stock to remain in the hands of the defendants. The court cannot say that the business success of the corporation is merely a result of war conditions, and that the management of the company's affairs by the individual defendants in their official capacity is a fortuitous circumstance, disassociated with the causes of the company's success. The stockholder may well have considered that the management contributed to or caused the company's success. The stockholder might reasonably consider questions of business policy relating to the disposition of the stock which would arise after its acquisition. Should it

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be held for a rise in value and sold at a profit? Should it be distributed at cost to heads of departments and employés under the bonus plan? Should it be held in the treasury, and the dividends earned distributed to the remaining stockholders? Or should it be retired, reducing the outstanding capital of the company? The increase or decrease of the capital stock of corporations is the subject of statutory regulation under the laws of most of the states, and, under the laws of Delaware and of New Jersey, is dependent upon the decision of the stockholders at a meeting duly called for the purpose after favorable action by the board of directors. It is essentially a question of corporate business policy; and the power to purchase its own stock is conferred upon the board of directors by the charters of both E. I. Du Pont & Co. and the E. I. Du Pont Powder Company. As the question of acquisition of the stock involves other considerations than taking it, together with the profits, without the payment of any money out of the treasury of the company, which raise questions of business policy, I see no reason to depart from the conclusions upon which the interlocutory decree was based.

[2] Passing to the complainants' second proposition, the first question presented is: To what extent the individual defendants were affected in their right to vote by their interest in retaining the stock, and, assuming, as we must, the truth of the allegations in the complainants' petition for the purpose of determining whether the defendants should be required to answer, what effect has the domination and control of the individual defendants over the corporation and its officers and employés and the alleged improper use of the opinion of the court upon the validity of the result of the vote at the stockholders' meeting?

The general rule is that a stockholder is not deprived of the right to vote upon a question in which he has an individual interest in the result of the vote apart from his general interest in the corporation. His relation as a stockholder to other individual stockholders and to the body of stockholders is not a fiduciary one. Consequently, when he is called upon to decide at a stockholders' meeting between his own interest as an individual and what may be his interest along with other stockholders in benefiting the corporation, he is free to exercise his own judgment, and to act in accordance with selfish rather than altruistic motives; and further, even though the question for determination by the stockholders be one raised by his acts in his own interest, while an officer or director of the corporation, he is not, as a stockholder, debarred from the full use of the property in his stock, including the right to vote that stock. An exception to that rule would apply in a case where, as a director of the corporation, he had misappropriated an asset of the company to which he was accountable to the corporation, as in the case of Cook v. Deeks, relied upon by counsel for the complainants and reported in the Law Reports, Appeal Cases, part 3, April 1, 1916, page 554. Officers appropriating an asset in equity belonging to the company—in that case a contract for the sort of work in which the corporation was actually engaged and for the performance of which it had been incorporated—could not, through their control of the majority of the stock at a meeting

called by themselves for that purpose, validly use their voting power to vest it in themselves. There was no question of business policy to be determined by the corporation in that case.

Where, as in the present case, a question of business policy is to be determined by the proper corporate authority, the court cannot deprive one who is interested adversely to the alleged interests of the corporation and other stockholders from exercising his right to vote his stock. Neither can the court, because of its power to prevent a majority depriving the minority of its rights to the benefit of a profitable asset, which in equity belongs to the corporation, usurp the power belonging to the individual stockholders by forcing upon the corporation its decisions in a question of corporate management, because that question of corporate management is coupled with the misuse of a fiduciary relation in the same transaction. In March, 1915, Pierre S. Du Pont and his associates as stockholders would have had an equal right with the complainants to vote in determining as a matter of corporate policy at a stockholders' meeting duly called upon full notice to all the stockholders of all the facts in relation to the transaction whether the company should purchase Coleman Du Pont's holdings of stock. The distinction between the situation as it then existed and as it now exists is that at that time, although the purchase had been consummated, one of the questions of policy to be determined would have been whether the company should pay money out of its treasury to acquire the benefits of a transaction which, while it then had all the appearance of being a profitable one, still had an element of uncertainty in the future value of the stock. Other questions of business policy present at that time and still remaining open have been discussed. The rights of the defendants as stockholders are no less now because of the circumstance that the transaction has ripened into a profitable one.

[3, 4] The question of influence exerted upon other stockholders through the domination and control of the defendants to vote against the resolution and the question of the effect upon stockholders of the letter sent to them by Messrs. Barksdale, Haskell, and Patterson would involve an inquiry by the court into the motives which actuated each stockholder in depositing his vote which it is beyond the power or policy of the courts to pursue. Every stockholder was fully informed of the decree of the court by the special master and of the questions involved. He had a right to give his proxy to whomsoever he desired, and his motives for voting, can no more be inquired into now than they could prior to the stockholders' meeting. It must be assumed that every stockholder was reasonably capable of deciding questions of business policy for himself, and if the court could not have determined that for him in advance, it cannot determine it for him now. Assuming, without so finding, that the letter of Messrs. Barksdale, Haskell, and Patterson involved an improper use of the opinion and decree of the court for which the defendants were legally responsible, and while the court might have prevented such improper use by the defendants, as in the case of Rollman Mfg. Co. v. Universal Hardware Works, 238 Fed. 568, 151 C. C. A. 504, the complainants

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had full opportunity to bring the matter to the attention of the court prior to the meeting. Not having done so they cannot now set up that act as a ground for setting aside the action of the stockholders at the meeting. For all that appears in the petition, these facts were as fully known to them at that time as at the present.

It is not necessary to decide whether the holders of the bonus stock were entitled to vote that stock, as the determination of that question would not affect the result of the ballot at the stockholders' meeting. In accordance with the foregoing views, it is concluded that the complainants' petition of November 14, 1917, does not set up any sufficient grounds for setting aside the interlocutory decree, nor for entering a decree in favor of the complainants.

The questions raised by the complainants' exceptions to the report of the special master, excepting the first, tenth, eleventh, and twelfth exceptions, are fully covered by the conclusions reached concerning the matters set out in the complainants' petition. The first exception to the master's report must be dismissed, as the special master was acting under the authority of the interlocutory decree, and, if there was error in ordering the stockholders' meeting, it was not the error of the master. The conclusions of the master in relation to the votes cast by various fiduciaries, to which the tenth, eleventh, and twelfth exceptions apply, have been carefully examined. The special master's conclusions are, in the opinion of the court, correct.

An order will be entered, vacating the order of December 11, 1917, upon the defendants, requiring them to answer the complainants' petition of November 14, 1917, striking off the said petition, and overruling the complainants' exceptions to the special master's report and confirming said report.

A decree will be entered, dismissing the bill, with costs to the defendants.

UNITED STATES v. PRIETH et al.

(District Court, D. New Jersey. August 1, 1918.)

1. ARMY AND NAVY ⇐40—ESPIONAGE ACT—CONSTRUCTION—"OBSTRUCT."

Espionage Act, tit. 1, § 3, applies to conspiracy to obstruct recruiting and enlistment service of United States by printing, circulating, and distributing newspaper articles persuading eligible persons throughout United States not to enlist, since anything which would impede, hinder, or embarrass recruiting service would "obstruct" it.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Obstruct.]

2. STATUTES ⇐184—CONSTRUCTION.

A construction will not be adopted which attributes to Congress an intent inconsistent with manifest purpose of act, unless language used clearly requires it.

3. ARMY AND NAVY ⇐40—ESPIONAGE ACT—CONSTRUCTION.

Espionage Act, tit. 1, § 3, is not, as construed in instant case, an act to regulate the press; the press having no more of a constitutional right, when the country is at war, to willfully induce available persons not to join army and navy, than an individual has to urge persons not to enlist, etc.

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4. ARMY AND NAVY ⟸40—COMPULSORY SERVICE—"THE RECRUITING OR ENLISTMENT SERVICE OF THE UNITED STATES."

Obstruction of the "draft" is a violation of Espionage Act, tit. 1, § 3, as well as obstruction of voluntary enlistment; the expression "the recruiting or enlistment service of the United States" applying to both the service created by Selective Service Act and that which has to do with voluntary enlistment.

5. ARMY AND NAVY ⟸20—SELECTIVE SERVICE ACT—"ENLISTMENT."

Since Selective Service Act, § 6, speaks of "enlistment" in connection with the compulsory service therein provided for, and section 7 speaks of "voluntary enlistment," an intention is shown to use the term "enlistment" in a broad and comprehensive sense.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Enlistment.]

6. ARMY AND NAVY ⟸40—"ENLISTED."

One becomes "enlisted" in the military or naval service, whether he volunteers or is drafted.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Enlist.]

7. ARMY AND NAVY ⟸40—OBSTRUCTING DRAFT—STATUTE.

Penal Code, § 37 (Comp. St. 1916, § 10201), applies only to conspiracies, and does not cover the case of one, acting alone, who induces another to fail to register pursuant to the Selective Service Act.

8. ARMY AND NAVY ⟸40—OBSTRUCTING DRAFT—INDICTMENT.

Indictment for conspiracy to violate Espionage Act, tit. 1, § 3, charging conspiracy subsequent to June 15, 1917, to induce persons liable to service under Selective Service Act to refuse to submit to registration, *held* to charge a conspiracy to induce persons who failed to register at time set by President's proclamation not to register under Selective Service Act, § 5, making provision for subsequent registration.

9. CRIMINAL LAW ⟸313—DATE FOR REGISTRATION OF DRAFTEES—KNOWLEDGE—PRESUMPTION.

It must be presumed that the grand jurors were cognizant of the fact that the day originally set for registration of persons subject to draft was June 5, 1917.

10. ARMY AND NAVY ⟸40—OBSTRUCTING ENLISTMENT—INDICTMENT.

An indictment for a conspiracy to violate one of the provisions of Espionage Act, tit. 1, § 3, *held* sufficient, although it did not state names of persons whom conspiracy was designed to induce not to enlist, etc., or allege that names were unknown to grand jury; it being manifest that names of such persons could not be known to grand jury.

11. INDICTMENT AND INFORMATION ⟸71—SUFFICIENCY IN GENERAL.

An indictment is sufficient, where it acquaints defendants with the nature and cause of the accusation and sets forth the charge with sufficient definiteness to enable them to make their defense and to avail themselves of the record of conviction or acquittal against further prosecution, etc.

12. INDICTMENT AND INFORMATION ⟸101—NAMES OF THIRD PERSONS.

It is not always necessary that the names of third persons be set forth in the indictment, or that there be an allegation that such names are unknown.

13. ARMY AND NAVY ⟸40—OBSTRUCTING ENLISTMENT—INDICTMENT.

In prosecution for conspiracy to violate one of the provisions of Espionage Act, tit. 1, § 3, by obstructing recruiting and enlistment service of the United States by means of newspaper articles, indictment *held* not subject to objection that it was defective, because not alleging that the articles were intended to be publications which defendant might not lawfully publish, or that they were untrue in fact.

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14. INDICTMENT AND INFORMATION ⊂=150—DEMURRER—QUESTIONS PRESENTED.
In prosecution for conspiracy to violate Espionage Act, tit. 1, § 3, by obstructing recruiting and enlistment service of the United States by means of newspaper articles, whether the means alleged to have been adopted would have accomplished the purpose is a question of fact, which cannot be passed upon on demurrer to the indictment.

Benedict Prieth and others were indicted under Espionage Act, tit. 1, § 4, for a conspiracy to violate one of the provisions of section 3 of said act. On demurrer to indictment. Demurrer overruled.

Charles F. Lynch, U. S. Atty., of Newark, N. J.

Otto A. Stiefel, Abram H. Cornish, and Harrison V. Lindabury, all of Newark, N. J., and Thomas P. Fay, of Long Branch, N. J., for defendants.

HAIGHT, District Judge. The indictment to which the defendants have demurred, is based on section 4, title 1, of the so-called "Espionage Act" of June 15, 1917 (40 Stat. 217, c. 30), and charges a conspiracy to commit the third specific crime set forth in section 3, title 1, of that act, before it was amended by Act May 16, 1918, c. 75. It contains but one count, and alleges, in substance, that subsequent to June 15, 1917, the defendants conspired "unlawfully and willfully to obstruct the recruiting and enlistment service of the United States, to the injury of the service and of the United States, through and by means of the printing and publishing at Newark, * * * and the circulating and distributing at Newark aforesaid and elsewhere throughout the United States, among persons who were then and there persons available and eligible for enlistment and recruiting in the military forces of the United States, as well as persons who then and there were liable to be taken into the service of the military forces of the United States, under the provisions of an act of Congress entitled [then follows a description of the Selective Service Act of May 18, 1917], a certain newspaper or publication called and known as the New Jersey Freie Zeitung, containing headlines and editorials and printed matter calculated and intended by the said defendants to induce said persons available and eligible for enlistment and recruiting in said military forces to fail and refuse to enlist for service therein, and to induce persons liable to military service pursuant to said act of Congress approved May 18, 1917, to refuse to submit to registration and draft for service in the military forces, to the injury of the service and of the United States"; that thereafter, at various times between June 16, 1917, and October 1, 1917, to effect the object of the conspiracy, they caused a number of articles to be printed in the before-mentioned newspaper, and the latter to be put in circulation through the mails and otherwise. The articles, together with the dates of publication, are all set forth in the indictment. Many grounds of demurrer have been assigned, but they raise comparatively few questions, which will hereafter appear.

[1] 1. It is urged, primarily, that the provision of section 3, title 1, of the "Espionage Act," which the indictment alleges that the conspiracy sought to violate, cannot be violated by merely inducing persons to refrain from enlisting; that it contemplates only such obstruc-

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tions as are in the nature of a tort, directed either against the persons actually engaged in the "recruiting or enlistment service" or "the service itself." Hence it is argued that, as the indictment alleges that the conspiracy was to induce those eligible for enlistment, etc., not to enlist, and in no way contemplated any acts which would constitute a tort or torts to "the service" or those engaged in it, it does not charge a crime. It is further insisted that, if that construction of the act is not tenable, and it can be violated by inducing eligible persons not to enlist, still the indictment charges no crime, because an obstruction, within the meaning of the act, must be directed to a concrete case or cases, and not generally, as the indictment in this case alleges, and must be of a coercive, threatening, or intimidating nature. These contentions are so closely associated that they may be properly considered together. I can find nothing in the act which would warrant any such constructions as the defendants urge. It is only applicable when the United States is at war, and at that time the government is chiefly interested in procuring men for the army and navy.

[2] It may at the outset, therefore, be safely assumed that the evil which Congress wished to prevent, by enacting the provision in question of the act, was the placing of obstacles in the way of raising an adequate army and navy, an urgent and pressing necessity, and that it was not concerned with the means which might be devised to obstruct recruiting or enlistments. Hence to adopt either of the defendants' constructions would be to attribute to Congress an intent entirely inconsistent with the manifest purposes of the act. Of course, no such construction should be adopted, unless the language used clearly requires it. But it does not. The verb "obstruct" is broad. It is defined in Webster's New International Dictionary (among other definitions) as synonymous with "to impede, retard, embarrass, oppose," and as "to be, or come, in the way of; to hinder from passing, action, or operation; to stop, impede, retard"; and such has been the construction generally given to it when it has been used in other federal penal statutes. See, for instance, United States v. Williams, Fed. Cas. 16,705; United States v. McDonald, Fed. Cas. 15,667. It thus follows that anything which would impede, hinder, or embarrass the "recruiting" service would "obstruct" it.

The contention that only such obstructions are within the act as are in the nature of torts committed against the persons actually engaged in the "recruiting service" is stated by counsel to be based on the use of the words "willfully" and "injury." Conceding that the meaning of those words is generally as counsel contends, I am nevertheless utterly unable to comprehend how, under any reasoning, the conclusion sought to be drawn therefrom is justifiable. Those words simply require that an obstruction, to be criminal, shall, on the one hand, be intentionally caused, with the evil purpose of obstructing the recruiting service, and, on the other hand, that it be injurious to the nation, or "the service," or both. It certainly requires no argument to demonstrate that the "enlistment or recruiting service" would be quite as much obstructed, and it and the United States as severely injured, by inducing eligible persons, through newspaper articles, persuasion, or any kindred means,

not to enlist, as by an assault upon a recruiting officer, the demolishment of a building in which a recruiting office is located, the tearing down or defacement of recruiting posters, or by actually intimidating prospective recruits. Indeed, the former means would probably be more effective than any of the latter.

The arguments that only such obstructions as are directed at a concrete prospective recruit, and then only when threats, etc., are employed, proceed, respectively, on the theory that this act should be construed the same as prior statutes which prohibit the obstructing of "an officer in the courts of the United States," and that decisions in labor injunction cases are applicable. If it be assumed for purposes of argument that the last-mentioned statutes have under all circumstances been construed as narrowly as counsel contend, that affords no reason for so construing the statute in question. Neither the language nor the purpose of the latter justify any such construction. There is no analogy between labor injunction cases and recruiting for the army and navy, save the right to freely contract. But the government has undoubtedly the additional right, which those decisions do not recognize that the employer has, to prevent any and all interferences with its raising of an army, no matter what they may be.

[3] There is no merit in defendants' contention that the act, construed as I have construed it, would be, in effect, an act to regulate the press. The press has no more of a constitutional right, when the country is at war, to willfully induce available persons not to join the army and navy, than an individual has to stand in front of a recruiting office and urge prospective recruits not to enlist, or by force, coercion, or intimidation attempt to keep them away, or otherwise actually interfere with the recruiting officers. The press, in its very nature, reaches a great many people and in a great many ways and places. To attribute to Congress an intention to make it criminal only when an obstruction is aimed at a concrete individual, and consists of threats, coercion, or intimidation (which could be easily frustrated by the police or military authorities), would necessarily presuppose that Congress intended that an evil-intentioned press, which is capable of being one of the most effective weapons against recruiting—a weapon which reaches the prospective recruit in his home, either directly or indirectly, when he is freer from the enthusiasm which pervades a community in times of war than when he is mingling with other men—could, with impunity, do anything it saw fit to obstruct recruiting. It would be ridiculous to think that Congress ever had any such intention.

Moreover, there has been no case, as far as I have been able to ascertain, where any judge has adopted any such narrow construction of the act in question as the defendants contend for, or any case in which it has not been held, in one way or another, that any willful act, no matter what it was, which was designed to, and the effect of which was to, obstruct recruiting and enlistment, whether it was aimed at a particular person or the public generally, is a violation of this provision of the Espionage Act. Some of the cases (most of them being charges to the jury, reported in the bulletins issued by the Department of Justice) which have so construed the act are as follows: United States v. Wal-

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lace, Bulletin No. 4 (D. C. S. D. Iowa); Masses Pub. Co. v. Patten, 246 Fed. 24, 158 C. C. A. 250, L. R. A. 1918C, 79, Ann. Cas. 1918B, 999; U. S. v. Olivereau, Bulletin No. 40 (D. C. W. D. Wash.); U. S. v. O'Hare, Bulletin No. 49 (D. C. N. Dak.); U. S. v. Hitt, Bulletin No. 53 (D. C. Colo.); U. S. v. Doe, Bulletin No. 55 (D. C. Colo.); U. S. v. Tanner, Bulletin No. 56 (D. C. Colo.); U. S. v. Wolf, Bulletin No. 81 (D. C. S. D.); U. S. v. Frerichs, Bulletin No. 85 (D. C. Neb.); U. S. v. Hendricksen, Bulletin No. 86 (D. C. Neb.); U. S. v. Stokes, Bulletin No. 106 (D. C. Mo.); U. S. v. Rhuberg, Bulletin No. 107 (D. C. Or.); U. S. v. Taubert, Bulletin No. 108 (D. C. N. H.); U. S. v. Sandvick, Bulletin No. 113 (D. C. Alaska); United States v. Pierce (D. C. N. D. N. Y.) 245 Fed. 886. It seems to me, therefore, that an obstruction such as the indictment in this case alleges that the conspiracy was formed to effectuate is within the act.

[4] 2. As before noted, the indictment alleges that the object of the conspiracy was to obstruct the "recruiting and enlistment service" by inducing not only volunteers not to enlist, but also to induce persons liable to be drafted into military service, pursuant to the Selective Service Act of May 18, 1917 (40 Stat. 76, c. 15), "to refuse to submit to registration and draft." It is urged that the provision in question of the Espionage Act has reference only to voluntary enlistments, and the machinery and "service" set up by law to procure the same, and consequently does not embrace the "Selective Draft Service," or persons subject to the provisions of the Selective Service Act. Hence it is argued that the indictment is defective, in that it alleges a conspiracy to obstruct the "draft" and also a conspiracy to obstruct voluntary enlistments; both objects being so connected in the indictment that they cannot be separated, so that one may be discarded as surplusage. I think that this latter proposition is well founded if the premise on which it rests is correct.

The question, therefore, is whether "the recruiting or enlistment service of the United States," referred to in the provision in question of the Espionage Act, embraces the "service" created by the Selective Service Act. One's first impression from a mere reading of section 3 of title 1 of the Espionage Act might readily be that the "service" intended was that which has to do with procuring voluntary enlistments. But, of course, a statute should not be construed on a mere superficial impression. The decisions rendered prior to the passage of the Espionage Act afford little assistance on this question. In Babbitt v. United States, 16 Ct. Cl. 202, it was held that the word "enlistment" was of technical origin, derived from Great Britain, and had reference only to a voluntary acknowledgment to serve as a private soldier for a certain number of years. On the other hand, the Supreme Court of Massachusetts, in Sheffield v. Inhabitants of Otis, 107 Mass. 282, held that the word "enlisted," in a Massachusetts statute which dealt with the question of settlement of those who had enlisted in the War of the Rebellion, referred to drafted men as well as volunteers. Nowhere in the statutes, so far as diligent and able counsel have been able to ascertain, is "the recruiting service" or "the enlistment service" spoken of in terms, although the machinery for procuring "recruits" by vol-

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untary enlistment is provided for. U. S. Comp. Stat. 1916, vol. 4, pp. 3610, 3799, 3800, 3810. The expression "the recruiting or enlistment service of the United States," so far as the literal meaning of the words used is concerned, may as well apply to both the "service" created by the Selective Service Act and that which has to do with securing voluntary enlistments as to either. It will be noticed that the word "or" is used. Both services are created for the same ultimate purpose, the raising of an army; the only differences being in the personnel of those composing them and the methods employed by each, respectively.

[5, 6] It is necessary, therefore, in order to ascertain the intention of Congress, to resort to other means than the literal meaning of the words used. The section in question of the statute is, as Judge Aldrich said in United States v. Taubert, Bulletin No. 108, "very broad and comprehensive." The Selective Service Act speaks (section 6) of "enlistment" in connection with the compulsory service therein provided for, and of "voluntary enlistments" (section 7) in connection with the provisions of the act which have to do with such enlistments, thus manifesting, I think, an intention on the part of Congress to use the word "enlistment" in a broad and comprehensive sense. One becomes "enlisted" in the military or naval service, whether he volunteers or whether he is drafted. The Selective Service Act fails to prohibit or provide any punishment for one who obstructs the draft, except for those charged with the duty of executing the law, or persons subject to draft, or to those aiding others to evade the draft. That act was passed almost a month before the Espionage Act, although the latter was introduced some two weeks before the former. On April 19, 1917, the Committee on Military Affairs favorably reported the Selective Service Act, and an effort was made by the chairman of the committee to have it immediately considered; but it was held up so that the Espionage Act might be considered (Congressional Record, vol. 55, p. 879). On April 20, 1917, Senator Lodge introduced, as an amendment to what subsequently became section 3 of title 1 of the Espionage Act (which, as reported, contained no provision regarding obstructing recruiting or enlistments), the following clause:

"Or shall interfere with or obstruct the recruiting or enlistment service of the United States." Volume 55, No. 16, Congressional Record, p. 879.

That amendment, in the form now found in the act, was subsequently adopted. It is therefore apparent that Congress, having before it the Selective Service Act, which contained no provision to prohibit the obstructing of the "service" thereby created, except as before stated (which will hereafter be shown to be manifestly inadequate to deal with the most dangerous and insidious obstructions), deliberately inserted the clause in question in that part of the "Espionage Act" which sought to prevent interference with the military forces and efforts of the nation, and thereafter passed the Selective Service Act without attempting to provide in it for any outside obstructions to the draft.

The irresistible conclusion to be drawn from these facts seems to me to be that Congress intended, by the clause in question, to pro-

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hibit any willful obstruction to the government in its efforts to raise an army to effectively deal with the crisis which confronted the country and the world, whether it be directed against voluntary enlistments or the draft. As it was not concerned with the means employed to obstruct, neither was it concerned with the particular branch of the "recruiting" service any obstruction might be aimed at. It is inconceivable that Congress intended to prevent any obstruction to voluntary enlistment, and to leave unscathed those who would obstruct the workings of the draft law, when it is considered that it had committed the country to the policy of raising an army by draft, and when there had been persistent opposition to that method on the part of some classes which might reasonably be expected thereafter to endeavor to obstruct it. Strength is afforded to this conclusion, I think, from the fact that section 3 of title 1 of the Espionage Act was amended recently (May 16, 1918), so as to be much more comprehensive than before, and yet no change was made in the clause in question, except to add the words "attempt to obstruct," and to eliminate the words "to the injury of the service or of the United States." The latter clause was in the act before the clause "obstruct the recruiting or enlistment service of the United States" was inserted, and therefore related back to and qualified each of the preceding interdicted acts.

Considering the thoroughness with which the whole section was revised, and that the Selective Service Act contained no provision to prevent obstructions to it, except in the ways before indicated, although many attempts to obstruct it had been made in the meantime, it is difficult to understand why, if Congress did not consider that an obstruction to "the enlistment or recruiting service" covered an obstruction to the draft, some attempt was not made, in the amendment, to cover obstructions to the draft specifically. An argument to the effect that Congress had, by the clause in section 3, title 1, of the Espionage Act, prohibiting the causing or attempting to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States," covered obstructions to the operation of the Selective Service law, on the theory that all who are registered are in the military forces, although not actually called or inducted into military service, as a number of the judges have held—United States v. Sugarman, Bulletin No. 12 (D. C. Minn.) 245 Fed. 604; United States v. Capo, Bulletin No. 37 (D. C. Porto Rico); United States v. Olivereau, Bulletin No. 40 (D. C. W. D. Wash.); United States v. Wolf, Bulletin No. 81 (D. C. S. D.); United States v. Frerichs, Bulletin No. 85 (D. C. Neb.); United States v. Stokes, Bulletin No. 106 (D. C. Mo.); United States v. Rhuberg, Bulletin No. 107 (D. C. Or.); United States v. Sandvick, Bulletin No. 113 (D. C. Alaska)—would not be an answer to the argument, above advanced, regarding the unreasonableness of attributing to Congress an intention not to prohibit obstructions to the draft, because the selective draft service could be obstructed in many ways besides acting immediately on those subject to be inducted into the service through the machinery of the draft.

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[7] Nor, for the same reason, as well as others, is there any force in the argument that, because a prosecution could be had under section 37 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1096 [Comp. St. 1916, § 10201]) for a conspiracy to induce one "to willfully fail to register or present himself for registration or submit thereto," as has been done in several cases which arose before the Espionage Act was passed (see Goldman & Berkman v. United States, 245 U. S. 474, 38 Sup. Ct. 166, 62 L. Ed. 410), the clause in question of the Espionage Act has no reference to the Selective Service Act. Section 37 is applicable only to conspiracies, and therefore does not cover the case of one, acting alone, who induces another, subject to the provisions of the act, to fail to register, etc. Moreover, the question has been directly considered in United States v. Hitt, Bulletin No. 53 (D. C. Colo.). While the only report of that case which I have seen is the charge of Judge Lewis to the jury, he not only specifically charged that an obstruction to the draft was a violation of the act, but later, when the question was specifically raised by counsel, so held.

The charges in United States v. Capo, Bulletin No. 37 (D. C. Porto Rico); United States v. Schenck, Bulletin No. 43 (D. C. E. D. Pa.); United States v. Doe, Bulletin No. 55 (D. C. Colo.); United States v. Wolf, Bulletin No. 81 (D. C. S. D.); United States v. Rhuberg, Bulletin No. 107 (D. C. Or.); United States v. Taubert, Bulletin No. 108 (D. C. N. H.); United States v. Rutherford, Bulletin No. —— (D. C. E. D. N. Y.)—all contain expressions which indicate that the several judges who delivered them were of the opinion that an obstruction of the draft was a violation of the provision in question of the Espionage Act. On the other hand, in several jury charges, although there are no expressions indicating that the judges expressly considered that an obstruction of the draft was not within the statute, the only obstruction seemingly dealt with was that which was aimed at voluntary enlistments. United States v. Frerichs, Bulletin No. 85 (D. C. Neb.); United States v. Hendricksen, Bulletin No. 86 (D. C. Neb.; same judge as in United States v. Frerichs); United States v. Stokes, Bulletin No. 106 (D. C. Mo.). See, also, remarks in United States v. Pierce (D. C. N. D. N. Y.) 245 Fed. 878, 887. Those cases, however, shed very little light on the question, because it does not appear that the indictments were so framed as to permit the consideration of it, but, on the contrary, it would seem that the indictments covered only obstructions to voluntary enlistments.

The remarks in Franke v. Muray, 248 Fed. 865, 868, —— C. C. A. ——, to which counsel refer in support of their contention, are in no respect applicable. They had reference only to the fact that the decision in Re Grimley, 137 U. S. 47, 11 Sup. Ct. 54, 34 L. Ed. 636, did not apply to the situation which was then before the court and which arose under the Selective Service Act, a different act than was considered in the Grimley Case. My conclusion, therefore, is that the clause in question of the Espionage Act covers the obstructing of the operation of the Selective Service Act, except as to such acts as are specifically provided for in that act and which might possibly be said to be obstructions, as well as that branch of the military service, strict-

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ly speaking, which is charged with the procuring of recruits by voluntary enlistment.

[8, 9] 3. It is further urged that the indictment shows on its face that there could have been no conspiracy to induce persons liable to service under the Selective Service Act to "refuse to submit to registration and draft," as it is alleged there was, because the conspiracy, according to the indictment, was formed after the time set for registration. Assuming that this argument is otherwise sound, it fails to recognize that there were many persons who were required to register at the time set by the President's Proclamation, but who did not do so. Provision for their subsequent registration was made in section 5 of the Selective Service Act. I think it entirely clear that the indictment, reasonably construed, charges that the conspiracy was to induce such persons to fail to register. It must necessarily be presumed that the grand jurors were cognizant of such a notorious fact as that the day originally set for registration was June 5, 1917.

[10, 11] 4. It is claimed that the indictment is defective, because it neither sets forth the names of the persons whom the conspiracy was designed to induce not to enlist and to refuse to submit to the draft, nor alleges that their names were unknown to the grand jury. Those whom the conspirators contemplated would be induced not to enlist were all eligible persons, to whose attention the newspaper articles should come, either directly or indirectly, and who would be affected by what was contained therein. Manifestly, in the very nature of things, the names of such persons would be unknown, either to the grand jurors or to the defendants. An allegation, therefore, that their names were unknown to the grand jurors, would have been idle and useless, so far as acquainting the defendants with the nature and cause of the accusation against them. That had already been sufficiently described. All that was required was that the indictment should acquaint the defendants with the nature and cause of the accusation, set forth the charge with sufficient definiteness to enable them to make their defense and to avail themselves of the record of conviction or acquittal, for their protection against further prosecution, and to inform the court of the facts charged, so that it might decide as to their sufficiency, in law, to support a conviction, if one should be had, and that the elements of the offense should be set forth with reasonable particularity of time, place, and circumstance. Armour Packing Co. v. United States, 209 U. S. 56, 83, 28 Sup. Ct. 428, 52 L. Ed. 681.

[12] The indictment, in every respect, meets the requirements of that rule. It is undoubtedly generally necessary, in order to comply with the before-mentioned rule, to set forth the name of the person or persons against whom, specifically, a crime has been committed—the person or persons to whom the injury has been done—or, if the names are unknown to the grand jurors, to so allege. But it is not always necessary that the names of third persons be set forth in the indictment, or that there be an allegation that they are unknown, if the indictment, in other respects, measures up to the rule above stated. Kirby v. United States, 174 U. S. 47, 62, 19 Sup. Ct. 574, 43 L. Ed.

809; State v. Cooney, 72 N. J. Law, 76, 60 Atl. 60, and cases cited in 12 Standard Encyclopædia of Procedure, p. 370, Note 15. I think the indictment in this case is within the latter class. The conspiracy alleged was not to injure any specific person or persons, but to obstruct the recruiting and enlistment service of the United States, to the injury of the country at large. The means by which this was to be done was to induce third persons, whose names could not, as before stated, be known, either to the grand jurors or the defendants, to decline to enlist. I think, therefore, that there was no need of an allegation in the indictment to the effect that the names of the persons whom the defendants conspired to reach were unknown to the grand jurors.

[13] 5. It is contended that the indictment is defective because it does not allege that the articles which the defendants conspired to publish, or those which they did publish, in furtherance of the conspiracy, are or were intended to be publications which the defendants might not lawfully publish, or that they were untrue in fact. But this contention completely ignores the allegations of the indictment that the "defendants willfully, unlawfully, and feloniously conspired to obstruct the recruiting and enlistment service * * * by newspaper articles * * * calculated and intended by the defendants to induce persons available not to enlist," etc. Without attempting to discourse upon the limitations of the "freedom of the press," it is sufficient, I think, to observe that the before-quoted words stamp the defendants' object as a felonious one, and make their conspiracy, under the statute, a criminal act. The propaganda such as these defendants, as would appear from the articles annexed to the indictment, were carrying on, ordinarily, was intended to be within the law and beyond the pale of punishment, as recent experience has taught. The test is, however, not whether the defendants thought that their publications were lawful or true, but whether they intended to accomplish a particular object, namely, the obstruction of enlistments and recruiting.

[14] 6. The other objections to the indictment I consider without merit, and to need no more than a passing reference. This indictment is not for a conspiracy to attempt to obstruct recruiting, but for a conspiracy to obstruct. Whether the means alleged to have been adopted would have accomplished the purpose is a question of fact, which cannot be passed upon on demurrer. It is worthy of note, however, that in many of the cases which have arisen under the Espionage Act, some of which are cited above, articles and words less objectionable than many of those which are set forth in the indictment in this case have been considered sufficient to permit a jury to find that they actually did obstruct "the recruiting and enlistment service," without any proof that particular individuals were actually induced thereby not to enlist.

My conclusion, therefore, is that the demurrer should be overruled.

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In re MANUFACTURERS' BOX & LUMBER CO.

(District Court, D. New Jersey. July 26, 1918.)

1. BANKRUPTCY ⟸308—CREDITOR'S PARTICIPATION IN ASSETS—PAYMENT OF ASSESSMENTS ON STOCK.

A creditor of a bankrupt corporation, who, as a holder of its capital stock, is liable on calls or assessments, cannot participate in the assets of the estate until he has paid or satisfied such assessments.

2. CORPORATIONS ⟸216—LIABILITY OF STOCKHOLDER—WHAT LAW GOVERNS.

Whether a stockholder of a bankrupt corporation is liable to the estate for the difference between the par value of the stock held by him and the amount originally paid therefor is determined by the law of the state where the corporation was incorporated.

3. CORPORATIONS ⟸99(2)—STOCKHOLDERS—LIABILITY FOR CORPORATE DEBTS—STOCK ISSUED FOR INSUFFICIENT CONSIDERATION.

Corporation Act, § 49 (2 Comp. St. N. J. 1910, p. 1630), providing that, in the absence of actual fraud, the director's judgment as to the value of the property purchased in consideration of stock shall be conclusive, while legislatively new, is but declaratory of the former law.

4. CORPORATIONS ⟸232(2)—PAYMENT OF STOCK SUBSCRIPTIONS—VALIDITY AS TO CREDITORS.

Under the New Jersey decisions payment of a stock subscription is good as against creditors of an insolvent corporation only, where payment has been made in money, or what may fairly be considered as money's worth.

5. CORPORATIONS ⟸232(1)—STOCK—PAYMENT—ASSESSMENT.

Where no money was paid for corporate stock when originally issued for property concededly worth less than the par value of the stock, and the directors did not determine the value of the property, it would be assessable, if still in the hands of the original holders.

6. CORPORATIONS ⟸244(7)—LIABILITY OF STOCKHOLDER—NOTICE AS TO PAYMENT—LIABILITY TO ASSESSMENT.

Actual notice to a purchaser of corporate stock that it was originally issued without having been fully paid is not necessary and his knowledge of facts impelling an ordinary and careful investor to inquire whether it was fully paid, which inquiry would have shown that it was not, would be sufficient notice to make him liable to an assessment.

7. CORPORATIONS ⟸244(7)—UNPAID STOCK—LIABILITY OF HOLDER—IMPUTED KNOWLEDGE.

A purchaser of corporate stock from the incorporators who knew that the corporation was in financial difficulties, and that part of its pledged book accounts, taken up by him in consideration of its company's note and all the stock, were not genuine, and who examined the books, was chargeable with further inquiry, which would have shown him that property taken by the corporation was an inadequate consideration for the original stock.

8. NOTICE ⟸6—DUTY OF INQUIRY.

Neither stupidity nor heedlessness any more than a fraudulent motive, will save one chargeable with making inquiry from the consequences of a knowledge which such an inquiry would have ascertained, as one may not take advantage of his own wrong, and as the law imputes to him that knowledge of facts which he would have ascertained, had he performed his duty.

9. CORPORATIONS ⟸232(1)—UNPAID STOCK—LIABILITY OF SHAREOWNER.

A holder of corporate stock, with imputed knowledge that it had been issued by the corporation to its incorporators for property which was an inadequate consideration, would be liable to an assessment thereon for such amount, not exceeding the difference between the fair value of the

property and the par value of the stock, as would be needed to pay allowed claims in bankruptcy and administration expenses.

10. BANKRUPTCY ⟸288(1)—LIABILITY OF STOCKHOLDER—ASSESSMENT—ENFORCEMENT.

Where no assessment had been made against the holder of stock issued to incorporators for property not an adequate consideration, it could not be enforced, on objection by a creditor of the bankrupt corporation to the holder's claim, without the holder's assent, as the proceeding is summary, and direct proceedings to enforce the assessment would have to be taken by the trustee.

11. BANKRUPTCY ⟸308—CLAIM AGAINST ESTATE—ALLOWANCE.

Where a claimant against a bankrupt corporation was liable to an assessment on his stock, his claim should not be formally allowed until the amount due on his stock was determined.

In Bankruptcy. In the matter of the Manufacturers' Box & Lumber Company, bankrupt. On review of a referee's order overruling a creditor's objection and allowing the claim of James H. Beals. Reversed.

Bilder & Bilder, of Newark, N. J. (Nathan Bilder, of Newark, N. J., of counsel), for objecting creditor.

Clifford L. Newman, of Paterson, N. J., for claimant.

RELLSTAB, District Judge. The bankrupt was incorporated in February, 1912, under the laws of New Jersey, and carried on the lumber business in that state. The total capital stock of the bankrupt issued and outstanding is $10,000, par value, divided into 100 shares. This was issued for property purchased from a copartnership composed of three members, who, for a period of about five months previous thereto, had carried on the same business. This copartnership had begun business with less than $1,000 capital, and the net assets at the time the corporation was formed were less than $2,000.

It is conceded that the fair value of the property thus turned over was very much less than the par value of the stock issued therefor. James H. Beals is the holder of 95 per cent. of the stock so issued, which he obtained from the incorporators of the bankrupt. He presented a claim against the estate for the sum of $14,947.67. This claim was objected to by one of the creditors. In substance, the only pertinent ground of objection is that the bankrupt issued this stock without receiving any consideration, and that it is liable to assessments in Beals' hands.

Upon the evidence taken before the referee, he found that the property for which this stock was issued was apparently worth $2,000, that Beals was a holder for value, and that the evidence failed to show that he "was informed, or in any way had notice, of the fact that the shares of stock were not fully paid up," and that it was not liable to an assessment in his hands. He thereupon made an order overruling the objections and allowing the claim, which order is now here for review.

[1, 2] It is conceded that a creditor of a bankrupt corporation, who, as a shareholder of the corporation's capital stock, is liable on calls or assessments to be made against said stock, will not be permitted to participate in the assets of the estate until he has paid or satisfied said

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assessments. See In re Wiener & Goodman Shoe Co. (D. C.) 96 Fed. 949, 3 Am. Bankr. Rep. 200; In re Duryea Power Co. (D. C.) 159 Fed. 783, 20 Am. Bankr. Rep. 219; In re Standard Dairy & Ice Co., 20 Am. Bankr. Rep. 321. Whether a stockholder of a bankrupt corporation is liable to the estate for the difference between the par value of the stock held by him and the amount originally paid therefor is determined by the law of the state where the company was incorporated. Kiskadden v. Steinle, 203 Fed. 375, 121 C. C. A. 559, 29 Am. Bankr. Rep. 346; Courtney v. Croxton, 239 Fed. 247, 152 C. C. A. 235, 38 Am. Bankr. Rep. 560, and cases cited.

[3, 4] The pertinent provisions of the New Jersey Corporation Act (Rev. of 1896; 2 Comp. Stat. N. J. pp. 1592, 1610, 1630) are:

"21. *Liability of Stockholders on Nonpaid-up Stock.*—Where the whole capital of a corporation shall not have been paid in, and the capital paid shall be insufficient to satisfy its debts and obligations, each stockholder shall be bound to pay on each share held by him the sum necessary to complete the amount of such share, as fixed by the charter of the corporation, or such proportion of that sum as shall be required to satisfy such debts and obligations." P. L. 1896, p. 284.

"48. *Payment of Capital Stock to be in Money.*—* * * Nothing but money shall be considered as payment of any part of the capital stock of any corporation organized under this act, except as hereinafter provided in case of the purchase of property. * * *" P. L. 1896, p. 293.

"49. *Purchase of Property and Issue of Stock to Pay Therefor.*—Any corporation formed under this act may purchase * * * property necessary for its business, * * * and issue stock to the amount of the value thereof in payment therefor, and the stock so issued shall be full-paid stock and not liable to any further call, neither shall the holder thereof be liable for any further payment under any of the provisions of this act; and in the absence of actual fraud in the transaction, the judgment of the directors as to the value of the property purchased shall be conclusive; and in all statements and reports of the corporation to be published or filed this stock shall not be stated or reported as being issued for cash paid to the corporation, but shall be reported in this respect according to the fact." P. L. 1896, p. 293.

Sections 21 and 48 are substantially re-enactments. The part of section 49 relative to the conclusive effect of the directors' valuation, while legislatively new, is but declaratory of the old law. Holcombe v. Trenton White City Co., 80 N. J. Eq. 122, 141, 142, 82 Atl. 618 and cases cited. With reference to the stockholders' liability to creditors of insolvent corporations, the rule declared in Wetherbee v. Baker, 35 N. J. Eq. 501, "that payment of stock subscriptions is good as against creditors, only where payment has been made in money or in what may fairly be considered as money's worth," has been inexorably enforced in New Jersey whenever that question has been judicially considered. See Donald v. American Smelting & Refining Co., 62 N. J. Eq. 729, 48 Atl. 771, 1116; See v. Heppenheimer, 69 N. J. Eq. 36, 61 Atl. 843; Easton National Bank v. American Brick & Tile Co., 70 N. J. Eq. 722, 64 Atl. 1095, and 70 N. J. Eq. 732, 64 Atl. 917, 8 L. R. A. (N. S.) 271, 10 Ann. Cas. 84 (two cases); Holcombe v. Trenton White City Co., supra.

[5] In the present case no money was paid for the stock when originally issued, and as it was issued for property concededly worth less than the par value of the stock, and without the directors determining

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the value of said property, it would be assessable, if it were still in the hands of the original holders. Section 21, in declaring the liability of stockholders in case the stock is not fully paid, makes no distinction between original and subsequent holders. Whether a bona fide purchaser of stock, for value, without notice that it was not fully paid when issued, can be held liable to creditors upon the corporation's insolvency, under the New Jersey statute, is not necessary to be decided, for the reasons that will presently appear.

None of the original holders of the stock had money or credit, and in less than four months after its incorporation it was evident that the company was conducting a losing business. It was struggling along on borrowed money. The company's book accounts and 66 shares of its capital stock, representing the shares of two of the copartners, had been pledged for the payment of some of said loans, and the pledgee was pressing for payment. In May, 1912, Mattison, the other copartner and an incorporator, who held 33 of said shares of capital stock in his own name, approached Beals, an acquaintance of some years, and asked his financial assistance. After several interviews, in the course of which he was informed of the company's financial straits and that two of the copartners had been guilty of fraudulent practices by padding some of the accounts so pledged, Beals agreed to loan the company enough money to redeem the book accounts, upon condition that all its issued capital stock be given to him. After some parleying this condition was accepted, with the modification that, upon the payment of said loan within six years, Mattison was to have his 33 shares returned to him. Thereupon Beals paid to the pledgee of the book accounts, etc., the sum of $8,534.47, the aggregate of its loans, the book accounts were turned over to the company, and Beals received the latter's note for that amount and the 66 shares so pledged and Mattison's 33 shares.

[6] The evidence does not prove that Beals had actual notice that the stock so issued to, or held for, the copartners was not fully paid. However, actual notice was not necessary; imputed notice would be sufficient. If he had knowledge of facts which would impel an ordinary, intelligent, and careful investor or purchaser of stocks to inquire whether they were fully paid, and such inquiry, if prosecuted, would have shown that they had not been so paid, that would be sufficient notice to make him liable. In See v. Heppenheimer, supra, 69 N. J. Eq. at page 87, 61 Atl. 843, Vice Chancellor Pitney said:

"I hold, further, that the fact that they were receiving for $1,000 in cash a mortgage bond for $1,000 and a bonus of $600 of stock of a company in process of formation was sufficient, of itself, to show them, or at least to put them on inquiry, that the stock so issued had not been paid for, either in cash or in its equivalent in property."

In Easton National Bank v. American Brick & Tile Co., 69 N. J. Eq. 326, at page 334, 60 Atl. 54, at page 57, decision modified on appeal, but not on this point, 70 N. J. Eq. 722, 64 Atl. 1095, and 70 N. J. Eq. 732, 734, 64 Atl. 917, 8 L. R. A. (N. S.) 271, 10 Ann. Cas. 84, Vice Chancellor (now Justice) Bergen said:

"The liability of transferees for assessments on account of unpaid stock has been the subject of much consideration by the courts of this country, re-

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sulting in radical differences of opinion, but in my judgment the weight of authority and sound reason support the view that a bona fide transferee of stock, the certificate for which recites that it is full paid, is not liable to make good the contract of the original subscriber if the transferee has no knowledge that the subscriber has not paid in full, nor notice of any fact from which knowledge may be inferred, or which requires him to inquire as to the truth of such statement."

That imputed notice is the equivalent of actual notice has been held by the courts of other states. See Garden City Sand Co. v. American Refuse Crematory Co., 205 Ill. 42, 68 N. E. 724; Wishard v. Hansen, 99 Iowa, 307, 68 N. W. 691, 61 Am. St. Rep. 238; Gillette v. Chicago Trust Co., 230 Ill. 393, 82 N. E. 891. See, also, Thompson on Corporations (2d Ed.) §§ 4385–4387.

[7-9] The evidence establishes that without the issue of the stock to Beals he would not have advanced the money to redeem the book accounts. He knew that the company was in financial difficulties, that the pledgee of the accounts was pressing for a payment of its loans, and that some part of these book accounts was not genuine. In part, Beals was actuated by his friendship for Mattison; but the impelling consideration for his making the loan was the putting of his son into a business which he hoped would become profitable. In taking the company's note and its capital stock, he carried out such purpose and put himself in the place of the original holders, to secure for himself the possible fruits of the enterprise.

Beals testified that he knew that, if the stock had not been fully paid, it would be subject to assessment. He inquired of Mattison, who was the only one of the three copartners active in the company's business, whether said stock had been fully paid, and was informed that it had, and that it had been paid by property purchased from the partnership. Before he advanced the money, he looked over the plant and had his son examine the books. He seems to have made no further inquiry as to the value of the property for which the stock had been issued, or why stock of the par value of $10,000, rather than some other sum, was fixed as the consideration for its transfer.

Was he chargeable in law to make further inquiry? A perusal of the minutes of the company would have advised him that, in accepting the property and ordering the issuance of stock therefor, the board of directors had given no expression of their judgment of its value. Inquiry of Mattison, who knew that the property so purchased was grossly overvalued, would either have elicited the true value, or, if he had attempted to deceive him, his deception would have been exposed by comparing the property on hand with the assets and liabilities shown by the books of the company. His inspection of the plant, made before he advanced the loan, disclosed the amount of lumber, etc., on hand. He knew that they had not made money, and the books were there to show that the company had been actually losing money from the very beginning.

Beals, in acquiring the stock, was not in the position of one who goes into the open market and purchases stock issued by a company which has been actively engaged in business for a long period, and whose stocks have become marketable merchandise. The protec-

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tion thrown about such a purchaser cannot be accorded Beals. He was not even a purchaser, but a donee. To him the stock was a bonus—obtained at his own insistence. He was not satisfied to be merely a creditor of the company, but insisted upon being practically its owner. He became both—a creditor for value; the owner by gift. His advent into the company was made known to the company's creditors; and in the financial statements, issued by it to the mercantile agencies, he was named as the owner of 95 per cent. of the company's capital stock. Under the New Jersey statute, his stock, not having been fully paid, was an asset in favor of the company's creditors. Beals took it in circumstances that called for an ascertainment on his part of the particulars of the transaction resulting in its issue.

The company had but recently been formed. Its business had been unprofitable. This, as well as that the capital stock had been issued for property, was known to Beals. That the property was an inadequate consideration could have been readily ascertained by him before he took over the stock. A superficial examination of the books and merchandise on hand would have yielded this information. As noted, he made some inquiry, examined the plant, and had his son examine the company's books. If he failed to learn that the property for which the stock was issued was grossly overvalued, it was due to his failure to follow the clue which such inquiry and examination uncovered. Neither stupidity nor heedlessness, any more than a fraudulent motive, will save one who is chargeable with making inquiry from the consequences of a knowledge which such an inquiry would have elicited. The law will not permit one to take advantage of his own wrong, and it imputes to him that knowledge of facts which he would have ascertained, had he performed his duty. With this imputed knowedge, Beals would be liable to an assessment on his stockholdings for such amount, not exceeding the difference between the fair value of the property purchased and the par value of the stock issued therefor, as would be needed to pay the allowed claims and administration expenses.

[10] However, no assessment has been made on this stock, and Beals' liability cannot be enforced in this proceeding, which is summary in character, without his assent, and, as he objects to such a course, direct proceedings to produce such an assessment will have to be instituted by the trustee. Kiskadden v. Steinle, supra; In re Haley (C. C. A. 6) 158 Fed. 74, 85 C. C. A. 404, 19 Am. Bankr. Rep. 313 (certiorari denied 209 U. S. 546, 28 Sup. Ct. 757, 52 L. Ed. 920); In re Remington Automobile & Motor Co. (C. C. A. 2) 153 Fed. 345, 347, 82 C. C. A. 421, 18 Am. Bankr. Rep. 389; In re La Jolla Lumber & Mill Co. (D. C.) 243 Fed. 1004, 40 Am. Bankr. Rep. 273. See In re Newfoundland Syndicate (D. C.) 196 Fed. 443, 28 Am. Bankr. Rep. 119 (also 201 Fed. 917, 120 C. C. A. 255, 29 Am. Bankr. Rep. 858), as to procedure and jurisdiction to enforce stockholders' liability for unpaid stock.

[11] But as, in my judgment, on the evidence before me, Beals is liable to a stock assessment, his claim as a creditor should not be formally allowed until the amount due on his stock has been deter-

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mined. In re Wiener & Goodman Shoe Co., supra; In re Duryea Power Co., supra.

The referee's order allowing Beals' claim is therefore reversed, and the allowance of the claim deferred until after appropriate proceedings to recover the amount due on said shares of stock have been pressed to a finality.

UNITED STATES v. ROSENBERG.

(District Court, S. D. New York. July 17, 1918.)

1. INTERNAL REVENUE ⊂=2—ANTI-NARCOTIC LAW—INVALIDITY AS REVENUE LAW.

Harrison Anti-Narcotic Law, § 2, forbidding any person selling opium to another not presenting a written blank furnished by a revenue collector, is not invalid as a revenue provision, though its chief purpose may be to control distribution, by empowering physicians exclusively to distribute the drug only as a medicine, and thereby suppress consumption by addicts.

2. INDICTMENT AND INFORMATION ⊂=63—CONCLUSIONS—PLEADING ULTIMATE FACTS.

In an indictment of a physician under Harrison Anti-Narcotic Law, § 2, for dispensing opium "not in the course of his professional practice," the phrase quoted, following the language of the statute, is not bad as a conclusion of the pleader, as it states the ultimate facts.

Jacob Rosenberg was indicted for violation of the Harrison Anti-Narcotic Law, and he demurs to the indictment. Demurrer overruled.

Demurrer to an indictment for the violation of section 2 of Act Dec. 17, 1914, c. 1, 38 Stat. at Large, pp. 785, 786 (Comp. St. 1916, § 6287h) known as the Harrison Anti-Narcotic Law. The indictment charges that the defendant was a physician registered with the collector of internal revenue as a dealer, distributor, and dispenser of opium and its derivatives, and that as such he dispensed to one Stutzenberg a quantity of heroin; that he so dispensed the heroin, "not in the course of his professional practice only," and not "in pursuance of a written order" from Stutzenberg of the kind prescribed by the act. The second and third counts concern other transactions of the same kind with other persons.

Francis G. Caffey and John E. Walker, both of New York City, for the United States.

Abraham Levy, of New York City, for defendant.

LEARNED HAND, District Judge (after stating the facts as above). [1] The chief question raised by the demurrer is whether section 2 of the Harrison Act is valid as a revenue provision, as which alone it can stand. That section forbids any person from selling opium to another who does not present a written blank furnished by the collector of internal revenue. The section later provides that the collector may furnish these blanks only to registered persons, who are defined by section 1, and who, roughly speaking, must be either sellers or makers. Presumably the phrase "any person" in the first sentence of the section, means "any registered person," as in section 8 (U. S.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

v. Jin Fuey Moy, 241 U. S. 394, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D, 854), though that question is not of much consequence here. In any view it follows that section 2 forbids the sale of opium to any one not himself in turn a seller, and that it therefore forbids any distribution whatever to consumers, and this prohibition would be absolute except for the provisos, (a), (b), (c), and (d). The first of these allows a physician to prescribe opium "in the course of his professional practice only"; the second allows "a dealer" to fill the physician's prescription. Provisos (c) and (d) create other exceptions not here of moment.

Now, it is of course quite true (McCray v. U. S., 195 U. S. 27, 24 Sup. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561), and indeed it has been long recognized (Veazie Bank v. Fenno, 8 Wall. 533, 19 L. Ed. 482), that in the exercise of its taxing powers Congress may in fact be actuated, in part, anyway, by purposes quite different from the raising of revenue, and the courts will nevertheless not question the result; and so it does not matter that the chief purpose of this section is pretty obviously not to raise revenue, but to control the distribution of opium. There must, however, be some objective test to determine how far the ancillary provisions of the act have any actual pertinency to a revenue measure, because it is clear that some degree of irrelevancy will exclude a subsidiary provision from the scope of the power. This, indeed, is involved in the court's right to scrutinize the power at all.

The effect of the act as a whole is in the first place to require all those who make or traffic in opium to register and pay their fees, and also to require all those registered persons who buy opium to pay for the blanks. In so far as it merely forbids all those who do not pay those sums from buying or selling or making opium, no question can arise. A question does arise over those provisions of section 2 which in effect prescribe that the distribution to consumers must be either by a physician or under his supervision. It is at first blush a little hard to see how this conduces to the collection of the registration fees, or how it tends to increase the number of registrants. U. S. v. Doremus (D. C.) 246 Fed. 958. Nevertheless, as in all such cases, the statute must be sustained so long as any plausible support for it can be found in the powers of Congress, and I think that a fair analysis can be made to show such a support here, however remote it may in fact have been from the purposes of those who framed and passed the act. The tax being an excise, it was an essential part of its purpose that there should be no sales by unregistered persons. Yet the final sale must be to an unregistered person, the consumer. There was, therefore, a genuine difficulty in insuring that the sale to any unregistered person should be to a consumer, and that he should not in turn resell. Physicians were naturally the class who would dispense a large part of the drug to consumers, whether used as a medicine or to gratify an appetite. It was a reasonable contrivance to limit the final sales to physicians upon the theory that they were the most reliable of all available classes of distributors to insure its limitation to genuine consumers. I cannot say, therefore, that it was not a fair

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piece of administrative machinery to empower this class exclusively to distribute the drug.

The section does, however, go further than this, because it forbids physicians selling opium except as a medicine, and it must be confessed that it may not be easy to see how this limitation can proceed from any other consideration than a policy of suppression. Nevertheless it still seems to me to have enough relation to reality to save even this feature of the plan. We are to suppose that physicians are intrusted with the final distribution of opium as the class of sellers most likely to secure a distribution to consumers only. But the only two classes of consumers are the sick and those who are addicted to it as the gratification of a morbid craving. Hence the effect of the limitation upon physicians' right to distribute is to cut off the second class of consumers. Has that prohibition any genuine relation to a statute aimed to require a license tax from all those who sell opium? On the whole, I think it cannot be said not to have such a relation. Addicts to the use of opium are as a rule persons of greatly impaired will and of little sense of social obligation, and they usually demand relatively large quantities at frequent intervals. If they are given access to unlimited quantities, there is a genuine possibility that they might find it profitable to sell so much as their immediate needs did not require. As a class they would be most unlikely to observe any law which imposed upon them an excise as a condition of resale. Therefore, to shut them off from all right to the drug, even assuming that Congress must regard indifferently their demand and that of the sick, does not seem to me inevitably an irrelevant administrative measure. It is quite true that incidentally it shuts off the actual consumption of opium by addicts; but I do not understand that it is a good cause of complaint against an excise that in its incidents it may suppress some consumption. All that is necessary is that the limitation be appropriate to suppress sales which, if they did occur, would evade the law. If that be true, the incidental other results do not invalidate it.

It must be confessed that the authorities are somewhat doubtful. The Circuit Court of Appeals for the Sixth Circuit, in Webb v. U. S., certified the question here presented to the Supreme Court on February 11, 1918. In U. S. v. Doremus, 246 Fed. 958, the statute was held unconstitutional in the District Court, and the Supreme Court had enough doubts of the validity of section 8 in U. S. v. Jin Fuey Moy, 241 U. S. 394, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D, 854, to feel obliged to impose upon it what the court itself recognized as a forced construction. On the other hand, section 2 was enforced in U. S. v. Curtis (D. C.) 229 Fed. 288, though without consideration of its constitutionality. It is apparent that the question is still in doubt, but, for the reasons I have just given, I overrule the objection to the constitutionality of the section.

[2] There remains only the question of the formal sufficiency of the indictment. That a physician "dispenses" the drug when he writes only a prescription I need not hold, for here the allegation says nothing of how he sold or dispensed it. Therefore the point raised

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in U. S. v. Reynolds (D. C.) 244 Fed. 991, does not arise. If there be such a difficulty, it will be raised at the trial. Certainly a physician may sell the drug. The phrase, "not in the course of his professional practice only," is indeed a conclusion of the pleader, but not bad for that reason, if it states only the "ultimate facts." That is what it should do. Nor is it an objection that the pleader followed the language of the statute; that depends upon how the statute reads. If it define the crime in colloquial language, precisely and without recourse to terms which in their turn involve conclusions of law, it is enough to use the words of the statute. In the case at bar a good many different situations would be evidence of the fact that the sale was not in the course of the defendant's practice; but they would be evidence from which the "ultimate fact" could be inferred, and they ought not to be pleaded. Perhaps a better form would have been that the defendant sold the drug "without any regard to the cure or alleviation of any malady from which the said Stutzenberg then and there was suffering"; but I question that this was necessary. A physician's practice is an effort to cure or alleviate his patient's ills, and it seems to me that to say that the sale was not in the course of his practice is substantially an equivalent of saying that he did not mean to cure by his treatment. In any case, the allegation has no implicit legal term, and, if it be too indefinite, the remedy is by bill of particulars. I cannot accept U. S. v. Friedman (D. C.) 224 Fed. 276, on the merits. It is quite clear that, however difficult the case may be to prove, the statute meant to reach the cases of those physicians who, abusing the privilege which their license gives them, use their position only to gratify the appetites of the unfortunate victims of the drug.

The demurrer is overruled.

In re SCHILLING et al.

(District Court, N. D. Ohio, E. D. July 9, 1918.)

No. 6510.

1. BANKRUPTCY ⇐172—APPLICATION FOR PERFORMANCE BOND—ASSIGNMENT OF PLANT AND MATERIALS—CHATTEL MORTGAGE.

A contractor's application for performance bond, assigning to the surety company, in event of nonperformance, all contractor's interest in tools, plant, materials, etc., has no greater force than chattel mortgage, and, as between surety company and trustee in bankruptcy of contractor, it is to be regarded as if it were on its face a chattel mortgage.

2. BANKRUPTCY ⇐152—RIGHT OF TRUSTEE—LIEN FROM ATTACHMENT OR EXECUTION.

Since amendment by Act June 25, 1910, § 8, to Bankruptcy Act July 1, 1898, § 47a (2), trustee in bankruptcy, as of date of adjudication, has all rights of creditors of bankrupt, as if such creditors had succeeded in fixing lien on bankrupt's property by levy of attachment or execution.

3. CHATTEL MORTGAGES ⇐196—FAILURE TO RECORD—VALIDITY AS TO CREDITORS—STATUTE.

By Gen. Code Ohio, § 8560, a chattel mortgage, not filed for record, and under which possession has not previously been taken by the mortgagee,

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is void as to all creditors of the mortgagor and subsequent purchasers and mortgagees in good faith.

4. BANKRUPTCY ⊂=254—COMPLETION OF CONTRACT BY TRUSTEE OR SURETY—DISCRETION OF COURT.

Whether or not a bankruptcy court will authorize its trustee to complete an unperformed contract, or will permit a surety of the bankrupt to make use of the property of the estate in so doing, is a matter within the discretion of the court; the surety not being entitled as a matter of right.

5. BANKRUPTCY ⊂=228—DISCRETIONARY DETERMINATION OF REFEREE—REVIEW.

Determination of referee in bankruptcy that best interests of estate require immediate sale of equipment, material, and supplies used by bankrupt in performing a public contract, rather than that surety on bankrupt's performance bond should be permitted to use property in completing contract, is within discretion of referee, and not subject to review.

6. SUBROGATION ⊂=7(1)—PERFORMANCE BOND—ASSIGNMENT IN EVENT OF NONPERFORMANCE.

Under contractor's application for performance bond, assigning to surety company, in event of nonperformance, all interest of contractor, and all tools, plant, equipment, and materials, also assigning all subcontracts and materials involved, upon the event of the condition, surety was entitled to be subrogated to all liens, rights, and remedies of other parties to the contract, and of laborers and materialmen whose bills it paid, or might be required to pay.

7. MECHANICS' LIENS ⊂=13—PUBLIC BUILDINGS.

Public buildings, owned or being constructed by public authority out of public funds, are not within the purview of mechanics' lien laws, unless expressly so provided.

8. MECHANICS' LIENS ⊂=13—PUBLIC HIGHWAY—RIGHTS OF LABORERS AND MATERIALMEN—STATUTES.

Despite Gen. Code Ohio, §§ 6947, 8310, 8311, 8376, and under section 8324 et seq., laborers and materialmen working for and furnishing material to a contractor with county authorities to construct a public highway have no rights against the equipment of the contractor, and materials furnished, other than that of general creditors; no lien on public buildings or highways being provided.

In Bankruptcy. In the matter of Chandler Schilling and W. H. Loller, doing business as the Schilling Construction Company, bankrupt. On petition for review of judgment of the referee. Affirmed.

McKain & Ohl, of Youngstown, Ohio, for trustee.

Wilson & Wilson, of Youngstown, Ohio, for bankrupt and Surety Co.

WESTENHAVER, District Judge. The Schilling Construction Company, a partnership, consisting of Chandler Schilling and W. H. Loller, entered into a contract with the board of county commissioners of Stark county, Ohio, for the construction of a public highway, known as the Cairo-Hartville road. This contract contains the usual provisions for payment on monthly estimates and for the retention of 10 per cent. of each estimate until the contract is fully performed. The contractor also executed a performance bond, with the New Amsterdam Casualty Company as surety in the sum of $97,506.78. The conditions of this bond, among other things, require that the surety shall be liable for all labor and material furnished or used in the construction of the road, and shall save the county commissioners

harmless from any default or failure of the principal contractor to pay for the same. In order to obtain this bond the Schilling Construction Company executed a written application, containing, among other provisions, the following:

"And for the better protection of the said company the applicant does, as of the date hereof, hereby assign, transfer, and convey to the said company all the right, title, and interest of the applicant in and to all the tools, plant, equipment, and materials of every nature and description that it may now or thereafter have upon said work, or in, on, or about the site thereof, including as well materials purchased for or chargeable to said contract, which may be in process of construction, on storage elsewhere, or in transportation to said site, hereby assigning and conveying also all its rights in and to all subcontracts which have been or may hereafter be entered into, and the materials embraced therein, and authorizing and empowering said company, its authorized agents or attorneys, to enter upon and take possession of said tools, plant, equipment, materials, and subcontracts, and enforce, use, and enjoy such possession upon the following conditions, viz.: This assignment shall be in full force and effect as of the date hereof, should the applicant fail or be unable to complete the said work in accordance with the terms of the contract covered by said bond, or in event of any default on its part under the same contract."

This application contains also a provision that the surety shall be subrogated to all the rights of the principal in the contract, and contains an assignment from the principal of all deferred payments and retained percentages, and any and all moneys and properties that may be due at the time of any breach or default.

An involuntary petition in bankruptcy was filed by this partnership in this court December 29, 1917, and an adjudication in bankruptcy was entered February 28, 1918. This contract was then only partially performed. There was upon the highway certain equipment belonging to and being used by the bankrupt, and also certain materials which had been bought by them and delivered on the job, to be used in constructing this highway. The controversy concerns this property. The surety, after the date of adjudication, took possession of this equipment and materials, and claims that it is entitled thereto by virtue of the assignment in the application for the performance bond above quoted, and also by virtue of the equitable doctrine of subrogation; that at least it is entitled to use and consume the materials in the completion of the highway, and to make use of the equipment until it is completed. The referee decided against these contentions, and ordered a sale of all the equipment, supplies, and material for the benefit of the bankrupt estate. This petition is filed to review that judgment of the referee.

[1] It is settled law in this district that the provisions above quoted from the bankrupt's application have no greater force and effect than a chattel mortgage, and that as between the surety company and the trustee of the bankrupt it is to be regarded as if it were in fact a chattel mortgage. Title Guaranty & Surety Co. v. Witmire (6 C. C. A.) 195 Fed. 41, 115 C. C. A. 43; Potter Mfg. Co. v. Arthur (6 C. C. A.) 220 Fed. 843, 136 C. C. A. 589, Ann. Cas. 1916A, 1268; Massachusetts Bonding & Insurance Co. v. Kemper (6 C. C. A.) 220 Fed. 847, 136 C. C. A. 593.

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[2] It is also settled law that since the amendment by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (Comp. St. 1916, § 9631), of section 47a (2) of the Bankruptcy Act, a trustee in bankruptcy has, as of the date of adjudication, all the rights of creditors of the bankrupt, as if such creditors had succeeded in fixing a lien thereon by the levy of an attachment or execution. Potter Mfg. Co. v. Arthur, supra; Fairbanks Shovel Co. v. Wills, 240 U. S. 642, 36 Sup. Ct. 466, 60 L. Ed. 841. Prior to this amendment it had been held that the trustee acquired such title only as the bankrupt himself had, and that the trustee's title was therefore not superior to that of an unrecorded chattel mortgage valid as between the parties thereto. Title Guaranty & Surety Co. v. Witmire, supra; York Mfg. Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782.

[3-5] It is also settled law in Ohio that a chattel mortgage not filed for record, and under which possession has not previously been taken by the mortgagee, is void as to all creditors of the mortgagor and subsequent purchasers and mortgagees in good faith. Section 8560, General Code of Ohio, so provides. Inasmuch, therefore, as it is a conceded fact that possession of the property in question was not taken by the surety until after adjudication, and that its chattel mortgage was never filed for record, it follows that the surety company does not have any lien upon this equipment, materials, and supplies, or any part thereof, but that its rights, if any, thereto are subordinate to the rights of the trustee. Potter Mfg. Co. v. Arthur, supra; Massachusetts Bonding Co. v. Kemper, supra. The contention of counsel for the surety company that the surety in the case last cited was permitted thus to consume the materials and supplies, and to make use of the equipment until the contract was completed by the surety, does not call for a different conclusion. Whether or not a bankruptcy court will authorize its trustee to complete an unperformed contract, or will permit a surety of the bankrupt to make use of the property of the estate, is a matter within the discretion of the bankruptcy court. The surety is not entitled thereto as a matter of right. It is only when the situation warrants a belief that the bankrupt's estate will be benefited by such a course being pursued that the bankruptcy court will permit the surety to consume the supplies and materials or to use the equipment. This course apparently was permitted in the administration of the bankrupt's estate in the Kemper Case. No point involving the right of a surety so to do, or of the bankruptcy court to refuse the surety that privilege was involved or decided. In the present case the referee, acting no doubt upon the trustee's recommendation, has determined that the best interests of the estate require that such a course shall not be pursued, but that, on the other hand, the estate will be benefited by an immediate sale of the equipment, material and supplies. This determination is entirely within the discretion of the referee, and is not subject to review.

[6] The surety's contention that, by virtue of the provisions of the bankrupt partnership's application for the performance bond, as well as on equitable principles, it is entitled to be subrogated to all the liens, rights, and remedies of the commissioners of Stark county and

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of the laborers and materialmen, whose bills it has paid or may be required to pay, is undoubtedly sound. Such is the settled law, evidenced by authorities cited on behalf of the surety, of which the following are illustrative: Prairie State Bank v. United States, 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412; Henningsen v. U. S. Fidelity & Guaranty Co., 208 U. S. 404, 28 Sup. Ct. 389, 52 L. Ed. 547; Title Guaranty & Surety Co. v. Dutcher (D. C.) 203 Fed. 167, citing numerous pertinent cases.

The contention here, then, comes down to the inquiry as to what liens, rights, and remedies the county commissioners and these laborers and materialmen may have against this equipment and materials. The county commissioners have a right, of course, to retain the reserve percentage, and also any unpaid balance in their hands at the time of the contractor's default. This right inheres in the contract relation, and arises out of and is protected by the county commissioners' possession of the fund. The construction contract does not, however, confer on the county commissioners any title to or lien upon the property now in dispute, or purport to give any right to use the same in completing performance. If such a title or a lien had been in terms expressly conferred, it would not be valid as against the trustee in bankruptcy, for the same reason that a like provision in the surety's contract with the bankrupt is invalid; that is to say, such a provision would be only a chattel mortgage, and would be void if not filed for record, or if possession of the property were not taken prior to the filing of the petition in bankruptcy.

[7, 8] What amount, if any, is due or has been paid to laborers or materialmen by the surety appears only from statements of counsel. These statements are for the purposes of this opinion assumed to be true. Answering the exact question involved, a careful examination of the lien laws of Ohio convinces me that laborers and materialmen have no rights against this equipment and materials other than that of general creditors. Section 6947, General Code (106 Ohio Laws, 574, known as the Cass Law), requires, it is true, a contractor, getting a contract to construct a public highway, to execute a performance bond, which shall contain, among other conditions, one requiring the payment of all labor and material furnished and used in the construction thereof. An action on this bond may be brought by any laborer or materialman at any time within one year after such labor or material is furnished. No lien, however, in any form is thereby given to laborers or materialmen.

General Code, §§ 8310 and 8311, provide what laborers and materialmen shall have liens, and also what property or structures shall be subject thereto. Public buildings and public highways are not within the terms of these sections. Section 8376, General Code, is also cited, but obviously it does not apply to highways owned or constructed by public authorities, but only to such as are owned or constructed by private corporations for profit. This section has also been held unconstitutional. Stewart v. Gardner, 10 Ohio Cir. Ct. R. (N. S.) 409. Furthermore, the law is well settled that public buildings owned or

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being constructed by public authority out of public funds are not within the purview of mechanic's lien laws, unless expressly so provided.

Section 8324 et seq., General Code, provides the only rights and remedies of laborers and materialmen who have furnished labor or materials in the construction, improvement, or repair of a road, pavement, sewer, street, or other public improvement. These sections permit him to file with the board, officer, or public authority with which the contract has been made within four months after furnishing labor and materials a sworn and itemized statement of the amount and value thereof. Upon receipt of this notice the board, officer, or public authority, or the authorized clerk or agent thereof, shall retain all subsequent payments due or to become due to the contractor to secure such claims, and also the claims of other subcontractors, materialmen, or laborers who have furnished materials and labor who shall intervene before the next subsequent payment on the contract, or within ten days after such notice is served.

The legal procedure whereby this remedy of the laborer or materialman is worked out need not be stated; it is sufficient to say that his remedy is exclusively against money due or to become due the contractor, and that no lien is given or authorized upon either the public highway or the equipment, materials, and supplies of the contractor assembled on the public highway. His rights are limited exclusively to the moneys due or to become due to the contractor. And it has also been held, and in my opinion correctly, that the lien thus acquired by giving such notice is subordinate to the right of the public authority to retain, control, and apply the reserve percentage, or any balance unpaid at the time of the contractor's default, in finishing the contract and in protecting the public authority from loss. Port Clinton v. Stone Co., 10 Ohio Cir. Ct. R. 1.

It is earnestly insisted that manifest injustice results from taking the contractor's equipment and materials and supplies, bought and delivered to be used on the improvement, as a fund for general creditors, and leaving the surety bound by the terms of its bond to pay therefor. This injustice, if such it may be regarded, is no different in quality or degree from that which always follows when one sells personal property to another on credit, passing title by delivery, and finds later that this property has been seized by other creditors of the purchaser. Nothing can prevent such results, except taking or preserving a lien in the manner and form provided by law; that is to say, either a conditional sale contract or chattel mortgage, duly filed or recorded.

The judgment of the referee is affirmed. An exception may be noted on behalf of the petitioner.

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In re SCHILLING et al.

(District Court, N. D. Ohio, E. D. July 9, 1918.)

No. 6510.

1. CHATTEL MORTGAGES ⇐34—WHAT CONSTITUTES.
Where an execution creditor, instead of compelling a sale, accepted a bill of sale as security, so as to give the debtor time, the bill of sale must be treated as a chattel mortgage.

2. BANKRUPTCY ⇐184(1)—RIGHT OF MORTGAGEE.
Under Gen. Code Ohio, § 8560, a chattel mortgage is void as against the mortgagor's trustee in bankruptcy, unless it is filed for record or possession be taken by the mortgagee prior to the date of the filing of the petition in bankruptcy.

3. CHATTEL MORTGAGES ⇐198—VALIDITY—DELIVERY OF POSSESSION.
Under Gen. Code Ohio, § 8560, declaring chattel mortgages void for failure to record only when not accompanied by an immediate delivery and followed by an actual and continued change of possession, immediate delivery or possession is not indispensable to the validity of mortgages as between the parties, and the title of the mortgagee is superior to creditors and subsequent purchasers, if he takes possession at any time before the creditor, etc., has fixed a lien on the property.

4. BANKRUPTCY ⇐152—TRUSTEES—RIGHTS.
Under Bankruptcy Act July 1, 1898, § 47a (2), as amended by Act June 25, 1910, § 8 (Comp. St. 1916, § 9631) a trustee in bankruptcy has the rights of a creditor obtaining a lien by legal process, etc., as and of the date of the filing of the petition in bankruptcy.

5. BANKRUPTCY ⇐342½—REFEREES—FINDINGS.
A referee's findings of fact should and will always be upheld, unless plainly against the evidence.

6. BANKRUPTCY ⇐340—CHATTEL MORTGAGEE—POSSESSION—EVIDENCE.
Where a chattel mortgagee of an Ohio bankrupt asserted the lien of its mortgage was superior to the rights of the trustee, evidence *held* to show that the mortgagee went into possession of the mortgaged property, etc., before the filing of the petition in bankruptcy.

7. BANKRUPTCY ⇐342—PRIORITIES—RIGHT OF TRUSTEE.
Where a trustee in bankruptcy attacked a chattel mortgage on the ground that it was invalid, under Bankruptcy Act July 1, 1898, § 67a (Comp. St. 1916, § 9651), but it appeared that though the mortgage was for a past consideration, it was not invalid, the mortgagee having gone into possession before bankruptcy, *held*, the referee's order sustaining the attack on the mortgage being reversed, the proceedings will not be remanded, to ascertain whether the mortgage was preferential; the evidence indicating the mortgage was not voidable on that ground.

In Bankruptcy. In the matter of the bankruptcy of Chandler Schilling and W. H. Loller, doing business as the Schilling Construction Company. On petition to review an order of the referee denying the claim of W. E. N. Hemperly to a lien. Referee's order reversed and set aside.

McKain & Ohl, of Youngstown, Ohio, for trustee.

Wilson & Wilson, of Youngstown, Ohio, for bankrupt and surety company.

W. E. N. Hemperly, of Massillon, Ohio, for Merchants' Nat. Bank of Massillon.

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WESTENHAVER, District Judge. Chandler Schilling and W. H. Loller, doing business as the Schilling Construction Company, were adjudicated bankrupts February 28, 1918, on an involuntary petition filed against them December 29, 1917. When this petition was filed, and for many months prior thereto, the partnership had been engaged in constructing a public highway known as the Cairo-Hartville road, under a contract with the board of county commissioners of Stark county, Ohio. Prior to November 26, 1917, certain equipment and materials acquired and assembled by them on and along the construction work then in progress for the purpose of performing the same was levied upon under an execution on a judgment obtained against them by the Merchants' National Bank of Massillon, Ohio. The property thus levied on was advertised for sale on November 26, 1917, and on this date, in order to avoid the sacrifice likely to result from such a sale, a bill of sale was executed by them to W. E. N. Hemperly, as trustee for the bank, of the property thus levied upon and advertised for sale.

This bill of sale recites the execution and levy thereof, describes the property seized, and purports to assign and transfer this property to the trustee, and further provides that the trustee shall hold it for a period of 60 days as security for the payment of the bank's judgment, at the end of which time, if this judgment and costs are not paid, the trustee is authorized to make sale of the property. This bill of sale was not filed for record. The referee, upon application by the trustee for an order to sell the bankrupt's personal property, including that transferred by this bill of sale, and to marshal liens thereon, has held that this bill of sale is void as to the trustee in bankruptcy, because it is in legal effect a chattel mortgage, and was not filed for record, and because possession thereof was not taken by the transferee or mortgagee prior to the filing of the petition in bankruptcy, and thereupon made an order directing this property now in dispute to be sold by the trustee for the benefit of the general creditors of the estate. This petition is filed by W. E. N. Hemperly to review this finding and judgment.

[1-4] It is settled law that this bill of sale, being intended as a security only for the debt due the Merchants' National Bank, is a chattel mortgage, and also that it is void as against the trustee in bankruptcy, unless filed for record, or unless possession was taken by the mortgagee prior to the date of the filing of the petition in bankruptcy upon which adjudication was eventually had. Section 8560, General Code; Potter Mfg. Co. v. Arthur (6 C. C. A.) 220 Fed. 843, 136 C. C. A. 589, Ann. Cas. 1916A, 1268; Massachusetts Bonding & Insurance Co. v. Kemper (6 C. C. A.) 220 Fed. 847, 136 C. C. A. 593; Fairbanks Shovel Co. v. Wills, 240 U. S. 642, 36 Sup. Ct. 466, 60 L. Ed. 841; Title Guaranty & Surety Co. v. Witmire (6 C. C. A.) 195 Fed. 41, 115 C. C. A. 43. It is conceded that this chattel mortgage was not filed for record, but it is contended that possession was taken by W. E. N. Hemperly prior to the filing of the petition in bankruptcy, and that therefore for this reason the finding and judgment of the referee is erroneous and should be reversed.

Section 8560, General Code, declares chattel mortgages to be void for failure to record only when "not accompanied by an immediate

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delivery, and followed by actual and continued change of possession of the things mortgaged." This is a very old section of the Ohio Code, and has been frequently construed by the Supreme Court of the state. It has been settled by these decisions that an immediate delivery or possession is not indispensable to the validity of a chattel mortgage as between the parties thereto, and that the title of the mortgagee is superior to creditors and subsequent purchasers, if the mortgagee takes possession at any time before a creditor has fixed a lien thereon by levy of an attachment or execution. Wilson v. Leslie, 20 Ohio, 161; Boyer v. Knowlton Co., 85 Ohio St. 104, 97 N. E. 137, 38 L. R. A. (N. S.) 224. A trustee in bankruptcy, since the amendment to the Bankruptcy Act of June 25, 1910 (Act July 1, 1898, c. 541, § 47a(2), 30 Stat. 557, as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 [Comp. St. 1916, § 9631]), now stands in the relation of a creditor having obtained a lien, as defined in these authorities, as and of the date of filing of the petition in bankruptcy. Fairbanks Shovel Co. v. Wills, 240 U. S. 642, 36 Sup. Ct. 466, 60 L. Ed. 841; Potter Mfg. Co. v. Arthur (6 C. C. A.) 220 Fed. 843, 136 C. C. A. 589, Ann. Cas. 1916A, 1268.

[5, 6] The question here, then, is whether or not the referee's finding that possession was not taken is supported by the evidence. The only testimony bearing on this finding is that of W. E. N. Hemperly and H. E. Warren. This shows that the property transferred by the bill of sale had been previously seized by the sheriff and advertised for sale. The presumption may be indulged, in the absence of any contrary showing, that the sheriff had done his duty, and had, when levying on this property, taken possession of it. Hemperly says that, as soon as the bill of sale was executed, the sheriff was asked to withhold the property thus levied on from sale, which the sheriff did, and that Hemperly, as trustee, thereupon took possession of this property and thereafter held the same; also that he notified immediately in writing a Mr. Young, then and for some time prior thereto an employé of the bankrupt, having charge of some part of the construction work. This written notification is not produced by Mr. Hemperly. A notification, dated November 26, 1917, addressed to Mr. Young, is produced in connection with the testimony of Mr. Warren. This notice is not signed by any one, and the inference from Mr. Warren's testimony is that it was signed by him. This discrepancy between the testimony of Mr. Hemperly and of Mr. Warren cannot be cleared up from the record. If, however, it was in fact signed by Mr. Warren and mailed by him, Mr. Hemperly was evidently a party thereto and is entitled to the benefit thereof. This notice recites that certain property therein described was already in Young's possession for the sheriff of Stark county, and directs him to take charge of it and continue to hold it for the trustee. Permission is therein given Mr. Young to make use of the equipment not perishable, nor likely to be materially depreciated in value by such use in further performance of the construction work, provided it is properly understood that the Schilling Construction Company does not have possession nor title thereto, and that such use is by sufferance only. Young is also directed to furnish an inventory

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of the property subject to the bill of sale, and to advise of its condition and where he has placed it. Mr. Warren further testifies that at this time the sheriff had a chain on the road roller, and that the other stuff, meaning evidently the property described in the bill of sale, was in a field near by; that Young had the pipe all wrapped up and set on racks; that the curbing forms he also had set up on racks; that the concrete mixer he had drained the water out of, and had placed all in a lot or field near by. "All" evidently refers to the property on which the sheriff had levied, and which was transferred by the bill of sale.

Mr. Hemperly further states that after the bill of sale was executed Mr. Young, acting on instructions received from him, took possession of the property described therein and located it as nearly as possible all in one place, and then covered it; removed the pump from the water, drained it, and moved it over onto a farm; that the cement curb forms were wrapped up and moved to one place by the roadside; that the concrete mixer and car unloader were drained and cleaned and placed on a farm near the road. The name of the owner of this farm is also given by him. Mr. Young, he further says, looked after this property for him and under his instructions until the 26th of February, 1918; that Young called to see him at different times, and reported to him what he had been doing and how the property had been taken care of; that on February 26, 1918, he took the key from Young, paid him his bill for his services, and then placed a man by the name of Charles E. Lehr in charge of the property, with similar instructions to let no one make use of the material in his charge until he (Hemperly) had given orders to that effect.

There is in the record no other or countervailing testimony. A referee's findings of fact should and will always be upheld, unless plainly against the evidence; but, notwithstanding this rule, I am of opinion that the referee's finding that possession was not taken by the mortgagee until after the filing of the petition in bankruptcy is contrary to the evidence and must be reversed. Evidence much less strong was held sufficient to show a transfer of possession and to protect a pledge in the following cases: In re Cincinnati Iron Store Co. (6 C. C. A.) 167 Fed. 486, 93 C. C. A. 122; Ward v. First National Bank (6 C. C. A.) 202 Fed. 609, 120 C. C. A. 655; Stellwagen v. Clum (6 C. C. A.) 218 Fed. 730, 134 C. C. A. 408. In Stellwagen v. Clum, supra, the subject-matter was lumber stacked in piles, together with many other piles of similar lumber, in a lumber yard. The pledgee or transferee had merely marked these piles distinctly with these words, "Sold to A. L. McB., Agt." These piles were later sold by the mortgagor with the consent of A. L. McBean, agent; the mortgagor receiving part payment in cash and part in notes. This evidence was held sufficient, notwithstanding the subsequent conduct of the parties in making or permitting the lumber to be sold to show a transfer or change in possession, thereby protecting the title of the pledgee as against the title of a trustee in bankruptcy. Obviously facts sufficient to show a taking of possession under a pledge is wholly sufficient in the case of a chattel mortgage. In Cincinnati Iron Store Company,

supra, the holding is sufficiently set forth in the third syllabus, which reads:

"A bridge company borrowed money from a bank, and as security for its repayment pledged a quantity of structural iron then in its possession. The pledged iron was set apart in piles on the company's premises, and the piles were marked by numbers and taken possession of by a designated employé of the company as agent for the bank, who issued a receipt therefor as such agent. The transaction was in good faith, and the piles remained intact until the company was adjudged a bankrupt. Held, that there was sufficient delivery to pass the property, and that the pledge was valid."

It will be noted that the subject-matter of the pledge remained in its former situation on the mortgagor's premises, and also that the pledgee's agent was an employé then and thereafter of the pledgor. So, likewise, in the instant case, Young's relationship of employé of the bankrupt does not disqualify him from acting as agent for W. E. N. Hemperly in taking and holding possession of the mortgaged property. This dual relationship might be regarded as a suspicious circumstance, but it is not a controlling circumstance; standing alone, it in no wise discredits or disproves the testimony showing first that the sheriff took possession and that later this possession was transferred to and taken over by W. E. N. Hemperly as trustee.

[7] The trustee appears to have based his claim to this property on section 67 of the Bankruptcy Act (Comp. St. 1916, § 9651). The judgment of the referee and his findings of fact support the trustee's position. Section 67a declares claims shall not be liens against the bankrupt estate which, for want of record or other reasons, would not have been valid as against claims of the creditors of the bankrupt. An unrecorded chattel mortgage under which possession has not been taken is of this class; consequently the referee held that this bill of sale, being in legal effect only a chattel mortgage, was void because not having been filed for record. Section 67a so provides. The referee also finds that this chattel mortgage was given for a past consideration, thereby placing it beyond the provisions of section 67b, which protects liens given or accepted in good faith and for a present consideration. No part, however, of section 67 makes invalid a chattel mortgage merely because it was given at a time when the bankrupt is insolvent and within four months prior to the filing of the petition in bankruptcy and for a past consideration. A chattel mortgage given under these conditions is valid or invalid as provided in section 60.

Section 60 of the Bankruptcy Law deals with what are known as voidable preferences. It provides that a lien given or created while the bankrupt is insolvent and within four months prior to the filing of the petition in bankruptcy to secure an existing debt may be avoided as a preference, "if the person receiving it or to be benefited by it, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference." Comp. St. 1916, § 9644. No case was made or attempted to be made by the trustee under the provisions of this section. Even if we might assume that the bankrupt were insolvent when the chattel mortgage in question was given, still the testimony is clear that

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W. E. N. Hemperly, trustee, had no knowledge or reason to believe that the bankrupt was insolvent, or to believe that a preference would result from the giving thereof, but that he believed, and, in the light of the facts testified to by him, was justified in believing, the contrary. In view of this testimony, and of the fact that the trustee rested the case on section 67, and did not invoke the provisions of section 60, the cause will not be remanded for inquiry as to whether or not the chattel mortgage is a voidable preference.

The referee's judgment and order of sale will be reversed and set aside, so far as it holds the bill of sale to be absolutely void, and this cause will be remanded, with instructions to enter an order giving the holder thereof a valid lien on the property thereby transferred prior to the title of the trustee in bankruptcy. The trustee may either be directed to sell the property, subject to the payment of the bank's lien, or direct the property to be surrendered to the bank's trustee, as appears to be for the best interests of the bankrupt estate.

An exception may be noted on behalf of the trustee and general creditors to this ruling.

Ex parte KUSWESKI.

(District Court, N. D. New York. July 1, 1918.)

1. CONSTITUTIONAL LAW ⇐74—JUDICIAL POWER—SELECTIVE SERVICE ACT.
 The enforcement of Selective Service Act May 18, 1917, has been intrusted to the War Department, and the correction of questionnaires, in the absence of fraud, is not for the courts.

2. ARMY AND NAVY ⇐20—DRAFT—ALIENS—MILITARY SERVICE.
 Congress and the President, acting through the War Department, have not required that an alien shall be subject to military duty, although such person must register, where required by Selective Service Rules, § 53, and be classified as provided by rule 12, unless the right of exemption is waived.

3. HABEAS CORPUS ⇐3—DRAFT—CORRECTION OF QUESTIONNAIRES—APPEAL TO COURTS—REMEDY.
 Where a drafted person, claiming exemption as an alien, by mistake waived exemption in his questionnaire, he had a remedy by appeal to the local board for correction, under Selective Service Rules, § 99, and where, after notice of his classification under section 100 he, through ignorance, allowed himself to be inducted into service, he still has a remedy under section 139, by appeal to the commanding officer of the mobilization camp, and is not entitled to relief by habeas corpus.

Application for a writ of habeas corpus discharging the petitioner, Stanilaus Kusweski, otherwise known as Stanley Kusmersky, from the alleged custody of Local Draft Board No. 3, City of Syracuse, and that of the military officers having the custody and control of persons held for service under the Selective Draft Law. Writ dismissed, and petitioner remanded.

Wm. Ryan, of Syracuse, N. Y., for petitioner.

James C. Setright, of Syracuse, N. Y., for draft board and the United States.

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RAY, District Judge. The petitioner, Stanilaus Kusweski, alias Stanley Kusmersky, was born in Russian Poland, has been in the United States about seven years, has never taken any steps to secure naturalization, is 30 years of age, and resides within the jurisdiction, under the Selective Draft Law, of Local Board No. 3, city of Syracuse, N. Y. He was duly registered and called upon to fill out his "questionnaire." He states in his petition that he does not read or write English, and understands but little English. It also states that one Willcox made out his questionnaire, and that petitioner informed him he was not a citizen of the United States, but that the question or matter of claiming exemption on the ground that he was not a citizen of the United States was not explained to him, and that such questionnaire was never read over to him; also that he did not intend to waive the exemption to which he was entitled on the ground he was not a citizen of the United States. In the questionnaire of petitioner it is stated that he is an alien and has not taken out any papers looking to naturalization, but to the question whether or not he claimed exemption on the ground of alienage the answer written in is "No." On the first page of the questionnaire is the usual waiver of exemption on such ground signed by the petitioner, but this is erased or canceled by pen and ink lines drawn through such waiver and the signature thereto. This erasure was made before the petitioner left the place where the questionnaire was filled out and signed. The petitioner has not applied to said local board, or to any board, for a correction of his questionnaire.

The petitioner was classified the same as a citizen of the United States, and in due time received an order from said local board having jurisdiction in the premises, inducting him into the military service and ordering him to report for immediate military service at the office of said board on the 23d day of June, 1918, and he did so report, but entered no complaint and made no claim to exemption. He was then notified by the local board to be ready to entrain for camp on the 24th day of June, 1918, at 2 o'clock p. m. On that day, instead of presenting himself for entrainment pursuant to said notice, with his attorney he went to the clerk of said local board and stated that he wished his case reopened, as he claimed and there and then reclaimed exemption from military service on the ground he was an alien. He was informed by the clerk that nothing could be done by reopening his case after receiving such order of induction; that it would be necessary for the petitioner to go to camp. The petition then states that the petitioner was informed by his attorney that under the Selective Service Act (Act May 18, 1917, c. 15, 40 Stat. 76) and the rules and regulations and all the circumstances connected with the making and signing of the said questionnaire he was not subject to the provisions of the act and was being unlawfully deprived of his liberty, and that relying on such information he did not go to camp June 24th, as directed. The petitioner denies any intent or purpose to evade military service, if lawfully subject thereto when his questionnaire is corrected and made to conform to his intent to claim exemption from military service on the ground he is an alien who has not taken first papers, and states his readiness to submit thereto,

if held subject to military service when his questionnaire is corrected. There is no allegation of fraud practiced to induce the answer referred to, or of a refusal of a hearing.

[1, 2] The enforcement of the Selective Service Act has not been intrusted to the Judicial Department of our government, or to the courts, but to the War Department. The correction of the questionnaires of registrants, in the absence of fraud, is not for the courts, but for that department of the government having charge of registrations, questionnaires, and exemptions, viz., the War Department. Section 53 of the Selective Service Regulations tells what persons are subject to registration, and states:

"Aliens who have not declared their intention to become citizens of the United States, and who have entered the United States for the first time since June 5, 1917, are *not* subject to registration."

But all other aliens who, June 5, 1917, had attained the age of 21, and had not attained the age of 31, are subject to registration, and this includes this petitioner, and he was required to fill out his questionnaire. Same section. All aliens (unless it be certain diplomatic and consular representatives) while living in the United States must obey its laws and owe to it a certain temporary and local allegiance. Carlisle v. United States, 16 Wall. 147, 21 L. Ed. 426; 2 Corpus Juris, 1074, 1046. Congress and the President, acting through the War Department, has not undertaken to say that an alien who has not taken any steps to become a citizen of the United States is subject to military duty in time of war. But rule XII of the Selective Service Regulations declares:

"In class V shall be placed any registrant found to be * * * (f) a resident alien (not an alien enemy) who has *not* declared his intention to become a citizen of the United States, unless such non declarant has stated in answer to question No. 2 of series VII of his questionnaire that he does not claim exemption on the ground of his alienage, in which case he shall be classified as though he were a citizen of the United States."

[3] This petitioner, an alien of full age who had not and has not filed his first papers, and who was duly and legally registered did state in answer to the question No. 2, referred to, that he did not claim exemption on the ground of his alienage, and hence the local board did right in classifying him as though he were a citizen of the United States. The local board did not fill out his questionnaire and was guilty of no fraud or illegal or improper act in so classifying him. The petitioner is presumed to have known the law, but claims, in substance, that he did not know what answer was written into his questionnaire, and that the effect of a negative answer was not explained to him. This is not alleged to have been the fault of the local board. In either event, as stated, no blame is attached to the local board. If later, or when called for induction, and before induction, he found he had made the wrong answer, or had acted in ignorance of his right, or had made an honest mistake, he had a remedy by appealing to the local board for correction. See section 99, S. S. R. He made no claim before or at that time and was duly inducted. This petitioner had notice of his classification under section 100, S.

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S. R., but no complaint or request for correction was entered. That section reads as follows:

"Immediately upon the expiration of seven days after the mailing of the questionnaire and the giving of notice in respect of any registrant, as prescribed in section 92, the local board shall proceed to the classification of such registrant into one of the classes prescribed in part IV hereof.

"In every case where a questionnaire is returned by a registrant the local board shall classify the registrant and mail notice of classification not later than four days after the receipt of the questionnaire. This shall not affect the duty of local boards to proceed to classify in class 1 registrants failing to return their questionnaires within the prescribed time.

"If, upon examination, the local board finds that a questionnaire does not contain the information required, or contains substantial or material errors which indicate ignorance or lack of knowledge on the part of the registrant, or in case the local board shall desire further information, the board shall require the registrant to appear at a day to be fixed and complete the questionnaire or correct any substantial or material error which may appear therein, or to furnish such other evidence as the board may require. Failure on the part of the registrant to appear on or before the day set by the local board shall remove the right of the registrant to correct, modify, or add to his questionnaire."

Assuming that the petitioner acted in ignorance of his rights, and allowed himself to be inducted into the service through ignorance of his rights and duties, and for want of that information, which the one who filled his questionnaire ought to have given him, we have a case which can be corrected under the provisions of section 139 of the Selective Service Regulations, which reads as follows:

"There are a few cases where, even after all the ample notice provided by these regulations, the induction of a delinquent into military service under orders of the adjutant general of a state results in great hardship on men whose delinquency is not willful, or upon others dependent upon them for support. After induction into military service, local and district boards have no authority to discharge from draft, but the relief can be granted by the commanding officer of a mobilization camp. Such commanding officers are hereby authorized to order such discharges upon recommendation of adjutants general of states, made as hereinafter provided, and not otherwise.

"When such cases come to the attention of the adjutant general of a state, he may direct the local board to receive from the delinquent a questionnaire, across the front sheet of which shall be written by the local board in large characters, in red ink, the words 'Recommendation only.'

"The local board shall thereupon proceed to classify the registrant in the usual manner. The government appeal agent shall enter an appeal. The district board shall review the case and send the questionnaire showing final classification to the adjutant general of the state, who shall indorse thereon his recommendation and forward it to the commanding officer of the mobilization camp. Upon receipt of the questionnaire, the commanding officer of the mobilization camp may order the registrant discharged from military service for the convenience of the government.

"The questionnaire will be returned by the commanding officer to the local board.

"If discharged from military service, the registrant shall thereafter stand classified for service in accordance with the classification determined by the local and district board in all respects as though such classification had been made in the usual manner.

"*Important Note.*—This is the only case in which a case can be reopened by a local or district board after induction into military service."

If this petitioner did not intend to waive the exemption to which he was entitled as an alien friend, and in ignorance of his rights made

answer as he did, and thereafter in ignorance of his rights allowed himself to be actually inducted into the service, he is not without remedy, as under this last section he may have relief. It is not a case where no remedy is prescribed by the Department of War having jurisdiction in the first instance, and where an irreparable wrong is consequently being done, and an alien is being wrongfully deprived and restrained of his liberty and unjustly forced into the army. It seems to me clear that on proper representation and proof made to the adjutant general of the state through the proper channel, a new questionnaire may be filled out and submitted to the local board, whereupon it will again hear and pass upon the case, in view of all the facts presented. Then an appeal is taken to the district board, and its recommendation goes to the adjutant general, and thence to the commanding officer of the mobilization camp. This may be regarded as a somewhat cumbersome and long drawn out mode of procedure; but it is the mode prescribed in those "cases where, even after all the ample notice provided by these regulations the induction of a delinquent into military service under orders of the adjutant general of a state results in great hardship on men whose delinquency is not willful," etc. And I do not doubt that this petitioner may obtain such relief as he may show himself entitled to under section 99, S. S. R. There can be no doubt that the local board, if satisfied a prejudicial mistake has been made through ignorance or fraud, may revoke its order for the induction of this petitioner into the service. The local and district boards are to consider claims for deferred classification only when presented within the time limits prescribed by the regulations, *except that they may extend the time for filing claims and proof* when a registrant—

"shall show to the satisfaction of the local or district board by affidavit evidence that the failure to make claims for deferred classification within the prescribed time limits was due to causes other than the fault or negligence of the claimant," etc.

The ignorance and consequent mistake of this petitioner cannot be said to be either his fault or negligence. Section 70, Selective Service Regulations, says:

"The *effect* of classification in class V *is to grant exemption or discharge from draft*. The term 'deferred classification,' as used in these regulations, is equivalent to the term 'temporary discharge.'"

We have already seen (rule 12, S. S. R., heretofore quoted) that this petitioner, if he had answered "Yes," instead of "No," to the question whether he claimed exemption on the ground of his alienage, would, if his alienage was established, have been placed in class V and exempted from the draft. He had the right to waive this exemption and classification. By the answer given he did waive it. The correctness, sincerity, and intelligence of that answer may be inquired into, undoubtedly, but by the boards and officers to whom that duty is confided, not by the courts, unless the boards and officers referred to act arbitrarily or corruptly, and contrary to the evidence presented, or refuse to act at all, when it is their duty to do so—that is, deny a hearing. Such a case is not presented.

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There is considerable basis for the contention of this petitioner that he did not intentionally and knowingly, or even negligently, waive the classification and exemption to which an alien friend, who has made no declaration of intention to become a citizen of the United States, is entitled under the law. However, this claim, which presents a question of fact not presented to or passed upon by local or district boards, or the commandant of the proper camp, must be heard and decided by the proper authorities, on request or application duly made, not by the courts, unless a hearing by such authorities is arbitrarily denied. There can be no sound reason in the United States why a resident alien friend may not waive his exemption from military service and be inducted therein, and why such waiver knowingly executed should not be irrevocable, except in case the government to which he owes prior allegiance thereafter goes to war with the United States.

The writ issued must be dismissed, and the petitioner remanded. So ordered.

UNITED STATES v. COULBY.

(District Court, N. D. Ohio, E. D. June 26, 1918.)

No. 9771.

1. TAXATION ⟸204(2)—STATUTES—EXEMPTIONS.
 Exemptions in a tax law must be clearly expressed, and will not be implied or spelled out of equivocal language.
2. INTERNAL REVENUE ⟸7—INCOME TAXES—PROPERTY SUBJECT.
 Under Income Tax Law 1913, § 2, subds. B, D, G, a member of a partnership need not include as part of his net income subject to tax that part derived from or through a partnership, which has been received by the firm as dividends on stocks owned by it in corporations taxable on their net income, for it is apparent that Congress disregarded a partnership; it having no legal entity as a corporation.
3. INTERNAL REVENUE ⟸7—INCOME TAX ACT—CONSTRUCTION.
 The provision of Income Tax Law, 1916, that members of partnerships shall be allowed credit for their proportionate share of partnership gains and profits derived from corporations taxable on their net income *held* a mere declaration of the rule under Income Tax Law 1913, and not legislative recognition of a change.

At Law. Action by the United States against Harry Coulby to recover alleged unpaid income taxes. Judgment for defendant.

E. S. Wertz, U. S. Atty., of Cleveland, Ohio.

Hoyt, Dustin, Kelley, McKeehan & Andrews, of Cleveland, Ohio, for defendant.

WESTENHAVER, District Judge. This is an action at law to recover $588.45, with interest and penalties thereon, alleged to be due as unpaid income tax for the nine months ending December 31, 1913, under the federal Income Tax Law of 1913. A jury trial was waived by the parties, and the case has been submitted to me for decision upon an agreed statement of facts. Briefly the facts are these:

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The defendant, during the period in question, was a member of a partnership by the name of Pickands, Mather & Co. This partnership was then the owner of stocks in certain corporations, which were taxable upon their net income under the provisions of section G of the Income Tax Law. Dividends were declared and paid by these corporations upon the stocks held therein by the partnership. The defendant, in making return of his income for taxation, included as a part of his gross income his share of the profits of the partnership, but deducted therefrom such part thereof as was derived by or through the partnership from dividends on stocks in these corporations taxable upon their net income.

Later, on or about June 27, 1917, the Commissioner of Internal Revenue examined the defendant's return and disallowed the deductions thus made and assessed the normal tax of 1 per cent. against the defendant on such deduction. The item of $588.45 represents that assessment.

[1, 2] The exact question presented for decision is whether or not a member of a partnership must include, as a part of his net income subject to the normal tax, such part of his income derived from or through a partnership which has been received by that partnership as dividends on stocks owned by it in corporations taxable upon their net income under section G of the federal Income Tax Law of 1913 (Act Oct. 3, 1913, c. 16, § 2, 38 Stat. 172). Plaintiff's contention that profits thus derived are a part of the partner's net income, and subject to the normal tax, is based on the following paragraph of section D:

"Provided further, that any persons carrying on business in partnership shall be liable for income tax only in their individual capacity, and the share of the profits of a partnership to which any taxable partner would be entitled if the same were divided, whether divided or otherwise, shall be returned for taxation and the tax paid, under the provisions of this section."

An examination of the entire Income Tax Law convinces me that plaintiff's contention is erroneous. Section B defines what shall constitute the net income of a taxable person; it includes his gains, profits, and income derived, not merely from salaries, wages, or compensation, for personal service, but also from businesses, trade, commerce, or sales or dealings in property, or the transaction of any lawful business carried on for gain or profit. This plainly includes such gains and profits derived from or through a partnership.

Section B also states what deductions shall be made from the gross income of a taxable person, in order to ascertain the net income for the purpose of levying the normal tax. Among these deductions is the amount received as dividends upon the stock or from the net earnings of any corporation, joint-stock company, association, or insurance company which is taxable upon its net income.

Section G provides for the normal tax upon the entire net income of corporations. It expressly excludes partnerships therefrom. This net income of corporations is subject only to the normal tax, such as is levied on the income of any natural taxable person, and not to the additional tax provided for by subdivision 2 of section A. This income from corporations received by a natural taxable person is

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exempt only from the normal income tax, and not from such additional tax.

Taking these provisions as a whole, the paragraph of section D, relating to partnerships, above quoted, must be considered and construed in the light of the general scheme thus outlined. No provision is anywhere made requiring a return to be made by a partnership upon its income. This is true, notwithstanding section D requires copartnerships, having the control, receipt, disposal, or payment of fixed income of another person subject to tax, to make a return in behalf of that person, and to deduct the same. This provision deals with the fiduciary relationship of guardians, trustees, executors, etc., having the possession and control of other persons' property; but, as regards an ordinary partnership and its ordinary business, the statement is true that no return is required to be made under the federal Income Tax Law of 1913 by a partnership.

Partnerships are expressly excluded from section G, requiring returns and payment of the normal tax by corporations. If Congress had intended that partnerships, as such, should be taxable upon their net income, the logical place to have so provided would have been in section G, and to have excluded from the net income of a natural taxable person, subject to the normal tax, that part of his income derived from a partnership, just as is provided with respect to his income derived from a corporation.

This law, therefore, ignores for taxing purposes the existence of a partnership. The law is so framed as to deal with the gains and profits of a partnership as if they were the gains and profits of the individual partner. The paragraph above quoted so provides. The law looks through the fiction of a partnership and treats its profits and its earnings as those of the individual taxpayer. Unlike a corporation, a partnership has no legal existence aside from the members who compose it. The Congress, consequently, it would seem, ignored, for taxing purposes, a partnership's existence, and placed the individual partner's share in its gains and profits on the same footing as if his income had been received directly by him without the intervention of a partnership name.

It follows, from these considerations, that legally the defendant's share of the gains and profits of Pickands, Mather & Co., derived from corporations taxable on their net incomes, is to be treated as if the same had been received by him directly from the taxpaying corporations. The contrary contention is based on a literal reading of the words:

"The share of the profits of a partnership to which any taxable partner would be entitled if the same were divided, whether divided or otherwise, shall be returned for taxation and the tax paid."

This sentence follows language plainly ignoring the existence of partnerships for taxing purposes. Section B had already provided what should be regarded as net income in language sufficiently comprehensive to include the gains and profits from business carried on in a partnership name. The words just quoted evidently apply only to the possibility that a partnership might not divide its gains and

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profits, but retain them in the firm name or business. It was to meet this possibility that these words were added, and not to provide an unequal and unique method of taxing a partner's gains and profits from a partnership.

The contention to the contrary is narrow and literal, even if not lacking in plausibility. It is a contention, however, contrary to the spirit and general policy of the act; it destroys uniformity and equality, and should not be adopted, unless required by the express language of the statute. In my opinion, the language of the statute does not so require; but, on the contrary, when the entire act is examined, it does give a right to the deduction.

Counsel for plaintiff invoke the legal principles that an exemption in a tax law must be clearly expressed, and will not be implied; that power to tax will not be taken away, unless the law-making power has done so in clear and unequivocal language; and that, inasmuch as uniformity and equality is difficult, if not impossible, of attainment in tax laws, the inequality which might result from the government's contention should not be permitted to control the language of the law. Numerous authorities illustrating these legal principles are cited. These principles are well settled, and I assume ample power in Congress to have assessed defendant's income derived from a partnership in the manner contended for. It is my opinion, however, that Congress has not done so.

The foregoing principles and authorities cited in support thereof are not those properly applicable in this situation. The principles in point are those stated in Gould v. Gould, 245 U. S. 151, 38 Sup. Ct. 53, 62 L. Ed. 211, where it was held that alimony allowances are not income within the meaning of the 1913 Income Tax Law; that is to say, in the interpretation of statutes levying taxes, it is the established rule not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out, and that in case of doubt they are to be construed most strongly against the government and in favor of the citizen. To the same effect are United States v. Wigglesworth, 2 Story, 369, Fed. Cas. No. 16,690; American Net & Twine Co. v. Worthington, 141 U. S. 468, 474, 12 Sup. Ct. 55, 35 L. Ed. 821; Benziger v. United States, 192 U. S. 38, 55, 24 Sup. Ct. 189, 48 L. Ed. 331.

[3] Counsel for plaintiff call attention to the fact that the federal Income Tax Law of September 8, 1916 (39 Stat. 756, c. 463), now provides that members of partnerships shall be allowed credit for their proportionate share of partnership gains and profits derived from corporations taxable on their net income, and urge that this is a change of the law, and evidences a belief of the law-making body that the 1913 Income Tax Law had provided differently. I do not agree with this contention. In my opinion, this provision was inserted in the 1916 act to put at rest the present controversy, rather than to change the law, and is to be regarded only as a legislative recognition of the scope and intent of the prior law. The applicable authorities, in my opinion, are the following: Bailey v. Clark, 21 Wall. 284, 22 L. Ed. 651; Johnson v. Southern Pacific Co., 196 U. S. 1, 25 Sup. Ct. 158,

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49 L. Ed. 363; Wetmore v. Markoe, 196 U. S. 68, 25 Sup. Ct. 172, 49 L. Ed. 390, 2 Ann. Cas. 265.

Judgment is rendered in favor of defendant. An exception may be noted on behalf of plaintiff.

QUEREAU v. LEHIGH VALLEY R. CO.

(District Court, N. D. New York. June 22, 1918.)

1. JURY ⇐34(3)—DENIAL OF RIGHT—DIRECTED VERDICT.
In action at law, where the parties are entitled to a jury trial, the court may not itself pronounce verdict for either party, except on consent, even though it may instruct the jury that the evidence establishes a fact involved and direct a finding to that effect.

2. COURTS ⇐10—VALIDITY OF ACTS—EXCESS OF JURISDICTION.
An act done or an order made by the presiding judge or court in the course of a trial is void, if the court or judge had no jurisdiction to do that particular thing or make that particular order, even though it had jurisdiction of the parties and the case.

3. TRIAL ⇐169—NONSUIT—EFFECT.
The granting of a nonsuit and dismissal of a complaint in an action at law is but a nonsuit, and if upon all the evidence the plaintiff has not established a cause of action, the proper disposition is to direct a verdict for defendant.

4. JUDGMENT ⇐570(5)—CONCLUSIVENESS—JUDGMENT ON MERITS.
In view of Code Civ. Proc. N. Y. §§ 841b, 963, 964, 968, 1204, 1209, 1237, a judgment of a state court, dismissing a complaint and directing a nonsuit in an action for wrongful death is not a judgment on the merits, which would bar a second action, notwithstanding the order and judgment stated that plaintiff's intestate was guilty of contributory negligence, for plaintiff was entitled to a verdict on such matters, and the court, while it might direct the same, could not pronounce it.

At Law. Action by Dora E. Quereau, as executrix, etc., of Wilson R. Quereau, deceased, against the Lehigh Valley Railroad Company. On defendant's motion for nonsuit, and dismissal. Motion denied.

This is a motion, at close of the plaintiff's case, and after the introduction by defendant of a certain order and judgment dismissing a former action in the Supreme Court of the state of New York between the same parties for the same cause, for a nonsuit and dismissal of this action, and a direction of a verdict for the defendant, on the grounds: (1) That the plaintiff has not proved a cause of action; (2) that the evidence established the defense, duly pleaded, of contributory negligence on the part of plaintiff's testator; and (3) that the evidence establishes a prior adjudication in the state court between the parties, which is a bar to this pending action in the United States court.

Peter B. Cole and Thomas Woods, both of Syracuse, N. Y., for plaintiff.

John M. Brainard, of Auburn, N. Y., and Wm. H. Harding, of Syracuse, N. Y., for defendant.

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RAY, District Judge (after stating the facts as above). This is an action in the United States District Court, brought by the plaintiff, as executrix of the last will and testament of her deceased husband, to recover damages for his death, caused by the alleged negligence of the defendant. The action is brought under the provisions of sections 1902, 1903, and 1904 of the Code of Civil Procedure of the state of New York, giving a right of action in such cases.

After the death of plaintiff's testator and the appointment of this plaintiff as executrix, etc., she brought an action under said sections of the Code of Civil Procedure to recover damages for the death of the testator in the Supreme Court of the state of New York against this defendant. The defendant filed and served its answer, denying negligence on its part, and as a defense alleging contributory negligence on the part of the plaintiff, contributing to the accident, injury, and death. The action and issues thus formed were brought to trial in Cayuga county, N. Y., where the venue was laid, before Mr. Justice Sawyer and a jury, and at the close of plaintiff's case, and before any testimony had been given on the part of the defendant, defendant moved for a nonsuit and a dismissal of the complaint and action. There was no request by either party for a direction of a verdict, and no waiver of a jury trial or submission of the case by the plaintiff to the determination of the court, and the motion did not request a dismissal on the merits. The motion was opposed, and after argument the court said in substance that it was satisfied the evidence was sufficient to take the case to the jury on the question whether or not the defendant at the time of the accident was guilty of negligence which was the proximate cause of the accident and death, but that it was also of the opinion, and held, that the evidence offered by the plaintiff, aided, of course, by the cross-examination of plaintiff's witnesses, proved as matter of law that plaintiff's testator was guilty of contributory negligence, that is, negligence contributing to the accident, injury, and death, and that plaintiff could not recover; that is, that on plaintiff's evidence in the case the defense of contributory negligence had been established and made out, and that the court so held as matter of law.

The plaintiff duly requested to go to the jury on the question of defendant's negligence, and also on the question of the contributory negligence of the plaintiff's testator, as well as that of damages; but the court denied these requests, and granted the motion for a nonsuit and to dismiss, and plaintiff duly excepted. The judge made no other findings, and neither signed nor filed any findings. Later an order granting the motion for a nonsuit and to dismiss the complaint was entered, duly signed by the judge, and thereupon a formal judgment was entered, granting the motion for a nonsuit and dismissal, and dismissing the complaint, with costs, duly taxed and entered therein, and this judgment was signed by the clerk. The evidence taken and remarks of the court or judge presiding at the trial and above referred to were not filed with or attached to either the order or the judgment. Neither the order of dismissal nor the judgment refers to or states the particular ground on which Mr. Justice Sawyer dismissed the suit,

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nor does either state it was dismissed on the merits. Both the order and the judgment state the grounds of the motion, viz.:

"That the cause of action pleaded in the complaint had not been established; (2) that the defendant had not been shown negligent; (3) that the defendant's negligence was not the proximate cause of the accident; and (4) that plaintiff's intestate was guilty of contributory negligence."

The material part of the order and judgment is:

"Ordered, that the plaintiff's complaint be dismissed, and that plaintiff be nonsuited."

There was no motion to dismiss on the merits. The costs so awarded by that judgment have not been paid.

Thereafter this action was brought by the same plaintiff against the same defendant on the same cause of action for the same purpose. To all intents and purposes the pleadings in this action are the same as those in the action in the state court, except that here such former proceedings in the state court, including the order and judgment, are pleaded as a defense and in bar of this action. I find and hold here that the plaintiff's evidence on the question of defendant's negligence and of the contributory negligence of the plaintiff's testator on this trial is such as to require a submission of these questions to the jury.

[1-4] Is such prior order and the judgment pursuant thereto a bar to this action and to plaintiff's recovery here, if the jury should find for the plaintiff on the other issue mentioned? Section 841b of the Code of Civil Procedure of the state of New York provides:

"On the trial of any action to recover damages for causing death the contributory negligence of the person killed shall be a defense, to be pleaded and proven by the defendant."

Section 1209 of the New York Code of Civil Procedure also provides:

"A final judgment, dismissing the complaint, either before or after a trial, rendered in an action hereafter commenced, does not prevent a new action for the same cause of action, unless it [the judgment] expressly declares, or it appears by the judgment roll, that it [the judgment] is rendered upon the merits."

In this case the judgment does not declare, expressly or otherwise, that the same is rendered upon the merits, and, as stated, there was no motion to dismiss on the merits. Does it appear by the judgment roll that it was rendered upon the merits? By section 1204 of the New York Code of Civil Procedure it is also provided that a judgment "may grant to a defendant any affirmative relief to which he is entitled." Section 1237 of the Code of Civil Procedure prescribes of what a judgment roll shall consist, and the papers contained therein, if the judgment itself does not expressly state that the complaint or action was dismissed on the merits, are to determine whether or not the complaint and action were in fact dismissed on the merits. The section last referred to (section 1237) says:

"The clerk, upon entering final judgment, must immediately file the judgment roll, which must consist, except where special provision is otherwise made by law, of the following papers: The summons; the pleadings, or copies thereof; the final judgment, and the interlocutory judgment, if any,

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or copies thereof; and each paper on file, or a copy thereof, and a copy of each order, which in any way involves the merits, or necessarily affects the judgment. If judgment is taken by default, the judgment roll must also contain the papers required to be filed, upon so taking judgment, or upon making application therefor, together with any report, decision or writ of inquiry, and return thereto. If judgment is taken after a trial, the judgment roll must contain the verdict, report, or decision; each offer, if any, made as prescribed in this act, and the exceptions or case then on file. Upon an appeal to the Court of Appeals from a judgment or order of the Appellate Division of the Supreme Court, the opinion of the Appellate Division, if any, shall, for the purposes of the appeal, be deemed to be a part of the judgment roll or appeal papers."

The action in the state court between these parties was an action at law, in which the parties were entitled to a jury trial, and the verdict of the jury on each and every material question of fact involved and at issue. True, the court must decide all questions of law, and may say to the jury this evidence establishes a fact involved, or the questions of fact involved and claimed, and may so instruct the jury, and direct the jury to so find the fact or facts, or to find a verdict for the plaintiff or for the defendant, as the case may be; but in an action at law the court may not itself pronounce the verdict for either party, except on consent. Peggo v. Dinan, 72 App. Div. 434, 76 N. Y. Supp. 565. In that case the court held:

"The judge presiding at a jury trial has no power, at the close of all the evidence, to dismiss the complaint 'upon the merits,' as such a dismissal substitutes the court for the jury in passing upon a question of fact, and thus impairs the right of trial by jury."

This case is followed in Meschneck v. Brooklyn, Q. C. & S. R. Co., 125 App. Div. 265, 266, 109 N. Y. Supp. 594. Harris v. Buchanan, 100 App. Div. 403, 91 N. Y. Supp. 484, holds the same as does Crecelius v. City of New York, 114 App. Div. 801, 100 N. Y. Supp. 314.

It appears from the papers in the case in the state court, assuming that the stenographer's minutes and statement of the presiding judge contained therein, but not filed, may be regarded as a part of the judgment roll, that it was a jury case, one in which the defendant was entitled to a verdict of the jury duly impaneled and sitting in the case. Clearly the court had the right, on the evidence in the case when the plaintiff rested, to direct a verdict in favor of the defendant on the ground the defendant from the direct and cross examination of plaintiff's witnesses had proved that the plaintiff's testator was guilty of contributory negligence, that is, negligence contributing to the injury and death, or that the plaintiff herself had proved it. This the court did not do, and was not requested to do. Did the court or judge have power or jurisdiction to take that question from the jury and decide it as matter of law, and thereby make its or his decision and the judgment entered thereon a decision or determination of the case on the merits? Was the court in so doing acting in excess of its jurisdiction? To make the decision an adjudication "on the merits," was it necessary to direct the jury to find a verdict and enter it, and then have judgment entered accordingly, based on such verdict?

The court had jurisdiction of the parties and of the subject-matter, and to preside at the trial and pass on and determine all questions of

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law, but not those of fact, which were for the jury to decide, and a jury trial requires and demands that the verdict of the jury be taken. An act done or an order made by the presiding judge or court in the course of a trial is void, if the court or judge had no jurisdiction to do that particular thing or make that particular order in the case, even if the judge or court had jurisdiction of the parties and of the case. In re Bonner, 151 U. S. 242, 254, 14 Sup. Ct. 323, 38 L. Ed. 149. Acts in excess of jurisdiction are void; but, if the power to decide is conferred on and resides in the court, then a wrong decision is mere error to be corrected on appeal.

Perhaps the question here may be summarized thus: In a jury case, can the court itself, except on consent, decide the case, the questions of fact, on the merits? Section 963 of the New York Code of Civil Procedure declares that:

"Issues are of two kinds: (1) Of law, and (2) of fact."

And section 964 declares that an issue of law arises "only upon a demurrer." Section 968 declares that:

"In each of the following actions, an issue of fact must be tried by a jury unless a jury trial is waived, or a reference is directed: 1. An action in which the complaint demands judgment for a sum of money only."

These provisions settle the proposition that a trial by jury was of right in the action in the Supreme Court above referred to. This the plaintiff would not have, if the court took the decision of the question of fact from the jury and itself decided it on the merits. This has nothing to do with the power of a court to direct the jury to find a certain verdict, for this the court did not do. If the court did assume the power to itself decide the facts, and direct a nonsuit and dismissal of the complaint, and a judgment for the defendant accordingly on the merits, it did something not sanctioned by the Code of Civil Procedure. What is a trial and verdict or decision on the merits?

The granting of a nonsuit and dismissal of a complaint in an action at law is but a nonsuit, and "if upon all the evidence the plaintiff has not established a cause of action the proper disposition of the case is to direct a verdict for the defendant." Niagara Fire Insurance Co. v. Campbell Stores, 101 App. Div. 400, 92 N. Y. Supp. 208, affirmed 184 N. Y. 582, 77 N. E. 1192. The above case also holds:

"In an action at law a dismissal of the complaint does not determine the merits of the action."

See, also, People ex rel. Nolan v. Prendergast, 88 Misc. Rep. 307, 310, 150 N. Y. Supp. 683, 686, where it is held:

"Furthermore, in a case tried by a jury, a dismissal of the complaint is never more than a nonsuit."

See, also, Stokes v. Altantic Av. R. N. Co., 89 Hun, 2, 34 N. Y. Supp. 1051; Peggo v. Dinan, 72 App. Div. 434, 76 N. Y. Supp. 565; Martin v. Wermann, 107 App. Div. 482, 95 N. Y. Supp. 284; Meschneck v. Brooklyn, etc., 125 App. Div. 265, 109 N. Y. Supp. 594. See, also, Bail v. N. Y., N. H. & H. R. Co., 201 N. Y. 255, 357, 94 N. E. 863. But see, contra, Ordway v. B. & M. R. Rd., 69 N. H.

429, 45 Atl. 243, a New Hampshire case, not under the New York Code of Civil Procedure. In Bail v. N. Y., N. H. & H. R. Co., 201 N. Y. at page 357, 94 N. E. 863, the court said:

"We agree with the contention of the plaintiff's counsel that the court had no power to dismiss the complaint upon the merits, and in so far as the dismissal upon the merits is concerned the judgment should be modified, by striking therefrom the words 'on the merits.'"

It cannot be assumed or presumed in this case that Judge Sawyer intended to do or did a thing he had no power to do. In the Bail Case a motion to dismiss was duly reserved until after verdict, and then granted.

In Peterson v. Ocean Electric Ry. Co., 214 N. Y. 43, 45, 108 N. E. 199, the plaintiff sued to recover damages for personal injuries and had a verdict, and an appeal was taken to the Appellate Division. At the Trial Term there was a motion made to dismiss, but *not to dismiss on the merits.* Section 1317, New York Code of Civil Procedure, provides:

"Upon an appeal from a judgment or an order, the Appellate Division of the Supreme Court, or Appellate Term, to which the appeal is taken, may reverse or affirm, wholly or partly, or may modify, the judgment or order appealed from, and each interlocutory judgment or intermediate order, which it is authorized to review, as specified in the notice of appeal, and as to any or all of the parties. It shall thereupon render judgment of affirmance, judgment of reversal and final judgment upon the right of any or all of the parties, or judgment of modification thereon, according to law, except where it may be necessary or proper to grant a new trial or hearing, when it may grant a new trial or hearing. When a trial has been before a jury, the judgment of the appellate court must be rendered either upon special findings of the jury or the general verdict, or upon a motion to dismiss the complaint or to direct a verdict. A judgment, affirming wholly or partly a judgment, from which an appeal has been taken, shall not, expressly and in terms, award to the respondent, a sum of money, or other relief, which was awarded to him by the judgment so affirmed. After hearing the appeal the court must give judgment, without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties."

The Appellate Division reversed the judgment and dismissed the complaint, but not on the merits. It was contended this would operate as a dismissal on the merits, but the Court of Appeals held:

"The plaintiff argues that the motion to dismiss the complaint, if granted at the Trial Term, would have resulted in a nonsuit only; that a nonsuit would not bar another action, but that the judgment of the Appellate Division, because characterized in the statute as final (Code Civ. Proc. § 1317), extinguishes the plaintiff's right forever. The judgment before us leads to no such consequences. It is not a judgment on the merits. It merely dismisses the complaint. We do not doubt that the Appellate Division has the power to direct judgment on the merits in any case where a motion for that relief has been made at the Trial Term and has been erroneously denied. In this case, however, the only motion was for the dismissal of the complaint, and the judgment of the Appellate Division is no broader than the judgment of nonsuit which was asked for at the trial. It is final, because it is not interlocutory. It puts an end to this action, but another action is not barred. Code Civ. Proc. §§ 405, 1209."

Consequently the dismissal by Judge Sawyer was not on the merits. It follows that in the action in the state court referred to, as it was

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a jury case and tried before a jury, and no verdict was directed or rendered, and there was no motion to dismiss on the merits, the granting of a nonsuit and dismissal of the complaint, although accompanied by the statement of the judge that the plaintiff's evidence showed the plaintiff's testator was guilty of contributory negligence, and therefore the nonsuit was granted and the action dismissed, was not a decision on the merits, and the judgment is not a bar to this action, as it was a nonsuit merely, and a judgment pursuant thereto, and not a trial and judgment on the merits.

The motion is denied.

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